The Rule of Law and the Security Council: The New Procedures for the Legal Protection of Individuals in the Fight against Terrorism

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First draft prepared for the CONNEX / Ius Commune Workshop Accountability and the Rule of Law at International Level, University of Amsterdam, 25 January 2008 – work in progress

1. Introduction

With Resolution 61/39 of 18 December 2006, the General Assembly of the United Nations firmly placed the rule of law on its agenda. In this Resolution, entitled, The Rule of Law at the National and International Levels, the GA made clear that a requested report of the Secretary General on this issue should take the international level into account. Indeed, international organizations and international regimes are increasingly engaged in normative processes which, de jure or de facto, impact on States and even on individuals and businesses. Since decisions of international organizations are increasingly coming to be considered a source of international law, it is quite common to regard them in terms of international regulation or legislation and, hence, to assess them in terms of the rule of law.

It is undisputed that international organizations may take binding decisions vis-à-vis their Member States and that they may even exercise sovereign powers, including executive, legislative and judicial powers. As Alvarez notes, more and more technocratic international organisations “appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making. They also often engage in law-making by subterfuge.”

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5 Thus, Alvarez’s survey includes standard setting by the IMO, the FAO, the ICAO, the ILO, the IAEA, UNEP, the World Bank, and the IMF. In addition, many international conventions – including UNCLOS (on the law of the sea) and a number of WTO agreements – incorporate generally accepted international “rules, standards, regulations, procedures and/or practices” (UNCLOS). J.E. Alvarez, International Organizations as Law-Makers, Oxford: Oxford University Press, 2005, p. 217.
increasing number of cases these norms have a more general nature and may have an effect on individuals.\(^6\)

The United Nations Security Council forms the most clear example of an international body that is increasingly active in the creation of ‘international regulation’ or ‘international legislation’, although its legal competence to engage in these activities has been questioned.\(^7\) Thus, in the area of anti-terrorism measures for example, Security Council Resolution 1390 (2002) was no longer directed at the Taliban regime but at individuals (Osama bin Laden, the Al-Qaeda network and the persons and entities associated with them). In that respect the resolution seemed to herald a new development, as any connection with the territory of a State is omitted. Perhaps Resolution 1373 (2001) already pointed to something new when, in reaction to the terrorist attacks of 11 September, the Council determined “that such acts, like any act of international terrorism, constitute a threat to international peace and security”, thus referring to terrorist acts in the abstract. The Council then imposed on all States duties to “prevent and suppress the financing of terrorist acts”, \textit{inter alia} by criminalising conduct aimed at financing or supporting terrorist acts.

Apart from this more general legal regime related to counterterrorism measures to be implemented by UN Member States, since 2000 (Resolution 1333) the Security Council has maintained its own list of possible terrorist individuals and entities. Resolution 1390 (2002) ‘updated’ this regime to the post 9/11 situation.\(^8\) It is this latter example – the sanctions directed towards individuals or entities which by now has lead to a form of “supranational administration”\(^9\) – that forms the subject of this contribution. While the topic as such has already received abundant attention over the past few years,\(^10\) in December 2006 the Security Council adopted Resolutions 1730 and 1735 in response to

\(^6\) See the contributions to Follesdal et al., \textit{op.cit.}


\(^8\) According to this Resolution, in addition to the freeze of the funds and other financial assets of the individuals or entities states are obliged to prevent the entry into or the transit to their territories of these individuals except under specific circumstances. States must also prevent the direct or indirect supply to these individuals or entities or arms and related material.


widespread criticisms in relation to the system of terrorist listings and with the clear aim of “ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”¹¹ The purpose of the present contribution is to analyse to what extent this new system of legal protection, introduced at the level of the United Nations Security Council, meets internationally accepted criteria related to the rule of law.¹² In that respect account may be given to the definition as formulated by the UN Secretary-General in 2004:

“The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.¹³


2.1 The New Listing Procedure

The main criticism with regard to the original listing procedure, laid down in the guidelines of the Sanction Committee established by Resolution 1267 (1999),¹⁴ concerned the lack of a uniform procedure, the closed sessions of the Committee and, perhaps above all, the unclear criteria used by the Committee in deciding whether or not individuals or entities where to be regarded as forming a

¹¹ Resolution 1730 (2006), Preamble.
¹⁴ Security Council Committee Established Pursuant To Resolution 1267 (1999) Concerning Al-Qaida And The Taliban And Associated Individuals And Entities. See also Res. 1333 (2000) which endowed the Sanctions Committee with the competence to maintain updated lists of individuals and entities that should be the object of the sanction measures. See for the so-called ‘Consolidated List’: http://www.un.org/sc/committees/1267/consolist.shtml.

terrorist threat. The Committee is a subsidiary organ of the UN Security Council and consists of all its members. On the basis of the Guidelines, the list was updated by the Committee on the basis of a proposal by a Member State. Detailed and extensive evidence was usually not presented and even discouraged by certain members of the Committee, although as of the year 2005 (Resolution 1617) states had an obligation to provide a ‘statement of case’.

The amended listing procedure, which was introduced by resolution 1735 (2006) and subsequently found its way into the Guidelines on 12 February 2007 seems – above all – to have streamlined the administrative procedure. A somewhat improved protection of the individual may be found in the fact that the new guidelines require a statement of case, forcing the proposing state to supply relevant information. The guidelines provide that this statement of case should provide as much detail as possible on the basis(es) for listing indicated above, including: (1) specific findings demonstrating the association or activities alleged; (2) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.) and (3) supporting evidence or documents that can be supplied. States should include details of any connection with a currently listed individual or entity and they should indicate what portion(s) of the statement of case the Committee may publicly release or release to Member States upon request. Despite the obvious margin of discretion for Member States, this requirement at least forms a basis for a certain accountability once a proposing state is unwilling to provide information on alleged terrorists.

The uniformity of the procedure is also approved through the introduction of a cover sheet, which guarantees that all necessary information is collected and that the risk of name errors is diminished. The thus proposed listings are considered by the Committee on the basis of the so-called “associated with” standard, which is laid down in Res. 1617 (2005). This means that the ‘evidence’ supplied by the proposing state supports the view that “an individual, group, undertaking, or entity is ‘associated with’ Al-Qaida, Usama bin Laden or the Taliban.”

Once the Committee (still by consensus) decides on a listing the Secretariat notifies the Permanent Mission of the state(s) where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national. In turn, the states are called upon to inform the listed individual or entity of the measures imposed on them, the Committee’s guidelines, the listing and delisting procedures and the provisions of Res. 1452 (2020) on exceptions.

19 Guidelines 2007, para. 6 (d).
20 If consensus cannot be reached, the matter may be submitted to the Security Council; Committee Guidelines, para. 4(a).
The more professional administration of the listing procedure increases the transparency to a certain extent, forces proposing states to prepare the evidence in a structured, written, manner and diminishes the risk of placing the wrong people on the list. The mere information of the ‘victim’, however, is a sign that in terms of legal protection the new procedure is still far from flawless.21

2.2 The New De-listing Procedure

Even more important than the listing procedure are the possibilities for individuals and entities to get de-listed. Under the original de-listing procedure (which was only introduced two years after the listings started)22 this procedure had to be initiated by the petitioner, who was depended on his or her government of residence and/or citizenship to request review of the case by the Sanctions Committee.23 It was up to the so-called petitioned government to request the original designating government for possible additional information before deciding to pursue a de-listing request. Ideally the request would be submitted by all governments involved, but it was possible for the petitioned government to submit a request individually.24 In case the original designating government wished to maintain the listing, chances of removing an individual or an entity from the list were low. After all, also with regard to de-listing issues the committee decided with consensus.

Resolution 1730 of 19 December 2006 aimed at improving the position of the individual by creating a so-called ‘focal point’, to which de-listings can be sent by individuals, without interference by their government of residence or citizenship, although the possibility has remained to use a willing government as a broker.25 Resolution 1730 (2006) is quite open about the reason to establish the focal point, and the preamble provides that the Security Council is “Committed to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions list and for removing them, as well as for granting humanitarian exemptions.” The unfairness of the previous procedure was also noted by the Member States themselves as became visible in a 2005 Report drafted by a special Monitoring Team set up under Resolution 1526 (2004). The somewhat shaky administrative procedure would even discourage Member States to add names to the list,26 which may explain why the new Resolution was the result of a proposal by the United States (and France).27

The focal point is clearly set up as an administrative organ (within the Secretariat), with as its main task to receive de-listing requests from petitioners (individual(s), groups, undertakings, and/or entities on the Sanctions Committee’s lists).28 In addition, it is to detect repeated requests, to

21 Cf. C.A. Feinäugle, op.cit., pp. 231-259, who concludes that the new procedure “is still far from a judicial review” (at 249).
22 On 7 November 2002 the Committee adopted the guidelines for a de-listing procedure.
23 Committee Guidelines as amended on 29 November 2006, para. 8 (a).
24 Ibid., para. 8 (d).
acknowledge receipt of the request and to inform the petitioner on the general procedure for processing that request, to forward the request for information and possible comments to the designating government(s) and to the government(s) of citizenship and residence. It shall also convey all communications from Member States to the Committee and inform the petitioner of the decision of the Committee to grant the delisting petition or to dismiss it.  

Consultation between the governments involved is still encouraged and in the end any placing of a request depends on the recommendations of the government(s) of residence or citizenship. Designating governments can still oppose a request, in which case the focal point will inform the Committee. During that phase all Committee members can be involved in sharing information and may recommend delisting. If after one month no Committee member recommends delisting, the request shall be deemed rejected and the focal point will be informed by the Chairman of the Committee. If one member maintains its request, the Committee will decide on the issue by consensus. The focal point informs the petitioner about the decision.

Although the new procedure clearly improves the position of the individual in the sense that it is no longer dependent on its government to submit a request and other Committee members can join in once they feel that the evidence submitted by the individual to prove his or her innocence is convincing, the role of the focal point is mainly administrative. It functions as a secretariat without decision-making powers and merely distributes request among Committee members. The fact that the procedure now is in the hands of a special administrative office, following clear procedural rules, certainly helps reducing the risk of errors and allows the individual to directly address the source of his or her listing. At the same time, the role of the members of the Committee as well as the role of the designating and petitioned government(s) in placing the issue on the Committee’s agenda is decisive for the outcome.

3. **Assessment in the Light of the Legal Protection of Individuals**

3.1 **The criteria**

It goes beyond the scope of this paper to address the question to what extent the United Nations Security Council is bound by international human rights standards related to the legal protection of individuals or to what extent these standards form part of customary law or are to be regarded as *ius cogens*. This contribution will simply use certain general standards as a starting point to assess whether or not the current system of legal protection introduced at the level of the Security Council meets these standards. In that respect, apart from specific literature as well as a number of special reports on the issue, the criteria mentioned by the UN Secretary General in 2004 are used as a reference.

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29 Committee Guidelines as amended on 12 February 2007, para. 8 (d).
framework. As referred to above, in defining the rule of law, the Secretary General, *inter alia*, referred to “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

In the literature discussing the sanctions system of the Security Council, generally the focus is on the rights of due process (or fair trial). In the words of Fassbender, rights of due process “have been generally recognized in international law protecting individuals from arbitrary or unfair treatment by State organs. Generally recognized due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority.” According to Fassbender, in the case of sanctions imposed on individuals and ‘entities’, the rights of due process should include the following elements:

a. “the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;

b. the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;

c. the right of such a person or entity of being advised and represented in his or her dealings with the council;

d. the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.”

As these elements are not that different from what has been proposed by others, we take the freedom of using them as benchmarks to assess the new procedures of the Sanctions Committee. This seems all the more valid now that these elements largely coincide with the elements mentioned by the UN Secretary General, both in his definition on the rule of law and his non-paper on the listing and delisting of individuals and entities on sanctions lists. According to that non-paper the minimum standards required to ensure that the procedures are fair and transparent would include the following four basic elements:

“First, a person against whom measures have been taken by the Council has the right to be informed of those measures and to know the case against him or her as soon as and to the extent possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.

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33 Fassbender, *op.cit.*, at 444.
34 Ibid., at p. 476.
Secondly, such a person has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.

Thirdly, such a person has the right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.

Fourthly, the Security Council should, possibly through its Committees, periodically review on its own initiative targeted individual sanctions, especially the freezing of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved."

At the same time, there seems to be some consensus on the ‘fundamental’ nature of the right to due process in the sense that ‘fundamental requirements of fair trial’ must not be derogated from by states in a state of emergency.36

It has been debated extensively whether the listings of individuals and entities are to be considered purely administrative measures (based on the sanctions Resolutions as ‘legislative acts’), or that they are to be seen as penalties imposed on account of a criminal offence. Obviously, the due process standard is higher in relation to criminal proceedings.37 In particular the standard of evidence used for listing would be different for criminal charges (‘beyond reasonable doubt’) and administrative measures (‘balance of probabilities’).38 While there seems to be some consensus that the sanctions are not to be seen as penalties,39 but rather as preventive measures,40 it is clear that some elements as well as consequences come close to a criminal charge.41 One could argue that, at least, with regard to the impact the measure may have on the life of an individual, the distinction between

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38 Van den Herik, *op.cit.*, at 806.

39 Cf. Fassbender, *op.cit.*, at 478; but see also the statement of the Monitoring Group established pursuant to Res. 1526 92004): “the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets prohibiting international travel and precluding arms sales”. UN Doc. S/2005/572 92005) at paras. 39-44.

40 Cf. also the Committee Guidelines, 2007, para. 6: “A criminal charge is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventive in nature.”

41 See for instance I. Cameron, *op.cit.*, at 2: “The effects of blacklisting [a person] may be sufficiently serious to be the ‘determination of a criminal charge’, triggering the application of Article 6 [of the ECHR on fair trial] in its entirety.” Along the same lines, A. Bianchi, *op.cit.*, at 905: “Undoubtedly, SC measures providing for inclusion of an individual in a black list and the ensuing financial sanctions could well be amenable within the notion of criminal charge under the law of the European Convention.” And, Alvarez (2004), *op.cit.*, at 131-132: “it could be argued that the severity of the Council’s sanctions (particular those which deprive individuals of all access subject to no humanitarian exception as for the necessities of life) results in treating individuals as de facto criminals regardless of whether they are formally so charged.”
administrative and criminal measures may be somewhat artificial. Whatever the status of the measures, there seems to be a considerable consensus that the elements of due process mentioned above cannot easily be ignored in the listing and de-listing procedures.

3.2 Assessment of the New Procedures

The new Guidelines of February 2007 reveal the establishment of a more sophisticated administrative procedure, both in relation to the listing and the de-listing of individuals and entities. With regard to the listing, the required cover sheet certainly reduces the risk of name and other errors and assures that all necessary information is presented by the designating state. Furthermore, the requirement of a statement of case by which states have to convince the Committee that the ‘associated with’ standard has been met, added transparency to the listing process. It remains clear, however, that streamlining the process did not fundamentally change its nature; there is no judicial review of either the procedure or the substantive part of the listing and the Consolidated List remains the result of a primarily intergovernmental political process.42

One may argue that this should not cause too many problems as long as possible errors may be corrected. In that respect the main improvement in the new procedures is that individuals are no longer dependent on a state to file a request for de-listing at the Committee. At the same time, the focal point is nothing more than a secretariat; the designating government(s) and the government(s) of residence of citizenship remain the “guards at the door of the Committee”.43 They can (unanimously) decide not to place the request on the agenda of the Committee. At the same time, however, one of these states (most probably the state of residence of citizenship of the individual) can still submit the request to the Committee. In the end, however, the Committee can only decide on a de-listing unanimously.

The situation has therefore not changed fundamentally. Returning to the criteria mentioned above, it can be concluded that indeed the right to be informed by a listing is now part of the procedure, but the right to be heard, the right of being advised and represented as well as the right to an effective remedy are still far from respected. Even if one only takes the UN Secretary General’s own non-paper as a starting point, the flaws are obvious. There is no “effective review mechanism” which is impartial, independent and competent to lift the measures or to award compensation. Exactly the same persons that decide on a listing, decide on a de-listing and even in the case when the Committee fails to reach consensus on a de-listing and the matter is submitted to the Security Council, it is dealt with by the same states.

4. Concluding Observations: Towards Multilevel Legal Protection?

It is a public secret that the modifications to the Guidelines of the Sanctions Committee were partly triggered by the judgments of the European Court of First Instance in the Yusuf and Kadi cases44 as

42 Cf. also Feinäugle, op.cit., at 249.
43 Ibid. at 253,
well as by the subsequent academic debate on the legal limbo that seemed to exist for individuals and entities on the UN consolidated lists. As is well known, in these cases the CFI concluded that when the European Community (or in fact the whole European Union) is bound by Security Council Resolutions, it becomes difficult for the CFI to annul the European Regulation when the only thing it does is implement binding superior law. Nevertheless, the Court states to be “empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to jus cogens”. One reason seems to be that no legal protection is possible at the level of the Security Council itself. In subsequent cases, in particular Hassan and Ayadi, the CFI even recognized a role for the EU Member States in filling the legal protection gap.\(^{45}\)

Indeed, the notion of ‘multilevel legal protection’ has occasionally been proposed.\(^{46}\) The idea is that in the absence of fair and clear procedures at the level of the Sanctions Committee, other – regional and national – Courts should be allowed to grant individuals those rights which are thought to be of a ‘fundamental’ nature. As Alvarez observed, “disputes over the legality or the interpretation of the Council’s terrorism measures, to the extent that they arise, are likely to spill over a number of different venues – from national courts to the Security Council itself. No one solution, no single forum is likely to emerge and attempts to force disputes into a single judicial or political forum are likely to be futile.”\(^{47}\)

For EU Member States the European Court of Justice would seem to be the appropriate forum as the UN sanctions decisions are ‘translated’ into EU decisions and hence become part of the Community legal order. While the Court of First instance in the Yusuf and Kadi cases proved to be reluctant to apply the Community standards with regard to due process and some fundamental rights to measures originating from Security Council resolutions, the European Court may decide otherwise in the appeals case brought by Mr. Kadi. On 16 January 2008, Advocate General Poiares Maduro delivered his opinion in this case.\(^{48}\) The Advocate General states that, given that there is no mechanism of judicial control by an independent tribunal at the level of the United Nations, the Community cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions. In so doing, the resulting absence of any possibility for Mr Kadi to seek an independent review infringes his fundamental rights and cannot be permitted in a Community based on the rule of law. Consequently the Community Regulation should be annulled in so far as it concerns him. Maduro argues that “the Court cannot [...] turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect.” (para. 44). According to the AG “[b]oth the right to be heard and the right to effective judicial review constitute fundamental rights that form part of the general principles of Community law” (para. 48).

With regard to the procedure at the level of the UN, AG Maduro is quite clear as well:

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\(^{46}\) See for instance R.S. Brown, ‘How Do Judges Cope with Multilevel Regulation?’, in Follesdal et al., op.cit.

\(^{47}\) Alvarez (2004), op.cit., at 144.

“The existence of a de-listing procedure at the level of the United Nations offers no consolidation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality.” (para. 51)

In fact, this is one of the reasons for him to allow for legal protection at the EU level: “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.” (para. 54).

For states being a party to the European Convention on Human Rights (ECHR), the case law of the European Court of Human Rights is relevant as well. In that respect reference is often made to the Waite and Kennedy case, in which the ECtHR looked at “reasonable alternative means” provided by the organization in order to assess the possibly required role of domestic courts. Indeed, it is the actions of state parties – and not of international organizations – that are monitored by the ECtHR. It can however be helpful in defining the balance between the ECHR obligations and other international obligations (such as binding EC or UN decisions). In that respect the case law of the ECtHR, and in particular the Bosphorus case, makes clear that there can be a ‘residual’ responsibility on state parties for violations of the Convention, even when the violation has come about when these states are implementing legal obligations arising out of their membership of an international organization.

Indeed, in situations in which ‘reasonable alternative means’ at the level of international organizations do not exists, it has been proposed to enlarge the role of domestic courts in the legal protection of individuals and that a judicial review of Security Council resolutions by these courts would not necessarily be in conflict with the UN Charter. In the words of Cannizzaro, “from the perspective of the UN legal order, a judicial determination as to the legality of a SC resolution by a domestic court is, by itself, legally irrelevant. However, insofar as it may make it impossible for the State to comply with its obligations arising under the SC resolution, the judicial finding may produce effects inconsistent with the Charter.” Thus, legal protection of individuals may go as far as guarding most aspects of the right to due process as far as domestic courts are able to do that. However, a domestic judgment which would – either de jure or de facto – lead to a non-application

49 Cf. also the Provisional draft Report on UN Security Council and European Union blacklists, Parliamentary Assembly of the Council of Europe (PACE), 12 November 2007 (to be debated at the session on 21-25 January 2008).
51 See Cameron, op. cit., at 3; Bosphorus Airways v. Ireland, ECtHR, Application no. 45036/98, 30 June 2005.
of the SC resolution, would make it impossible for the state to comply with its obligations under the
UN Charter.

A certain Solange-reasoning – similar to the judgments of the German Constitutional Court which
made its jurisdiction dependent on an adequate (constitutional) human rights protection at the
European level – seems to be the best way out of this dilemma.\(^{53}\) I share the doubt expressed by
Alvarez that “member states may be held responsible under existing international law for an
infringement of human rights by international organizations to which they have transferred powers.
Even with respect to human rights, intergovernmental organizations do not operate on the premise
that they are merely the alter ego of their members.”\(^{54}\) At the same time, however, both states and
regional organizations (in particular the EU) will need to strike a balance between their international
obligations and the own constitutional requirements related to the protection of fundamental rights.

To enhance possibilities for a uniform application of the due process standards by different states,
the most appropriate solution would be the establishment of (ad hoc) judicial or quasi-judicial\(^{55}\)
bodies at the level of the UN Security Council, with a competence to apply the core provisions of the
human rights treaties in relation to the right of due process.\(^{56}\) In the absence of accountability at the
level of the UN Security Council domestic or regional judicial bodies are likely in the best position to
provide for adequate review of sanctioning decisions, albeit under the guidance of specific
international standards.\(^{57}\)

\(^{53}\) Ibid.; along similar lines P. Eeckhout, ‘Community Terrorism Listings Fundamental Rights, and UN Security
Council Resolutions’, Eur. Const. Law Rev., 2007, pp. 177-181. The first solange-judgment was delivered
on 29 May 1974 (93 International Law Reports, 362); the second one on 22 October 1986 (93 International
Law Reports, 403).

\(^{54}\) Alvarez (2004), op.cit., at 126.

\(^{55}\) It has been suggested that perhaps lawyers are not fit to decide on these issues. Thus, Klabbers proposed
“to appoint panels of wise men (or women) to decide on issues where a strict application of legal rules
might be awkward or, more often perhaps, lead to awkward results.” Rather than taking the rule of law as
the starting point, a Weberian ‘kadi justice’ could result in ‘fairer’ justice than legal rules would permit.

\(^{56}\) Cf. E. de Wet, op.cit., at 354.

\(^{57}\) Cf. P. Gutherie, ‘Security Council Sanctions and the Protection of the Individual’, NYU Annual Survey of
American Law, 2005, pp. 491-542. Gutherie (at 525) analyses three possible options that are not
necessarily mutually exclusive: 1. Elimination of the current sanctions regime, placing responsibility for
sanctioning individuals (and protecting their rights) fully on the shoulders of individual states; 2.
strengthening the UN mechanisms for review by creating an independent review mechanism under the
auspices of the Security Council; and 3. maintaining UN oversight of the sanctions regime, including the
adoption by the Security Council of certain standards of review to be applied by domestic bodies, while
strengthening state mechanisms for review and promoting inter-judicial and intergovernmental
cooperation. He concludes that “Ultimately, the sanctions regime will be most effective, in both freezing
assets and protecting rights, if it consists of a combination of Security council oversight and member state
implementation.” (at 541)