Between a Rock and a Hard Place: The *Kadi* Decision and Judicial Review of Security Council Resolutions

Lorraine Finlay*

The U.N. Security Council sanctions regime, which targets Al-Qaeda and the Taliban, is binding on U.N. Member States and has been implemented within the European Community through European Council regulations. Questions about the lack of due process protections within the regime were considered by the European Court of Justice in Kadi v. Council*. The Court annulled the implementing Council regulations, holding that it had jurisdiction to review the regulations and that they infringed fundamental rights under Community law. The immediate effect of this decision has been to create a direct conflict for EU Member States between their obligations under the U.N. Charter and at the European level. This Article will consider the* Kadi *decision in terms of the relationship between the U.N. Security Council and national and regional legal orders, and the implications of binding U.N. Security Council resolutions being subject to judicial review. It will be argued that it is, on balance, not desirable to subject binding U.N. Security Council resolutions to judicial review at the national or regional levels, and that the decision places Community members in a difficult position given the conflict between their regional and international obligations.*

I. INTRODUCTION 478
II. THE SANCTIONS REGIME 479
III. THE *KADI* DECISION 483
  A. The Background Facts 483
  B. The Court of First Instance 483
  C. The Opinion of the Advocate General 484
  D. European Court of Justice 486
  E. An Isolated Example? 487
IV. JUDICIAL REVIEW AND THE U.N. SECURITY COUNCIL 489
  A. Advantages of Judicial Review 489
  B. Difficulties with Judicial Review 492
V. *KADI* AND THE FUTURE OF TARGETED SANCTIONS 496
VI. CONCLUSION 500

---

* © 2010 Lorraine Finlay. B.A. (Hons) (UWA), LL.B (Hons) (UWA), LL.M. (NYU), LL.M. (NUS). NYU@NUS Singapura Scholar. Law Lecturer, Murdoch University. The author would like to acknowledge Professor Victor Ramraj for his assistance and advice in drafting this Article, which was originally written as part of the NYU@NUS Masters Program.

I. INTRODUCTION

An important element of the "War on Terror" has been the international financial sanctions regime that has been implemented under the auspices of the United Nations Security Council (U.N. Security Council) and that requires all Member States to apply targeted sanctions against designated individuals and entities associated with Al-Qaeda, Osama bin Laden, or the Taliban. While the sanctions regime has been seen as an essential instrument of international counterterrorism efforts, questions have also been raised about a perceived lack of transparency and due process protections. In the recent decision of *Kadi v. Council*, the European Court of Justice (ECJ) annulled regulations imposed by the Council of the European Union (EU Council) implementing the U.N. Security Council sanctions regime insofar as they froze the funds of the applicants, holding that they impermissibly infringed on fundamental rights under Community law.[1] Commentators have suggested that the *Kadi* judgment is a "groundbreaking decision" that is "destined to become a landmark in the annals of international law."[2] Its more immediate effect, however, has been to create a direct conflict for European Union (EU) Member States between their obligations under the United Nations Charter (U.N. Charter) and at the European level.

This Article will consider the *Kadi* decision in terms of the relationship between the U.N. Security Council and national and regional legal orders, and the implications of binding U.N. Security Council resolutions being subject to judicial review. The *Kadi* decision is the first time the ECJ has held that it has jurisdiction to review measures giving effect to binding U.N. Security Council resolutions, with the Grand Chamber ultimately holding that the sanctions regime impermissibly violates fundamental human rights and that the EU Council regulations giving effect to the U.N. Security Council resolutions should be quashed. The implications of this decision are far-reaching, both in terms of the continuing operation of the U.N. Security Council sanctions regime and the more long-term significance of Chapter VII resolutions being reviewed by national and regional courts.

Part II of this Article will provide a broad overview of the sanctions regime. Part III will consider the *Kadi* decision and the dualist approach to international law adopted by the ECJ. Part IV will look more broadly at the question of U.N. Security Council resolutions and judicial review, concluding that the approach taken by the ECJ in *Kadi* is problematic,

1. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41 (2008).
2. Joseph Weiler, Editorial, 19 EUR. J. INT'L L. 895, 895 (2008).

with the prospect of judicial review of U.N. Security Council resolutions by national and regional courts undermining the uniformity that is essential to the effective implementation of counterterrorism sanctions and, more broadly, the effectiveness of the U.N. Security Council in terms of its ability to maintain international peace and security. Finally, Part V will consider the immediate response to the *Kadi* decision and what the decision means for the future of targeted sanctions.

This Article argues that it is, on balance, not desirable to subject binding U.N. Security Council resolutions to judicial review at the national or regional level, with the *Kadi* decision placing Community members in an extremely difficult position given the apparent conflict between their respective obligations at the regional and international levels. The question then becomes whether it is possible to reconcile these obligations, while also aiming to avoid the problems associated with judicial review of U.N. Security Council resolutions.

II. THE SANCTIONS REGIME

The current sanctions regime originated in U.N. Security Council Resolution 1267, which was passed on 15 October 1999. The U.N. Security Council, acting under Chapter VII of the U.N. Charter, reaffirmed "its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security" and required all States to impose targeted sanctions against the Taliban regime.[3] The "1267 Committee"—comprising all of the members of the Security Council—was established to designate the specific targets of the sanctions and to oversee and monitor their implementation.[4] Subsequent resolutions have strengthened and expanded the sanctions regime, which now requires States to apply sanctions in the form of the freezing of assets, travel bans, and arms embargoes against designated individuals and entities associated with Al-Qaeda, Osama bin Laden, or the Taliban (the 1267 sanctions regime).[5] A consolidated list of designated individuals and entities is maintained by the 1267 Committee (Consolidated List), which has responsibility for both the listing and de-

3. S.C. Res. 1267, pmbl., U.N. Doc. S/RES/1267 (Oct. 15, 1999).
4. *Id.* ¶ 6.
5. *See, e.g.*, S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

listing processes.[6] As of March 2010 there are, in total, 498 individuals and entities designated under the Consolidated List.[7]

In addition to the sanctions targeted at the individuals and entities specifically identified on the Consolidated List, States are also required, by way of U.N. Security Council Resolution 1373 (2001), to freeze the funds and assets of persons "who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts" (the 1373 sanctions regime).[8] The implementation of these sanctions is supervised by the Counter-Terrorism Committee; however, unlike sanctions imposed under the 1267 sanctions regime, there is no Consolidated List produced by the Counter-Terrorism Committee, and it is left to individual States to determine who falls within the scope of Resolution 1373.

The 1267 sanctions regime is binding on Member States under article 25 of the U.N. Charter, with the Security Council acting under Chapter VII in response to a perceived threat to international peace and security.[9] This was expressly highlighted by U.N. Security Council Resolution 1267 itself, with the U.N. Security Council calling upon all States "to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement."[10]

The EU has met this obligation by implementing the 1267 sanctions regime through the adoption of Council Common Positions under the Second Pillar[11] and EU Council Regulations,[12] the latter of which are immediately applicable in the EU Member States. The regulations are intended to directly implement the 1267 sanctions regime, with the Consolidated List maintained by the 1267 Committee being included as an annexure to the regulations and the regulations being periodically amended to reflect changes to the Consolidated List.

---

6. *See* S.C. Res. 1267, *supra* note 3, ¶ 6.

7. U.N. Security Council, Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, http://www.un.org/sc/committees/1267/consolist.shtml (last visited Mar. 14, 2010). This consists of 137 individuals associated with the Taliban, 258 individuals associated with Al-Qaeda, and 103 entities associated with Al-Qaeda. *Id.*

8. S.C. Res. 1373, ¶ 1(c), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

9. *See* U.N. Charter arts. 25, 39-51.

10. S.C. Res. 1267, *supra* note 3, ¶ 77.

11. *See, e.g.*, Council Common Position (EC) No. 1999/727/CFSP of 15 Nov. 1999, 1999 O.J. (L 294) 1; Council Common Position (EC) No. 2001/154/CFSP of 27 Feb. 2001, 2001 O.J. (L 57) 1; Council Common Position (EC) No. 2002/402/CFSP of 29 May 2002, 2002 O.J. (L 139) 1; Council Common Position (EC) No. 2003/140/CFSP of 28 Feb. 2003, 2003 O.J. (L 53) 1.

12. *See, e.g.*, Council Regulations (EC) No. 337/2000, No. 467/2001, No. 2062/2001, No. 2199/2001, No. 881/2002, No. 561/2003.

The 1267 sanctions regime is an example of "smart sanctions,"[13] being designed to target culpable individuals and entities directly and to avoid the humanitarian consequences visited upon innocent civilian populations as a result of the state-based sanctions that have previously been imposed by the Security Council. It has, however, been subjected to considerable criticism from a human rights perspective, based primarily upon concerns about the lack of transparency and due process protections. For example, while the Council of Europe Committee on Legal Affairs and Human Rights considered targeted sanctions to be preferable to state-based sanctions, it found that the standards applied by the 1267 sanctions regime did not fulfil minimum standards of procedural protection and legal certainty and that they "violate the fundamental principles of human rights and the rule of law."[14]

Particular criticism has been directed toward the listing and de-listing procedures. Under the original listing process, new listing proposals could be put forward to the 1267 Committee by States and regional organisations and would be added to the Consolidated List once they had been circulated to the Committee, provided no Committee member objected to the listing within the designated forty-eight-hour period. The criteria for listing was vague, supporting information was not always provided or disclosed, and there were limited avenues available for an individual to challenge being listed, with the lack of procedural protections standing in stark contrast to the serious consequences that resulted from an individual being named on the Consolidated List.[15] Further, until November 2002, there was no formal de-listing process allowing for individuals to have their listings reviewed or to request removal from the list.[16]

In response to these criticisms, the U.N. Security Council has attempted to improve the sanctions regime over recent years.[17] Listing

---

13. Clemens A. Müller, *Fundamental Rights in Multi-Level Legal Systems: Recent Developments in European Human Rights Practice*, 2 INTERDISC. J. HUM. RTS. L. 33, 46 (2007).

14. Comm. on Legal Affairs & Human Rights, Council of Eur., United Nations Security Council and European Union Blacklists, ¶¶ 4, 6 (16 Nov. 2007).

15. *See, e.g.*, Michael Bothe, *Security Council's Targeted Sanctions Against Presumed Terrorists: The Need to Comply with Human Rights Standards*, 6 J. INT'L CRIM. JUST. 541 (2008); Iain Cameron, *European Union Anti-Terrorist Blacklisting*, 3 HUM. RTS. L. REV. 225 (2003); Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203 (2007); Müller, *supra* note 13, at 46-47.

16. Hudson, *supra* note 15, at 207-08.

17. *See, e.g.*, CHATHAM HOUSE INT'L LAW DISCUSSION GROUP, UN AND EU SANCTIONS: HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM—THE *KADI* CASE (2009); Hudson, *supra* note 15, at 203; Chia Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, 11 ASIL INSIGHTS 1 (2007); Larissa van den Herik, *The Security Council's Targeted*

guidelines now require a detailed statement of case to accompany listing requests; humanitarian exceptions have been introduced; a mechanism has been established to inform the host country, country of nationality, and designated individual of the listing once the name has been added; and the 1267 Committee has committed to undertaking a complete review of all existing designations by 2010. In November 2002 the Committee adopted de-listing guidelines, establishing a procedure whereby an individual could petition his national government to request a review of the listing by the Committee, although a unanimous decision would be required before de-listing occurred. This was subsequently amended further to provide for a "focal point" through which individuals could directly submit de-listing requests for consideration by the Committee.[18]

The Chair of the 1267 Committee acknowledged recently when briefing the U.N. Security Council that these changes are in direct response to criticism of the sanctions regime, stating:

> One cannot ignore the international context in which these developments have taken place. The reality is that Security Council sanctions regimes find themselves increasingly under pressure and have recently been questioned, especially in light of the need for fair and clear procedures for listing, de-listing and the granting of humanitarian exceptions.[19]

It has been recognised repeatedly at the U.N. level that there is a need to incorporate human rights protections within counterterrorism strategies; for example, the U.N. Security Council has declared that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, . . . in particular . . . human rights, refugee, and humanitarian law . . . ."[20]

Sanctions Regimes: In Need of Better Protection of the Individual, 20 LEIDEN J. INT'L L. 797 (2007).

18. *See* Larissa van der Herik, *The Security Council's Targeted Sanction Regimes: In Need of Better Protection of the Individual*, 20 LEIDEN J. INT'L L. 797, 805 (2007); *see also* Clemens A. Feinaugle, *The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Law for the Protection of Individuals?*, 9 GERMAN L.J. 1513, 1528-29 (2008).

19. U.N. Security Council, *Provisional Record of 6043rd Meeting*, 9, S/PV.6043 (Dec. 15, 2008).

20. S.C. Res. 1456, ¶ 9, U.N. Doc. S/RES/1456 (20 Jan. 2003).

III. THE *KADI* DECISION

A. *The Background Facts*

The appropriate balance to be struck between counterterrorism strategies and human rights was directly in question in the *Kadi* case. Yassin Abdullah Kadi (a Saudi Arabian businessman) and the Al Barakaat International Foundation (established in Sweden) were included on the Consolidated List by the 1267 Committee on October 19, 2001, and November 9, 2001, respectively.[21] They commenced proceedings before the Court of First Instance in parallel cases seeking the annulment of the EU Council regulations implementing the 1267 Committees listing decision, initially Regulation (EC) No. 467/2001 and then subsequently Regulation (EC) No. 881/2002. The applicants argued that the EU Council lacked competence to adopt the contested regulations and that the regulation breached fundamental human rights, namely the rights to property, to a fair hearing, and to an effective judicial remedy, although for the purposes of this Article, the judgments will be examined solely in relation to the question of whether the courts had jurisdiction to review (directly or indirectly) the relevant U.N. Security Council resolutions.

The original applications were also joined by Abdirisak Aden, Abulaziz Ali, and Ahmed Yusuf, individuals of Somalian origin who were living in Sweden and who had also been listed by the 1267 Committee. Aden and Ali withdrew from proceedings while the case was pending before the Court of First Instance after being removed from the Consolidated List on 26 August 2002 following successful negotiations and a de-listing request by the Swedish Government. Yusuf similarly discontinued his action pending appeal proceedings after being de-listed in August 2006.

B. *The Court of First Instance*

On September 21, 2005, the Court of First Instance dismissed the actions.[22] In adopting the relevant regulations, the EU Council was held to be acting under circumscribed powers because it was required to give effect to the U.N. Security Council resolutions and was unable to exercise

21. U.N. Security Council, The Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them, 1, 57, 64-65 (2009), *available at* http://www.un.org/sc/committees/1267/consolist.pdf.

22. Case T-306/01, Yusuf v. Council, 2005 E.C.R. II-3533, *rev'd*, Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41 (2008); Case T-315/01, Kadi v. Council, 2005 E.C.R. II-3649, *rev'd*, Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41 (2008).

any autonomous discretion in doing so. The Court of First Instance rejected "arguments based on the view that the Community legal order is a legal order independent of the United Nations"[23] and held that engaging in a review of the EU Council regulations in this case would necessarily mean engaging in an indirect review of the U.N. Security Council resolutions. It was held, with reference to articles 25 and 103 of the U.N. Charter, that binding U.N. Security Council resolutions take precedence over Community law (including human rights standards) with the Court of First Instance stating:

> From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the [European Convention for the Protection of Human Rights and Fundamental Freedoms] and, for those that are also members of the Community, their obligations under the EC Treaty.[24]

The Community was held to be bound by the obligations under the U.N. Charter by virtue of its obligations under the EC Treaty and was therefore "required to give effect to the Security Council resolutions concerned."[25] The Court of First Instance concluded that considering, even indirectly, the lawfulness of U.N. Security Council resolutions in light of Community law fell, in principle, outside the ambit of the Court's judicial review.

The Court of First Instance went on, however, to impose a potentially significant limitation to this general rule, holding that it had the power "to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible."[26] In this particular case, however, it was held that the regulations did not violate *jus cogens*.

C. The Opinion of the Advocate General

The Advocate General recommended that the ECJ allow an appeal against the judgment of the Court of First Instance and annul Regulation (EC) No. 881/2002 insofar as it concerned the applicants, on the grounds

23. *Kadi*, Case T-315/01, para. 208.
24. *Id.* para. 181.
25. *Id.* para. 207.
26. *Id.* para. 226.

that the regulation infringed upon the right to be heard, the right to judicial review, and the right to property.[27] It was stated that Community Courts "in the final analysis . . . determine the effect of international obligations within the Community legal order by reference to conditions set by Community law"[28] and that "[t]he claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights."[29] The Advocate General adopted a dualist approach to the relationship between international and Community law, claiming that the legal effects of a ruling by the ECJ would remain confined to the municipal legal order of the Community and stating:

> While it is true that the restrictions which the general principles of Community law impose on the actions of the institutions may inconvenience the Community and its Member States in their dealings on the international stage, the application of these principles by the Court of Justice is without prejudice to the application of international rules on State responsibility or to the rule enunciated in Article 103 of the UN Charter.[30]

One aspect of the opinion with potentially significant implications for the interplay between the regional and international obligations imposed on individual States is the suggestion that the obligations under article 307 of the EC Treaty[31] "flow in both directions."[32] The suggestion appears to be that the obligations flowing from article 307 require Community Member States, and particularly those who are members of the Security Council, "to act in such a way as to prevent, as far as possible, the adoption of decisions by organs of the United Nations that are liable to enter into conflict with the core principles of the Community

27. Case C-402/05, Kadi v. Council, 2008 E.C.R. I-6351; Case C-415/05, Kadi v. Council, 2008 E.C.R. I-6351.

28. *Kadi*, Case C-402/05, para. 23; *Kadi*, Case C-415/05, para. 23.

29. *Kadi*, Case C-402/05, para. 34.

30. *Id.* para. 39.

31. The first two paragraphs of article 307 of the EC Treaty state:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.
>
> To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

Treaty Establishing the European Community, Consolidated Version, Dec. 29, 2006, 2006 O.J. (C 321E) 178.

32. *Kadi*, Case C-402/05, para. 32; *Kadi*, Case C-415/05, para. 32.

legal order."[33] For the United Kingdom and France this then raises the question of whether the Advocate General is suggesting they may be under a legal obligation, enforceable by Community Courts, to exercise their veto within the U.N. Security Council and its 1267 Committee to prevent the adoption of sanctions that may infringe upon European human rights standards.

D. European Court of Justice

On September 3, 2008, the Grand Chamber of the ECJ set aside the judgments of the Court of First Instance, holding that, while U.N. Security Council resolutions are binding in international law, the Community courts had jurisdiction to review the lawfulness of the implementing EU Council regulations within the Community constitutional framework and in light of the fundamental rights protected under Community law. To this end, the Court observed that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system,"[34] although it went on to emphasize that judicial review was being applied here to the implementing regulations and not the Security Council resolution itself, and further that "any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law."[35] The ECJ held that it had no power to review the lawfulness of U.N. Security Council resolutions adopted under Chapter VII "even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*."[36] This separation between the regional and international legal orders was claimed to be evidenced by the fact that "[t]he Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order."[37]

The ECJ then proceeded to hold that the regulation must be annulled on the basis that the right to be heard and the right to effective

---

33. *Kadi*, Case C-402/05, para. 32; *Kadi*, Case C-415/05, para. 32.
34. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41, para. 282 (2008).
35. *Id.* para. 288.
36. *Id.* para. 287 (emphasis added).
37. *Id.* para. 298.

judicial review "were patently not respected"[38] and that the regulation constituted an unjustified restriction of the right to property.[39] However, in recognition of the fact that annulment with immediate effect "would be capable of seriously and irreversibly prejudicing the effectiveness of the restrictive measures imposed by the regulation and which the Community is required to implement,"[40] the Court allowed the effects of the regulation to be maintained for three months to provide the EU Council with the opportunity to remedy the infringements.

E. An Isolated Example?

It is important to recognise that the *Kadi* decision is not merely an isolated example of U.N. Security Council sanctions being challenged by individuals at the national and regional level. For example, it has been reported that fifteen percent of States submitting compliance updates to the Counter-Terrorism Committee have faced domestic legal challenges to their implementing measures.[41] Regulations implementing other U.N. Security Council-mandated sanctions were similarly annulled by the Court of First Instance in *Organisation des Modjahedines du Peuple d'Iran v. Council*[42] and *Sison v. Council*,[43] and the U.N. Human Rights Committee recently decided in *Sayadi v. Belgium*[44] that Belgium's actions in relation to listing the complainants under the 1267 sanctions regime violated articles 12 and 17 of the International Covenant on Civil and Political Rights.

It is notable also that there have been a number of challenges commenced in U.S. federal courts against sanctions applied in

---

38. *Id.* para. 334.

39. *Id.* para. 370.

40. *Id.* para. 373.

41. Peter Gutherie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 519 (2004).

42. Case T-228/02, 2006 E.C.R. II-04665. In contrast to *Kadi*, this decision concerned Council Regulation (EC) No. 2580/2001, which implemented U.N. Security Council Resolution 1373 (2001). As described above, the 1373 sanctions regime leaves individual states with the discretion to maintain their own sanctions list and to determine the procedure for identifying individuals to be listed. The sanctions list is therefore controlled in a real sense by the EU Council itself, which is not the case under the 1267 sanctions regime that instead requires the EU Council to apply a list controlled at the United Nations level.

43. Case T-47/03, 2009 ECJ EUR-Lex LEXIS 1233. As with *Organisation des Modjahedines du Peuple d'Iran v. Council*, this decision concerned a challenge to Council Regulation (EC) No. 2580/2001 and, indirectly, the 1373 sanctions regime.

44. U.N. Hum. Rts. Comm., Communication No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008).

accordance with the 1267 sanctions regime.[45] The U.S. implementation of the 1267 sanctions regime is different from the European approach in that the American implementing legislation does not wholly adopt the Consolidated List, but instead provides for the Executive Branch, acting through the Office of Foreign Assets Control, to exercise autonomous discretion in introducing regulations sanctioning individuals and entities designated by the 1267 Committee. Challenges to sanctions imposed by this process are viewed therefore as challenges to Executive Branch actions and are assessed according to national due process standards. While the due process challenges have been rejected in each case thus far, the courts have indicated a willingness, in the appropriate factual circumstances, to strike down sanctions in the future. Daniel Meyers suggests:

> In light of the breadth and open-endedness of the "war" on terror, it may only be a matter of time before a United States court invalidates the application of sanctions called for by the 1267 resolutions, rendering the United States in violation of its obligations under Article 25 of the Charter.[46]

This stands in contrast to the approach toward the judicial review of Security Council resolutions recently taken by the House of Lords in the *Al-Jedda* decision.[47] In *Al-Jedda v. Secretary of State for Defense*, the appellant argued that his detention by British troops in Iraq infringed on article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[48] In response, it was argued that article 5(1) was qualified in this particular case by the legal regime established pursuant to U.N. Security Council resolution 1546 (2004)[49] and subsequent resolutions, with the resolutions taking priority by reason of the operation of articles 25 and 103 of the U.N. Charter.[50] The appeal turned on the relationship between the ECHR and U.N. Security Council

---

45. *See* Global Relief Found. v. O'Neill, 207 F. Supp. 2d 779 (N.D. Ill.), *aff'd*, 315 F.3d 748 (7th Cir. 2002); Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003); Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D.D.C. 2005), *aff'd in part*, 477 F.3d 728 (D.D.C. 2007).

46. Daniel S. Meyers, *The Transatlantic Divide over the Implementation and Enforcement of Security Council Resolutions*, 38 CAL. W. INT'L L.J. 255, 282 (2008).

47. R (on the Application of Al-Jedda) v. Sec'y of State for Defence [2007] UKHL 58 (appeal taken from Eng.).

48. *Id.* para. 1.

49. U.N. Security Council resolution 1546 provides that the multinational force in Iraq shall, inter alia, "have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq." S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

50. *Al-Jedda* [2007] UKHL 58, para. 3.

resolutions adopted under Chapter VII, with the House of Lords holding that by reason of article 103 of the U.N. Charter, "binding Security Council decisions taken under Chapter VII supersede all other treaty commitments."[51] As a result, the United Kingdom could lawfully exercise the power to detain insofar as it was authorised by the U.N. Security Council resolutions, although it was obliged to ensure that rights protected under the ECHR were not infringed upon to any greater extent than necessary.[52]

IV. JUDICIAL REVIEW AND THE U.N. SECURITY COUNCIL

The *Kadi* decision is not an entirely isolated example, but instead points to a more general pattern of indirect legal challenges to the application of the U.N. Security Council-mandated targeted sanctions being taken at the national and regional level. The question of whether U.N. Security Council resolutions should be subjected to judicial review by national and regional courts, and the implications of doing so, is therefore a question of increasing significance. There are clearly arguments in favour of judicial review, including the changing role of the U.N. Security Council, the protection of human rights, and the existing "legal protection deficit."[53] On the other hand, the potential problems with U.N. Security Council resolutions being reviewed at this level include establishing a clear legal foundation for such review, the potential conflict between national and international obligations, the risk of fragmentation and uncertainty, and the potential impact on the overall effectiveness of the U.N. Security Council. It will be argued here that, on balance, judicial review by national or regional courts is not an appropriate mechanism by which to restrain U.N. Security Council actions and that, in this respect, *Kadi* sets an unwelcome precedent.

A. Advantages of Judicial Review

One argument in favour of subjecting U.N. Security Council resolutions to judicial review is that the role of the U.N. Security Council is changing. The counterterrorism activities taken at the Security Council level in recent years are argued to provide "evidence of the Security Council's transformation from enforcer of collective security to

---

51. *Id.* para. 35.
52. *Id.* para. 39.
53. Ramses A. Wessel, *The* Kadi *Case: Towards a More Substantive Hierarchy in International Law?*, 5 INT'L ORG. L. REV. 1, 3 (2008).

global law maker."[54] Traditionally, Security Council resolutions have been either limited in scope—by applying to a specific dispute—or, if addressing a more general topic, have been non-binding in nature. The counterterrorism sanctions regime moved beyond this traditional role, with the U.N. Security Council unilaterally imposing on States "a series of obligations of a general nature, with no temporal or spatial restrictions attached to them."[55] When acting as a "world legislator," however, the U.N. Security Council will not be subject to many of the constraints that traditionally restrain and moderate the exercise of power by an executive or legislature within the domestic sphere.[56] Further, it has been observed that the U.N. Security Council is "neither well-equipped nor well-suited"[57] to perform the role of a "world legislator" in that "[i]ts political representation is uneven, its decision-making lacks transparency and, as aptly noted, it lacks what could be termed a legal culture. Moreover, as regards the repression of terrorist activities, the [Security Council] does not possess the institutional machinery to enforce the law it has prescribed."[58] While some argue that the U.N. Security Council is the body best suited to respond immediately and effectively to the threat of terrorism at the international level and that its evolving role is a welcome development, Enzo Cannizzaro responds: "If an evolution of the role of the [Security Council] is desirable, one could expect that its transformation would not entail the rise of the modern prince of the world, exercising political power outside the constraint of the law."[59]

This assumes particular importance in light of the fact that the 1267 sanctions regime imposed by the U.N. Security Council directly targets specific individuals, which has previously been a relatively rare occurrence. The risk of U.N. Security Council resolutions directly violating individual human rights is heightened through its evolving role. The U.N. Security Council itself has recognised the need to ensure that measures taken to combat terrorism comply with human rights obligations,[60] and the appellant in *Al-Jedda* submitted that "it would be anomalous and offensive to principle that the authority of the UN should

---

54. Hudson, *supra* note 15, at 203.
55. Andrea Bianchi, *Security Council's Anti-Terror Resolutions and Their Implementation by Member States: An Overview*, 4 J. INT'L CRIM. JUST. 1044, 1047 (2006).
56. *See id.* at 1071.
57. *Id.*
58. *Id.* (footnote omitted).
59. Enzo Cannizzaro, *A Machiavellian Moment? The UN Security Council and the Rule of Law*, 3 INT'L ORG. L. REV. 189, 221 (2006).
60. *See, e.g.*, S.C. Res. 1467, U.N. Doc. S/RES/1467 (Mar. 18, 2003).

itself serve as a defence of human rights abuses."[61] In this sense, the *Kadi* decision may be seen as a decision strengthening the protection of human rights. Judicial review may be desirable as a retrospective measure to provide a certain level of protection and redress for individuals who are specifically targeted by U.N. Security Council resolutions. It may also have a prospective value, with Erika de Wet and André Nollkaemper suggesting: "The possibility of review on the national level could serve as an incentive for the Security Council to draft its resolutions in accordance with human rights standards."[62]

If it is accepted, in a general sense, that there is a need to restrain U.N. Security Council powers and that there are advantages to allowing judicial review of U.N. Security Council resolutions, then national and regional courts may, in practice, provide the only existing avenues for such review, even if review at this level is undertaken indirectly by reviewing state-based implementing legislation. It has been argued that there is a "legal protection deficit" in terms of appropriate judicial mechanisms at the international level to review individual designations made under the sanctions regime.[63] The International Court of Justice is not able to hear applications from individuals, the U.N. Human Rights Committee can only issue non-binding communications, there is no existing International Court of Human Rights, and the current de-listing review mechanism provides for the 1267 Committee to review its own designations.[64] The existence of this "legal protection deficit" may necessitate a role for national and regional courts by default if there is to be any measure of judicial review. This point was made by the Advocate General in *Kadi*, who observed:

> Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists.[65]

61. R (on the Application of Al-Jedda) v. Sec'y of State for Defence [2007] UKHL 58 (appeal taken from Eng.), para. 37.

62. Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN Y.B. INT'L L. 166, 202 (2002).

63. Wessel, *supra* note 53, at 3.

64. *See, e.g.*, Bothe, *supra* note 15, at 541; Müller, *supra* note 13, at 33-34; Van Den Herik, *supra* note 17, at 801-02.

65. Case C-402/05, Kadi v. Council, 2008 E.C.R. I-6351, para. 54; Case C-415/05, Kadi v. Council, 2008 E.C.R. I-6351, para. 54.

B. Difficulties with Judicial Review

While on one view the *Kadi* decision may be welcomed for indirectly exposing U.N. Security Council resolutions to judicial review and enhancing the protection of individual human rights, it is also important to recognise that there are potentially significant problems associated with subjecting U.N. Security Council resolutions to judicial review. This Article suggests that judicial review by national or regional courts is not an appropriate mechanism by which to restrain U.N. Security Council actions. From this perspective, the *Kadi* decision establishes an unwelcome precedent, with undesirable practical implications.

One difficulty with allowing judicial review is establishing a clear legal foundation for such review in the first place, particularly when, as was the case in *Kadi*, the review is being undertaken by a regional body and the U.N. Security Council resolution is being measured against regional human rights standards. The United Nations Charter itself is silent on the question of judicial review of U.N. Security Council actions and, in fact, "a proposal to include a provision in the Charter calling for judicial review was rejected at the San Francisco conference, evincing the will to keep [Security Council] action beyond the reach of judicial control."[66] Further, article 103 of the U.N. Charter appears to expressly define the relationship between binding U.N. Security Council resolutions and regional human rights obligations in a manner that significantly constrains review at the regional level. 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 obligations under any other international agreement, their obligations under the present Charter shall prevail."[67] In the European context this is reinforced by article 307 of the EC Treaty.[68] Article 103 of the U.N. Charter is effectively a conflicts rule whose effect is to give priority to Charter obligations over other international obligations (with the exception of *jus cogens* obligations) and which "precludes the responsibility of a state for failing to abide by its conflicting obligation, so long as the conflict lasts."[69]

---

66. Cannizzaro, *supra* note 59, at 192.

67. U.N. Charter art. 103.

68. Treaty Establishing the European Community, Consolidated Version, Dec. 29, 2006, 2006 O.J. (C 321E) 178.

69. Marko Milanovic, Sayadi*: The Human Rights Committee's* Kadi *(or a Pretty Poor Excuse for One . . .)*, EJIL: TALK!, Jan. 29, 2009, *available at* http://www.ejiltalk.org/sayadi-the-human-rights-committee's-kadi-or-a-pretty-poor-excuse-for-one.../.

The *Kadi* approach to article 103 creates a very real and practical problem for Member States whose actions in implementing U.N. Security Council resolutions are challenged in national or regional courts. The ECJ drew a distinction in *Kadi* between U.N. Security Council resolutions and the implementing EU Council regulations, claiming that any judgment that the implementing regulations violated Community human rights obligations "would not entail any challenge to the primacy of that resolution in international law."[70] While such a distinction can be theoretically drawn, it becomes much more difficult to apply in any meaningful sense in practice, particularly given the specific background facts in *Kadi*. U.N. Security Council resolution 1267 and subsequent resolutions require strict compliance with their terms and do not leave States with a range of alternative options to choose from in terms of possible models for the transposition of those resolutions into the domestic legal order. The EU Council regulations in the case of *Kadi* "had merely transposed the Security Council resolutions into the Community legal order,"[71] with the individuals and entities listed under the regulations directly mirroring the Consolidated List at the U.N. level. In this situation any attempt to distinguish between the domestic implementing legislation and the U.N. Security Council resolutions, and thus any attempt to claim that review of one is not also necessarily an indirect review of the other, is drawing an illusory distinction.

The *Kadi* decision effectively leaves European Union member states between a rock and a hard place. As things presently stand they remain obligated under international law to implement the 1267 sanctions regime. While a plain reading of article 103 of the U.N. Charter suggests that Member States will not incur responsibility at the international level for any failure to abide by regional human rights obligations to the extent that they conflict with their obligation to implement the 1267 sanctions regime, following *Kadi* it appears that European Union Member States will be held responsible at the regional level for violating the ECHR and will be in breach of Community law if they implement the 1267 sanctions regime. As Albert Posch has observed, the ECJs approach in *Kadi* "only works if there is a way to implement UN Security Council resolutions in conformity with

70. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41, para. 288 (2008).

71. Elizabeth F. Defeis, *Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community*, 30 FORDHAM INT'L L.J. 1449, 1457 (2007).

fundamental rights of the EU."[72] The 1267 sanctions regime does not, however, currently provide States with this level of flexibility or discretion. Unless changes are made by the U.N. Security Council to the sanctions regime, European Union Member States will effectively have to decide between fulfilling either their international or regional obligations. The decision in *Kadi* means that they cannot, at present, do both at the same time.

This is of particular concern given the subject matter of *Kadi*, with the uniform application of measures across the international community being essential to the successful implementation of the sanctions regime. Allowing judicial review of U.N. Security Council resolutions in this way "entails accepting the risk of a multiplicity of interventions by domestic courts of the most various legal traditions, which could distort the principle of the primacy of the UN Charter and could ultimately affect its constitutional design."[73] Further risks include increasing uncertainty in an area that, more than most, requires certain and decisive action, and the increasing risk of fragmentation at the international level that, in turn, creates "the danger of conflicting and incompatible rules, principles, rule-systems[,] and institutional practices."[74]

The prospect of judicial review may also have negative implications for the overall effectiveness of the U.N. Security Council. Under article 24(1) of the U.N. Charter, the U.N. Security Council is given "primary responsibility for the maintenance of international peace and security"—an important objective that will often require prompt and decisive action to be taken by the U.N. Security Council.[75] The "speed and flexibility"[76] of the U.N. Security Council is essential if it is to be able to respond effectively to crisis situations. As Simon Chesterman has observed:

> An important caveat is to note the danger of a body like the Security Council embracing too many rules and too much accountability. The UN General Assembly is a more representative body than the Security Council, but there is a reason why matters of international peace and security were delegated to a smaller body with special rights accorded to the most

---

72. Albert Posch, *The* Kadi *Case: Rethinking the Relationship Between EU Law and International Law?*, 15 COLUM. J. EUR. L. ONLINE 1, 4 (2009), http://www.cjel.net/wp-content/uploads/2009/03/albertposch-the-kadi-case.pdf.

73. Cannizzaro, *supra* note 59, at 221.

74. U.N. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 9, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

75. U.N. Charter art. 24, para. 1.

76. Simon Chesterman & Chia Lehnardt, *The Security Council as World Judge? The Powers and Limits of the UN Security Council in Relation to Judicial Functions*, INST. FOR INT'L L. & JUST. 5 (May 2006), *available at* http://www.iilj.org/research/documents/panel_3_report.pdf.

> powerful countries of the day. If the cost of greater accountability were that the capacity of the Security Council to respond to a crisis suffered, many would argue that the cost would be too great.[77]

It should further be noted that the ECJ in *Kadi* held that the right to an effective legal remedy required that a court be able to substantively review the evidence against the individual applicants that led to their original inclusion on the Consolidated List. The Court found that the EU Council had failed to communicate to the appellants the evidence used to justify their listings and had not adduced such evidence before the Court, leading to the following conclusion:

> The Court cannot, therefore, do other than find that it is not able to undertake the review of the lawfulness of the contested regulation insofar as it concerns the appellants, with the result that it must be held that, for that reason too, the fundamental right to an effective legal remedy which they enjoy has not, in the circumstances, been observed.[78]

One difficulty with allowing substantive judicial review of listing decisions under the 1267 sanctions regime, and of the evidence informing such decisions, is the nature of the evidence on which the decisions are based. Normally, targeted sanctions are "based on intelligence information [that] inevitably limits scrutiny even at the national level."[79] Secrecy is particularly important in this context given the ease with which funds can be moved and hidden, both within and between countries. States are generally reluctant to share classified, security-related intelligence in the best of circumstances, and this reluctance will only be magnified if there is a perceived risk of such information being subjected to review by a national or regional court in an entirely separate jurisdiction.

It is also important not to overstate the protective potential of judicial review in terms of restraining the excessive exercise of U.N. Security Council powers and protecting individual human rights. For while the ECJ did ultimately find that the targeted sanctions imposed against Kadi and the Al Barakaat International Foundation breached fundamental rights, and annulled Regulation (EC) No. 881/2002, this decision came almost seven years after the appellants had been initially

---

77. Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 GLOBAL GOVERNANCE 39, 46 (2008).

78. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41, para. 351 (2008).

79. CHATHAM HOUSE, UN AND EU SANCTIONS: HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM—THE *KADI* CASE (2009), *available at* http://www.chathamhouse.org.uk/publications/papers/download/-/id/699/file/13293_il220109.pdf.

added to the Consolidated List. The initial decision by the Court of First Instance similarly took almost four years from the time of the sanctions first being applied. While this is perhaps "not abnormally long in comparison with other cases before the CFI, it nevertheless is a long time in terms of the interests of the applicants at stake, and the impact of the financial sanctions on their private lives."[80] By contrast, the intervention of Sweden at the political level led to a number of the original applicants, namely Abdirisak Aden and Abdulaziz Ali, being de-listed less than a year after being originally added to the Consolidated List.

Further, both Kadi and the Al Barakaat International Foundation have since been re-listed and remain subject to sanctions. While the *Kadi* decision may have highlighted concerns about the sanctions regime and indirectly encouraged reform, it did not ultimately result in the applicants being permanently de-listed, perhaps demonstrating the practical limits of judicial review as a constraint upon executive or legislative powers.

V. *KADI* AND THE FUTURE OF TARGETED SANCTIONS

The *Kadi* decision has opened the door to further individual challenges to the 1267 sanctions regime being brought before national and regional courts, as well as further indirect judicial review of U.N. Security Council resolutions. As outlined above, however, there are potentially significant costs attached to allowing judicial review of U.N. Security Council resolutions. Further, given the apparent conflict between obligations at the international level, under the U.N. Charter, and at the Community level, under the *Kadi* decision, Community members have been left in a particularly uncomfortable position. The question becomes whether it is possible to reconcile these obligations while also avoiding the problems associated with U.N. Security Council resolutions being subject to judicial review by national and regional courts.

In response to the *Kadi* decision, the Commission communicated the narrative summaries of reasons provided by the 1267 Committee to Kadi and the Al Barakaat International Foundation and offered them the opportunity to comment, following which the individual cases were reviewed. It was expressly stated that this was done "in order to comply with the judgment of the Court of Justice."[81] Following this review both

---

80. Mielle Bulterman, *Fundamental Rights and the United Nations Financial Sanction Regime: The* Kadi *and* Yusuf *Judgments of the Court of First Instance of the European Communities*, 19 LEIDEN J. INT'L L. 753, 761 (2006).

81. Maria Tzanou, *Case-Note on Joined Cases C-402/05 P & C-415/05 P* Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council of the European Union &

parties were again listed and remain named today on both the Consolidated List and the related EU Council Regulation. As Maria Tzanou has observed, it is questionable whether this response could be regarded as satisfactorily complying with the *Kadi* decision:

> The answer is probably to the negative, as it does not seem that the due process requirements asked for by the Court's decision are met. . . . However, it should be noted that compliance of the EC institutions with the ECJ's ruling seems indeed a very difficult task, as the smart sanctions are decided at the UN level, and therefore the EU institutions cannot have more information than the UN is willing to provide, that being limited only to the narrative summary of reasons.[82]

Certainly Kadi himself did not see this as satisfactory compliance, considering he recently commenced a fresh legal application. In an action commenced on February 26, 2009, Kadi is seeking the partial annulment of Commission Regulation No. 1190/2008, which amended Council Regulation (EC) No. 881/2002 and re-imposed financial sanctions against him (among others).[83] One of the grounds relied upon by Kadi is that the contested regulation fails to remedy the infringement of protected rights previously identified by the ECJ.

One suggestion has been that the *Kadi* decision may encourage EU Member States to take a more independent approach towards the implementation of the Consolidated List, along the lines of the American approach described above. This has been suggested by Richard Barrett, the coordinator of the United Nations' Al-Qaeda and Taliban Monitoring Team:

> The best way forward would be for each Council member, particularly those most likely to face legal challenges, to ensure that every listing meets the standards expected by its domestic courts. The United States already does this by taking proposed listings through a long and detailed examination to ensure that any domestic legal challenge would be likely to fail. The record of success so far suggests that this system works.[84]

There are, however, a number of potential problems. The first, which is acknowledged by Barrett, is that most countries do not have access to the same level of information as the United States.[85] They will be unable,

---

Commission of the European Communities, 10(2) GERMAN L.J. 123, 152 (2009) (quoting Commission Regulation 1190/2008, O.J. (L 322) 25).

82. *Id.* at 153.

83. Case T-85/09, Kadi v. Comm'n, 2009 O.J. (2009/C 90/56).

84. Richard Barrett, *Al-Qaeda and Taliban Sanctions Threatened*, WASH. INST. NEAR E. POL'Y, Oct. 6, 2008, Policy Watch No. 1409, http://www.washingtoninstitute.org/templateC05.php?CID=2935.

85. *Id.*

therefore, to effectively undertake an independent assessment of each proposed listing, particularly given that the 1267 sanctions are largely based on intelligence information that states are often reluctant to share. The listing process would also be dramatically slowed, and potentially suffer from fragmentation, if listings were dependent on each country undertaking an independent domestic review before sanctions could be applied, thus losing the speed, flexibility, and uniformity that is a central advantage of the existing Security Council sanctions regime. A further problem is that only states that are members of the 1267 sanctions committee would have the power to directly veto a proposed listing if it didn't meet the standards expected by their own domestic courts.

Perhaps the biggest problem, however, is that the American approach does not ultimately reconcile the potential conflict between regional and international obligations. Once an individual or entity has been included on the Consolidated List, states are obliged to impose sanctions against that listed party, regardless of whether the listing meets the standards expected by its own domestic courts. As Meyers has suggested, although the U.S. courts have so far rejected due process challenges against sanctions applied in accordance with the 1267 sanctions regime, they have indicated a willingness to strike down sanctions in the appropriate factual circumstances, which would then render the United States in violation of its obligations under article 25 of the U.N. Charter.[86]

Realistically, the only way Community members will be able to comply fully with the *Kadi* decision and also meet their international obligations is for the 1267 sanctions regime to itself be modified at the U.N. Security Council level in such a way as to answer the concerns raised by the ECJ. It has, in fact, been argued that one of the most important consequences of the *Kadi* decision is that it may provide just the necessary impetus for reform of the sanctions regime and may "open up a political process that had previously become frozen."[87]

The ECJ alluded to this possibility in *Kadi*, suggesting that greater deference may be shown to the implementing regulations if the sanctions regime at the U.N. level is amended so as to address the violations identified by the Court. However, it was held that "[s]o long as the law of the United Nations offers no adequate protection for those who[] claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect

86. Meyers, *supra* note 46, at 282.

87. Inst. for Int'l L. & Just., The NYU *Kadi* Panel Discussion in Full (Oct. 14, 2008), http://globaladminlaw.blogspot.com/2008/10/nyu-kadi-panel-discussion-in-full.html.

to resolutions of the Security Council."[88] The Court of Justice went on to find in relation to the 1267 Committee: "[T]he fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting their rights and that committee taking its decisions by consensus, each of its members having a right of veto."[89]

Amending the sanctions regime in this way to provide for an individual's right to effective legal remedy through the establishment of an independent review mechanism has been previously suggested, as seen in, for example, the Fassbender Report (commissioned by the U.N. Office of Legal Affairs)[90] and the Watson Institute Report (produced by the Watson Institute for International Studies at Brown University).[91] One example of the type of review mechanism that may be worthy of further consideration in these particular circumstances is the World Bank Inspection Panel. The Panel provides a mechanism through which individuals may directly challenge World Bank projects on the grounds of non-compliance with World Bank policies and internal directives. The panel members are not directly associated with the World Bank and have the power to review decisions and to issue reports and recommendations, although these are not ultimately binding on the Bank. It has been acknowledged that while this is not an ideal solution,

> [i]t provides, however, some sort of hints as to [the] possibility of an independent[,] non-judicial review procedure. The essential point is that it constitutes a fruitful compromise. . . . It does not constitute an outside judicial review, it is administrative in nature. On the other hand, it provides a guarantee for an independent control of decisions and an effective remedy for those actors which are affected by the Bank's decisions. That independence and the ensuing impartiality provide a certain equivalence to a procedure of judicial review.[92]

Whether such a compromise is politically feasible or a realistic possibility in the current environment is, however, another question entirely. As observed by Fassbender:

---

88. Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 3 C.M.L.R. 41, para. 256 (2008).

89. *Id.* para. 323.

90. Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 INT'L ORG. L. REV. 437, 437-38 (2006).

91. WATSON INST. FOR INT'L STUD., BROWN UNIV., STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES (2006), *available at* http://www.watsoninstitute.org/pub/strengthening_Targeted_Sanctions.pdf.

92. Bothe, *supra* note 15, at 554.

> It is no secret that the United States and the United Kingdom, in particular, do not support changes to the present situation that would call into question the ultimate decision-making authority of the Security Council with respect to sanctions imposed against individuals and "entities." Both governments therefore reject the establishment of any form of independent review mechanism the decisions of which would be binding on the Security Council, and at least dislike the idea of a body or person with only recommendatory powers whose recommendations would compel the Council to explain and justify its decisions . . . .[93]

These practical difficulties are encapsulated in a discussion paper prepared by Denmark for the open debate in the Security Council on June 22, 2006, titled "Strengthening International Law: Rule of Law and the Maintenance of International Peace and Security" where it was observed, under the heading "Enhancing the Efficiency and Credibility of United Nations Sanctions Regimes":

> The Security Council has repeatedly stated that, while combating acts of terrorism by all means, the fight against terrorism must take place within the established framework of international law, in particular international human rights, refugee and humanitarian law. While there seems to be broad support for this principle, its more practical application is still under development.[94]

VI. CONCLUSION

The *Kadi* decision has opened the door for individuals listed under the 1267 sanctions regime to bring legal claims challenging domestic implementing measures before national and regional courts and for these courts to indirectly review the U.N. Security Council resolutions establishing the sanction regime. While the decision has been welcomed by many as providing enhanced protection for human rights and a check on the exercise of power by the U.N. Security Council, this Article has argued that it is, on balance, not desirable to subject binding U.N. Security Council resolutions to judicial review at the national or regional level and, further, that the *Kadi* decision has placed Community members in a difficult position given the conflict between their regional and international obligations.

Despite this criticism, however, the reality is that the *Kadi* decision cannot simply be ignored. The ECJ has squarely placed the ball in the

93. Fassbender, *supra* note 90, at 438.

94. Security Council, Letter Dated June 7, 2006, from the Permanent Representative of Denmark to the United Nations addressed to the Secretary-General, at 4, U.N. Doc. S/2006/367 (June 7, 2006).

U.N. Security Council's court. The continued application and enforcement of targeted sanctions by the European Union is necessary both to ensure the continuing effectiveness of the sanctions regime, which "is still one of the most important tools of the international community in the fight against terrorism,"[95] and to also avoid undermining the longer-term authority and legitimacy of the U.N. Security Council. To ensure the continued uniform application of counterterrorism sanctions it would appear that the U.N. Security Council will, as a practical necessity, need to consider reforming the existing 1267 sanctions regime to address the concerns raised in the *Kadi* decision.

95. Security Council, Provision Record of 6043rd Meeting, at 9, U.N. Doc. S/PV6043 (Dec. 15, 2008) (quoting Ambassador Jan Grauls, Chair, 1267 Committee).