



Refining United Nations Security Council Targeted Sanctions

'Proportionality' as a Way Forward for Human Rights Protection

*Nadeshda Jayakody**

Independent researcher

Nadeshda.Jayakody@gmail.com

Abstract

The United Nations Security Council's targeted sanctions seek to protect global peace and security. The majority of these sanctions are imposed on individuals deemed to be a terror threat and include measures such as asset freezes and travel bans. These measures can impede, inter alia, the right to private life and freedom of movement of targeted individuals. While it is accepted that certain rights can be restricted for the protection of public security, restrictions must be proportional under international human rights law. Given that UN sanctions regimes have come under scrutiny in recent years for their lack of procedural safeguards and disproportionate restrictions on fundamental rights, this article argues that proportionality based reasoning should be included in sanctions committees' substantive decision-making processes. Other procedural safeguards should also be incorporated by UN sanctions committees. This would help ensure that sanctions are more measured and minimise impairment of human rights.

Keywords

United Nations targeted sanctions – United Nations Security Council – principle of proportionality – due process – right to private life – freedom of movement

* Nadeshda Jayakody, LL.M., is alumna of the Advanced Master in European and International Human Rights Law, Leiden University, Netherlands.

1 Introduction¹

United Nations (UN) targeted sanctions have often been viewed as a paradox. While they are important tools for the protection of global peace and security, they have also been found to infringe certain human rights. The UN Security Council (UNSC) enjoys powers under Chapter VII of the UN Charter (Charter) to impose sanctions.² Targeted sanctions (used interchangeably with 'smart sanctions' and 'coercive' or 'restrictive measures') are not only directed at states but also non-state actors, including individuals. This has raised several human rights concerns, particularly in the post 9/11 era where the use of targeted sanctions against individuals in the context of counter-terrorism has expanded significantly. For example, targeted sanctions generally comprising of restrictions on international travel, denial of access to visas and freezing of financial assets may affect the rights to property, private and family life and freedom of movement of targeted individuals and their families. Targeted individuals are listed before being afforded a chance to respond and there are limited opportunities for review of a listing decision at the UN level. Thus, the rights to due process and an effective remedy are also affected.

Today, there are 14 UN sanctions regimes which focus on a variety of objectives, including counter-terrorism, nuclear non-proliferation, the cessation of human rights and humanitarian law violations and supporting the settlement of armed conflicts. Each regime is administered by a UN sanctions committee. Apart from one of these sanction regimes, all others do not have an avenue for listed individuals to challenge UN sanctions listing decisions and have their names removed from sanctions lists, without intervention from UN member states. This risks undermining the legitimacy and effectiveness of UN sanctions regimes as listed individuals have challenged states' implementation of UN sanctions before a number of judicial and non-judicial bodies on human rights grounds.³ In fact, over the past decade or so, judicial and quasi-judicial bodies in a number of jurisdictions have held that states implementing UN sanctions, particularly those in the counter-terrorism context, cannot do so

1 This is a revised version of the author's Master's thesis, supervised by Professor Carsten Stahn. The author would like to thank Professor Carsten Stahn for his guidance, Ms Kimberly Prost, former UN Ombudsperson to the Al-Qaida Sanctions Committee for her insightful interview and to other academics and friends for their valuable assistance.

2 Article 41, Charter of the United Nations 1945, 1 UNTS XVI.

3 J. Cockayne, R. Brubaker and N. Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures*, United Nations University, New York, 2018. Retrieved 16 March 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf.

without respecting certain minimum due-process standards. Otherwise, the implementation of sanctions by states have been found to be a disproportionate infringement on fundamental rights.

The ISIL (Da'esh) & Al-Qaida sanctions regime has evolved to respond to these criticisms, and now provides for a UN Ombudsperson tasked with reviewing requests from individuals, groups and entities that wish to be removed from the ISIL (Da'esh) & Al-Qaida (also known as the '1267 Committee') sanctions list. However, the literature indicates that the Ombudsperson's office could also be further strengthened to ensure that listed parties' rights and the legitimacy and effectiveness of UN targeted sanctions are safeguarded.

If courts and other bodies continue to find that states implementing UN sanctions are in contravention of their rights obligations, there is a risk that states will be unable to adequately give effect to sanctions, raising concerns about their legitimacy and effectiveness. Thus, reforms are necessary.

This article argues that in addition to ensuring the proportionality of UN targeted sanctions through establishing fair and clear procedures at the UNSC—such as expanding the UN Ombudsperson's mandate to all sanctions regimes—sanctions committees should conduct proportionality analyses of the coercive measures before they are implemented against each individual, on a case-by-case basis. This means that once a sanctions committee has decided to sanction a particular individual, they should be able to decide which particular coercive measures to apply to that person, depending on their unique circumstances, rather than imposing all measures (unless the sanctions committee decides after having conducted a proportionality analysis that that individual must be subjected to all coercive measures). Further, when a sanctions listing is being reviewed, a similar exercise should occur, where the reviewer decides whether the particular coercive measures imposed on the targeted individual are necessary.

It is widely accepted that certain rights can have limitations, as is the case with rights affected by sanctions, including the right to freedom of movement and the right to privacy. However, these limitations should be proportional to the objectives they seek to achieve in order for targeted sanctions to be compatible with human rights. For example, freezing someone's assets may be intended to prevent them from financing a terrorist organisation and to encourage a change in behaviour, which then forms part of an overall effort to curb terrorism. This overarching aim has been accepted as a legitimate limitation by various human rights bodies.⁴ Nevertheless, when sanctions are

4 See T-85/09 *Yassin Abdullah Kadi v European Commission* 30 September 2010; *Nada v Switzerland* Application No 10593/08, Merits, 12 September 2012.

imposed indefinitely without listed parties having the opportunity to effectively challenge their listing, and when the full ambit of restrictive measures are imposed without a determination of whether all of these measures are necessary to achieve the sanctions' aims, questions of legitimacy and effectiveness are raised.

While the implications that targeted sanctions have on fundamental rights have been written about extensively in existing literature,⁵ the proposal to utilise the proportionality doctrine to mitigate the impact of rights restricting measures has been little discussed. In 2015, the Group of Like-Minded States on Targeted Sanctions proposed that the UNSC 'consider introducing flexibility-clauses in each sanctions regime which would allow the application of specific sanctions to a specific listing to be decided at the moment of the listing or of its review and based on all the information available.'⁶ However, the merit of this proposal has been little discussed. Since the targeted sanctions framework continues to garner criticism from the human rights community, deciphering ways to refine the system is essential. This is the case not only for those whose rights are impacted but also to increase the legitimacy and effectiveness of UN sanctions themselves.⁷

This article will explore these issues to determine which reforms could be useful to ensure that UN targeted sanctions, as rights restricting measures, are proportional to their intended aims. Section 2 of this article explores a theoretical framework for proportionality, examining why proportionality is a useful lens with which to limit the impact that targeted sanctions have on individual rights and freedoms; section 3 examines the current jurisprudence concerning UN targeted sanctions and what courts have held to be the minimum due process standards that must be met if sanctions are to be implemented by states; section 4 discusses how sanctions regimes could be refined to ensure that UN

5 See for example D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) 46 *International & Comparative Law Quarterly* 309; and Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *American Journal of International Law* 851.

6 Group of Like-Minded States on targeted sanctions, Fair and clear procedures for a more effective UN sanctions system, New York, 2015. Retrieved 16 March 2019, https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf.

7 See J. Cockayne, R. Brubaker and N. Jayakody, Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures, United Nations University, New York, 2018. Retrieved 16 March 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf.

sanctions do not infringe individual rights and freedoms and remain legitimate and effective; and section 5 concludes.

It must also be noted that while the proportionality of sanctions has often been viewed through international humanitarian law (IHL) conceptions of this doctrine, this article concentrates only on the proportionality principle found in international human rights law (IHRL). IHL was raised when dealing with comprehensive sanctions impacting civilian populations. Sanctions targeting individuals however, predominantly concern human rights.

2 A Theoretical Framework for Proportionality

2.1 *Universal Recognition of Proportionality*

McLachlin opines that proportionality 'aligns with our conceptions of and metaphors for justice, fairness and reasonableness.'⁸ While some rights can be limited in times of emergency or to protect public health, safety or the rights of others, such restrictions cannot be imposed without review. Thus, proportionality is utilised in various constitutional traditions and by international bodies to curb state or institutional power. Decision-makers are required to justify their reasons for limiting rights and demonstrate that they have adequately considered the potential negative impacts of their decisions.

In modern times, the proportionality assessment was first properly elucidated in German public law, subsequently spreading through Europe and then onto Commonwealth states.⁹ Currently, virtually all systems of constitutional justice accept the key tenets of proportionality, though the proportionality tests adopted vary in different jurisdictions.¹⁰ The doctrine is also employed by treaty-based regimes such as the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) and the UN Human Rights Committee (Human Rights Committee). Due to its widespread

8 McLachlin, *Proportionality, Justification, Evidence and Deference: Perspectives from Canada* (Report, 2015) at 29, available at: www.hkcfa.hk/filemanager/speech/en/upload/144/Proportionality,%20Justification,%20Evidence%20and%20Deference%20-%20Perspectives%20from%20Canada.pdf [last accessed 20 May 2016].

9 See Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73; and Cohen-Eliya and Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 *International Journal of Constitutional Law* 263.

10 Ibid.

use, the principle is now recognised as a general principle of international law¹¹ that has emerged as a best-practice standard.¹² Some academics label proportionality as the *jus cogens* of IHRL.¹³ Given its universal acceptance, there is merit in assessing whether UN sanctions committees should conduct proportionality tests prior to imposing sanctions and when a reviewer is reviewing a sanctions listing. While proportionality assessments are primarily used by adjudicators when reviewing rights claims, original decision-makers including administrative bodies should also make such an analysis so that their decisions are better reasoned. This could also mean that an individual whose rights are being affected by the decision is less likely to challenge it. However, before analysing whether proportionality assessments should be applicable to UN sanctions regimes, it is necessary to ascertain what the principle entails.

2.2 *Limbs of the Proportionality Test*

The proportionality analysis is a heuristic tool that involves the decision-maker or reviewer making value judgements. This value judgement centres on the balance that must be struck between the significance of the aim pursued by the rights limitation and the value of the fundamental right infringed upon. The possible subjectivity of value judgments is mitigated by the objective proportionality criteria. The most commonly used proportionality test can be distilled into four limbs: (1) does the decision-maker's action which limits fundamental rights serve a legitimate purpose that justifies the limitation (legitimate aim limb) (2) are the means employed rationally connected to the objective (sufficiency limb) (3) are the means necessary, that is, there are no better alternatives and the means employed minimally impair fundamental rights (necessity limb) and (4) is there a fair balance struck between furthering an interest and the extent to which a right is infringed (proportionality *stricto sensu* limb)?¹⁴

When this test is applied teleologically, it allows for the proportionality of a particular rights restricting measure to be evaluated on a case-by-case basis.¹⁵

11 See generally Franck, 'Proportionality Law' (2010) 4 *Law and Ethics of Human Rights* 230; and Yutakrai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (1st edn, Intersentia Publishers 2002) at 192.

12 See Andreescu, 'Principle of Proportionality, Criterion of Legitimacy in Public Law' (2011) 18 *Lex ET Scientia International Law Journal* 113.

13 Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (2014) at 3.

14 Ibid; Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 142 at 149–50.

15 Beatty, *The Ultimate Rule of Law* (2004) at 170.

This is done to reach a measured outcome that is based on emphasising the factual distinctions of each case. In other words, applying the proportionality doctrine allows for the close scrutiny of the positive and negative effects of the acts of powerful bodies, directing a meticulous evaluation of the facts at hand.¹⁶ When a UN sanctions committee decides whether or not to list an individual, it analyses the evidence on a case-by-case basis. However, once a decision to list someone has been made, the process arguably presents as an ‘all or nothing’ framework. In essence, once an individual is listed, they are subject to the full brunt of restrictive measures consisting of an assets freeze, travel ban and so on, limiting their rights to property, freedom of movement and private life. This ‘all or nothing’ framework could be considered problematic in certain situations. For example, a travel ban may not be proportional if the listed individual is engaging solely in the financing of terrorism and the aim of the sanction is to put a stop to this. Here, an assets freeze by itself might be sufficient to achieve the committee’s aim and a travel ban could be an unnecessary restriction. This hypothetical example highlights how the principle of proportionality could be applied to a particular set of facts to settle a problem.

2.3 *Proportionality as a Way to Compel Justifications and Limit Discretionary Power*

Having established the normative framework, this sub-section analyses why proportionality is important when discussing human rights and targeted sanctions. Proportionality assessments serve two key purposes. First, they compel decision-makers to provide substantial justifications for limiting rights and second, they help limit the decision-maker’s discretionary power.¹⁷ These purposes are intertwined because the requirement on authorities to provide sound reasoning for their actions mitigates their ability to act in a discretionary or arbitrary manner.

According to Huscroft, Miller and Webber, proportionality is at the ‘core of the culture of justification.’¹⁸ Essentially, when a court or other adjudicative body reviews a restrictive measure through the lens of this doctrine, they are asking the decision-maker to seriously consider an individual’s rights claim and their obligation to justify the exercise of power that has adversely affected the right(s) in question. This position is mirrored in Möller’s theory, which

¹⁶ Ibid at 183–4.

¹⁷ See Jackson, ‘Being Proportional about Proportionality. Book Review Of: The Ultimate Rule of Law. by David M. Beatty’ (2004) 21 *Constitutional Commentary* 803.

¹⁸ Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (2014) at 11.

views proportionality as an important avenue for educing justifications from authorities.¹⁹ This is because rights should only be interfered with if there are seriously sufficient reasons for doing so. This culture of justification is not only found in constitutional law but is also central to public international law. Franck's seminal work on the legitimacy of international institutions demonstrates that an institution's legitimacy relies greatly on whether its decision-making and decision-executing is in accordance with processes that safeguard against arbitrariness and idiosyncrasies.²⁰ One way to increase legitimacy is through the proportionality principle, where any decision to hamper rights must be carefully justified.

Adjudicative bodies are often the ones undertaking proportionality assessments when reviewing rights claims brought before them.²¹ However, I argue that in certain situations a proportionality analysis should also be conducted by the original decision-maker. This is particularly important if the decision made will affect an individual's fundamental rights, such as the sanctions committees' listing procedures. Effectively, any authoritative act impinging on human rights must be envisaged as a collective judgment of reason. This is what notions of justice, procedural fairness and good policy-making require. However, some are weary of original-decision makers, like legislators, using proportionality as a guide to legislative reasoning. They argue that it could detract from the legislator's primary objective which is to make laws for the public good.²² This article does not seek to answer whether legislative bodies should adopt proportionality review. In any case, UN sanctions committees making listing decisions are not making laws but applying UN resolutions which directly affect individual rights and freedoms. In this context, Kumm's avowal stands true. That is, through the principle of proportionality:

[T]he language of human rights is used to subject practically all acts of public authorities that affect the interests of individuals to liberty and equality based proportionality review and thus to the test of public reason.²³

19 See Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 *International Journal of Constitutional Law* 453.

20 Franck, *Fairness in International Law and Institutions* (1995) at 7.

21 Barak, *Proportionality: Constitutional Rights and Their Limitations* (2012) at 330.

22 Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (2014) at 13.

23 Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 142 at 152.

Moreover, when public institutions, including international organisations such as the UNSC, provide sound reasons for their rights confining actions, the legitimacy of those actions might be more accepted by the international community and even by the party who faces the full force of the restrictive measures. Confirming the utility of proportionality-based reasoning, the Human Rights Committee in its General Comment 27 highlights that the doctrine must be respected when administrative authorities apply restrictive laws or other measures that limit human rights.²⁴

Aside from promulgating a culture of justification, the proportionality doctrine limits arbitrariness. Authorities must not only give legitimate reasons for their actions but must also demonstrate that the measures taken go to achieving the aims pursued and that there are no better alternatives. This restricts the actions of authorities to ones that are reasonable, thereby limiting discretionary power and power abuse. This limiting effect can occur when the rights restricting decision is being made at the first instance or when the person reviewing the initial decision makes a finding of disproportionality, compelling the original decision-maker to amend the disproportionate measure²⁵ (or the reviewer to do this themselves). Of course disproportionality in the latter sense is less likely to arise when the initial decision was made through the lens of the proportionality doctrine, because the line that has been drawn has already been influenced by the proportionality doctrine.²⁶

While it is acknowledged that authorities possess discretionary power, it is often challenging to discern where this ends and where begins power abuse. In these difficult to delineate situations, proportionality offers a valuable standard of review. For example, it is accepted that sanctions committees exercise discretion when deciding if an individual referred to them by a state should be subjected to sanctions. However, at present, upon deciding that a listing is warranted, sanctions committees impose a whole array of coercive measures without evaluating if each individual measure is necessary to stop that *particular* person from associating with terrorism or any other unfavourable act. The question here is not whether the UNSC and its bodies are empowered to impose sanctions. Rather, it is whether having made such a determination, they are bound by certain norms delimiting their power. It is hypothesised that introducing proportionality assessments into the UN sanctions regime would act as this tool of legal restraint.

24 Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement), 2 November 1999 at para 15.

25 Ibid.

26 Franck, *Fairness in International Law and Institutions* (1995).

2.4 *Is the United Nations Security Council Bound by International Human Rights Law and the Principle of Proportionality?*

Now that the theoretical framework and utility of the proportionality doctrine have been established, it is necessary to analyse the applicability of this principle to the UNSC and its subsidiary sanctions committees.

While this sub-section seeks to answer whether the UNSC is bound by the principle of proportionality rather than the rights themselves, human rights and the proportionality doctrine are inextricably linked so it is impossible to speak of one without discussing the other. Proportionality is not a stand-alone doctrine as it is only triggered when an authority that must respect human rights decides to enact measures that limit them.

The question of whether the UNSC and its subsidiary bodies are bound by IHRL norms has been substantially explored in the existing literature.²⁷ In the past there was significant disagreement amongst scholars on this issue. However, at present there is greater consensus in favour of applicability. I will not delve into the numerous reasons justifying applicability, except to highlight that the most convincing argument in favour of the application of human rights to the UNSC is the UN Charter itself. The Charter obliges the UNSC to act in accordance with the UN's purposes and principles,²⁸ one of which is to 'promote and encourage respect for human rights and fundamental freedoms.'²⁹ Another is to settle situations which might breach the peace 'in conformity with the principles of justice and international law.'³⁰ As a result, there is a strong textual argument to be made that respect for human rights is inherent in the UN Charter. The UNSC must respect human rights by virtue of its own governing document.

Wolfrum supports this analysis, finding that the Charter's purposes and principles are intended to narrow the UN's discretionary power.³¹ Also, Article 42 of the Charter references the proportionality doctrine when it declares that the UNSC can use force 'as may be *necessary* to maintain or restore international peace and security.'³² While Article 41 which authorises the use of sanctions does not explicitly oblige the UNSC to only take measures that are 'necessary,' it

27 See Bruno Simma (eds), *The Charter of the United Nations: A Commentary* (1994); Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95 *The American Journal of International Law* 851.

28 Article 24(2), Charter of the United Nations 1945, 1 UNTS XVI.

29 Article 1(3), Charter of the United Nations 1945, 1 UNTS XVI.

30 Article 1(1), Charter of the United Nations 1945, 1 UNTS XVI.

31 Wolfrum in Simma (eds), *The Charter of the United Nations: A Commentary* (1994) at 52.

32 Article 42, Charter of the United Nations 1945, 1 UNTS XVI.

could be argued that the proportionality doctrine is a principle of justice and/or international law that the Charter explicitly references. In light of the foregoing, the UNSC is bound by human rights and the proportionality doctrine pursuant to its own constitution.

This is also a counterargument to the commonly held belief that UNSC resolutions prevail over states' human rights obligations where there are inconsistencies. If the UNSC's actions must be human rights compliant in the first place, inconsistencies need not arise.

3 Proportionality of Targeted Sanctions: The Case Law

Having established the theoretical framework on proportionality and the doctrine's applicability to UN sanctions committees, this section analyses how the principle is practically applied in cases where the proportionality of sanctions has been determined. The jurisprudence of the UN Human Rights Committee, the CJEU and the ECtHR are compared to derive common standards on the proportionality of sanctions under IHRL. The case law on UN sanctions is limited but nevertheless provides insights into what courts view to be the minimum 'fair and clear procedures' that should be in place when implementing them.

It is important to note that all three bodies I will examine have no jurisdiction to directly review sanctions committees' actions. Therefore, these bodies are reviewing states' or the EU's implementation of UNSC resolutions rather than the UNSC resolutions themselves. Consequently, the question in the case law is not whether sanctions committees' measures are proportional, rather, it is whether states' and the EU's actions vis-à-vis UNSC resolutions compelling states to implement sanctions listings are proportional. As the case law will suggest, these judicial and quasi-judicial bodies have used innovative, and at times contentious,³³ legal reasoning to indirectly review UNSC measures. The merit of these bodies' legal reasoning will not be discussed, except to say that the jurisdictional barriers faced by these bodies highlight the human rights vacuum caused by limited fair and clear procedures at the UN level and why reforms are necessary.

33 See for example Milanovic, 'Sayadi: The Human Rights Committee's Kadi (or a pretty poor excuse for one...)' *EJIL Blog of the European Journal of International Law*, 29 January 2009, available at: www.ejiltalk.org/sayadi-the-human-rights-committee-s-kadi-or-a-pretty-poor-excuse-for-one... [last accessed 13 April 2016].

3.1 *UN Human Rights Committee*

In *Sayadi and Vinck v Belgium*³⁴ (*'Sayadi'*), Nabil Sayadi and Patricia Vinck, two Belgian nationals who unsuccessfully challenged their listing on the Al-Qaida sanctions list before domestic courts, took their case to the UN Human Rights Committee. They successfully argued that Belgium had violated their right to liberty of movement and the right to be free from unlawful attacks on one's reputation pursuant to Articles 12 and 17 of the International Covenant on Civil and Political Rights (ICCPR) respectively.

The Human Rights Committee conducted a proportionality test when determining whether there was a breach of Article 12, as the right to liberty of movement is not absolute. The Committee conceded that travel bans pursuant to UNSC resolutions constituted a limitation that was necessary to protect public order or national security but nevertheless held that the restriction was disproportional to this aim.³⁵ The Committee reached this conclusion based on a combination of factors. First, the Belgian government submitted the applicants' names for listing before domestic investigations had ceased.³⁶ Second, Belgium decided to secure their listing despite other states not having submitted names of other employees of their foundation which was also listed.³⁷ Third, the applicants' names were transmitted to the 1267 Committee before they were afforded an opportunity to be heard.³⁸ Fourth, the domestic criminal investigations initiated against the authors were dismissed.³⁹ This last point together with the Belgian government's request for the authors' delisting on two occasions suggested that the applicants did not pose any threat to national security or public order.⁴⁰ Therefore, having considered these facts complementarily, the Human Rights Committee concluded that the restriction on the authors' right to travel was unnecessary to achieve the intended aim. This decision was reached also due to the Human Rights Committee's General Comment 27, which enunciates that for restrictions on Article 12 to be proportional, 'reasons for the application of restrictive measures must be provided,'⁴¹ which in this case, they were not. Further, the Committee found that even though Belgian authorities had attempted to secure the applicants'

34 *Sayadi and Vinck v Belgium* (1472/2006), Views, CCPR/C/94/D/1472/2006.

35 *Ibid* at paras 10.1–10.10.

36 *Ibid*.

37 *Ibid*.

38 *Ibid*.

39 *Ibid*.

40 *Ibid*.

41 Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement), 2 November 1999 at para 15.

delisting, the government was 'responsible for the presence of the authors' names on those lists and for the resulting travel ban'⁴² in the first place.

While the Human Rights Committee conducted an appropriate proportionality analysis and the decision is a human rights friendly one, the majority's opinion has been criticised for its paucity of reasoning. For example, the Committee attributed liability to Belgium without addressing the norm conflict at play between Belgium's obligations under the ICCPR and UNSC resolutions.⁴³ Notwithstanding these criticisms, the Human Rights Committee's use of the proportionality principle evinces the doctrine's capacity to restrain institutional power. Proportionality was used to indirectly limit the UNSC's actions and directly limit Belgium's. Although, it is unclear how much power Belgium actually possessed.

3.2 *Court of Justice of the European Union*

In *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*⁴⁴ ('Kadi I') and *European Commission and Others v Yassin Abdullah Kadi*⁴⁵ ('Kadi II'), the CJEU also ruled on the proportionality of rights restricting measures. The Kadi I decision of 2008 is the first time that an international court found, albeit implicitly, that the UNSC's counterterrorism sanctions regime violated fundamental rights. Similar to the Human Rights Committee, the CJEU bypassed any jurisdictional barrier by holding that a review of the European Community's implementation of UNSC sanctions by way of an EU regulation was permitted, as community law is an autonomous legal system which cannot be destabilised by an international agreement.⁴⁶ The CJEU then found that the EU resolution giving effect to UN sanctions listings should be annulled in so far as it concerns the applicants, Mr Kadi and the Al Barakaat International Foundation. This is because the EU regulation, which imposed assets freezes in line with UNSC resolutions, infringed the right to judicial review, right to be heard and the right to property.⁴⁷ When deciding whether the right to property was

42 *Sayadi and Vinck v Belgium* (1472/2006), Views, CCPR/C/94/D/1472/2006 at para 10.7.

43 Milanovic, 'Sayadi: The Human Rights Committee's Kadi (or a pretty poor excuse for one...)' *EJIL Blog of the European Journal of International Law*, 29 January 2009, available at: www.ejiltalk.org/sayadi-the-human-rights-committee-s-kadi-or-a-pretty-poor-excuse-for-one.../ [last accessed 13 April 2016].

44 T-85/09 *Yassin Abdullah Kadi v European Commission* 30 September 2010.

45 Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] CJEU 518.

46 T-85/09 *Yassin Abdullah Kadi v European Commission* 30 September 2010 at para 316.

47 *Ibid* at para 298.

violated, the CJEU conducted a proportionality assessment. In particular, the Court determined whether the assets freeze, which restricted the right to property, was proportional to the aim of fighting threats to international peace and security posed by terrorism. The Court found that, in principle, the restriction on the right to property is not disproportional to its aim and is justified. However, the Court then considered if the sanctions regulation, which may not in and of itself be disproportionate, remains proportional when applied to Mr Kadi specifically. The Court held that because Mr Kadi was not afforded a reasonable opportunity to bring his case in front of a competent authority, and given the duration and nature of the measures affecting him, the applicant's listing was deemed disproportionate and an unjustified limitation on his right to property.⁴⁸ This case exemplifies the added value of the proportionality assessment. It enables the adjudicator to review measures according to how they affect specific individuals within a particular context. This ensures that the nuances of a case are taken into account, as a coercive measure deemed acceptable in theory might not be so in practice- when concerning a particular individual and their unique set of circumstances.

Complying with the *Kadi I* judgment, the EU subsequently provided Mr Kadi with the Sanctions Committee's narrative summary of the reasons for his listing. The EU also gave Mr Kadi an opportunity to respond to the relatively vague reasons presented for his listing but then rejected his defence and re-listed him. The applicant then took the matter to the European General Court which struck down the re-listing.

In the meantime, the UNSC responded to these adverse court decisions and other calls for reform by establishing the Office of the Ombudsperson for the Al Qaida regime/Taliban sanctions regime (now the ISIL & Al Qaida regime) in 2009.

Then in 2013, the European Commission, the Council of the EU and the UK appealed the General Court's decision in favour of Kadi before the CJEU's Grand Chamber in *Kadi II*. In this case, the Court stated that while the EU provided Mr Kadi with the opportunity to be heard before re-listing him, this is not sufficient.⁴⁹ It held that in order to ensure a fair balance between securing international peace and security and the protection of fundamental rights of the person concerned, judicial review of listing decisions must occur.⁵⁰ Review bodies should consider whether reasons provided for the listing are

48 Ibid.

49 Joined cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and Others v Yassin Abdullah Kadi* [2013] CJEU 518 at para 131.

50 Ibid.

substantiated and form a sufficient basis to warrant the listing.⁵¹ Moreover, while the EU in theory can refrain from providing the applicant with detailed reasons for his listing due to the information's classified nature, the CJEU went on to assert that an appropriate balance must be struck 'between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the EU or its member states.'⁵² It is up to the courts to assess to what extent a failure to disclose information to the listed person and his/her resulting inability to submit an adequate response impacts on the probative value of the evidence.⁵³ The CJEU's reasoning suggests that one way to determine the proportionality of sanctions is to discern whether the affected individual had access to reasons for the listing and a substantive review of those reasons to verify how sufficient and substantiated they are. Where this has not occurred, restrictions on fundamental rights may be unjustified. The Court then proceeded to assess the validity of the EU's explanations for Mr Kadi's re-listing, indirectly assessing the UN Sanctions Committee's narrative summary. Ultimately, the CJEU upheld the General Court's judgment, declaring that there was insufficient evidence to justify the re-listing.

Responding to the CJEU's reasoning, the EU argued against the Court's authority to conduct a substantive review of the explanations for a listing.⁵⁴ Yet the Court found that given the significant negative impact that sanctions have on individuals, particularly the disruption to working and family life as well as the duration of restrictive measures and the negative publicity faced by those listed, a substantive judicial review is necessary.⁵⁵ Despite the existence of the UN Ombudsperson who has the power to delist individuals on the 1267 list, the Court found this to be insufficient as the Ombudsperson cannot substantively review a listing decision and therefore cannot provide reparations to those wrongfully listed.⁵⁶ Effectively, the CJEU held that as long as there is no mechanism at the UN level empowered to guarantee effective judicial protection, it will continue to rule on these kinds of cases. The *Kadi II* judgment is bold in its scope as it critiques the UN's counterterrorism sanctions framework and challenges discretionary power through a proportionality analysis.

51 Ibid at para 119.

52 Ibid at para 128.

53 Ibid at para 129.

54 Ibid.

55 Ibid at paras 131–2.

56 Ibid at para 96.

This case has however also garnered criticism for giving limited consideration to the Ombudsperson reforms that eventuated in response to *Kadi I*, and leaving states in the unenviable position of having to either disregard the court's decision or UNSC resolutions compelling states to implement sanctions.⁵⁷ On the other hand, recent case law, such as the *Al-Ghabra*⁵⁸ case handed down in 2016, indicates that the EU courts are now beginning to recognise that the Ombudsperson process does offer satisfactory due process protections, despite not offering strict judicial review. In this case the Court struck down Al-Ghabra's challenge to an EU Commission regulation implementing 1267 committee sanctions on several grounds, including the fact that the applicant had failed to engage with the 'in-depth investigations'⁵⁹ offered by the Ombudsperson.

3.3 *European Court of Human Rights*

The ECtHR in *Nada v Switzerland*⁶⁰ ('*Nada*') and *Al Dulimi and Montana Management Inc v Switzerland*⁶¹ ('*Al Dulimi*') found restrictions on the right to private life and the right to access a court (respectively) to be disproportionate to the aim of advancing international peace and security. In *Nada* the ECtHR held that a travel ban imposed on Mr Nada pursuant to UNSC Resolution 1267 violated the right to his private and family life and the right to an effective remedy found in Articles 8 and 13 of the European Convention on Human Rights (ECHR) respectively.⁶² In reaching this conclusion, the Court conducted a proportionality assessment of measures restricting Article 8 rights. The Court first determined that Switzerland had interfered with Mr Nada's right to private and family life. The travel ban lasting six years confined the applicant to the limited area of Campione d'Italia, an Italian enclave within Switzerland, hampering his capacity to visit family and friends living outside the enclave.⁶³

Subsequently, the Court engaged in a proportionality assessment to evaluate whether the restriction was justified. First, the ECtHR held that the restriction

57 J. Cockayne, R. Brubaker and N. Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures*, United Nations University, New York, 2018. Retrieved 16 March 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf at pp 15–16.

58 Case T-248/13, *Mohammed Al-Ghabra v. European Commission* [13 December 2016], not published, (General Court).

59 *Al-Ghabra* [2016], para. 179.

60 *Nada v Switzerland* Application No 10593/08, Merits, 12 September 2012.

61 *Case of Al-Dulimi and Montana Management Inc v Switzerland* No 5809/08, Judgment, 21 June 2016.

62 *Nada v Switzerland* Application No 10593/08, Merits, 12 September 2012 at paras 173–4.

63 *Ibid.*

did have a legal basis (the UNSC resolution) and a legitimate aim to prevent crime, combat terrorism and secure Switzerland's national security.⁶⁴ Following this, the ECtHR conducted a proportionality test. While an examination of the necessity of restrictive measures requires evaluating whether less obstructive means were available for achieving the aim, the Court decided that states should be left with a wide margin of appreciation in this regard.⁶⁵ The Court then proceeded to analyse the proportionality *stricto sensu* of the sanctions, finding that this also connected to examining whether Switzerland's reasons for imposing the sanctions were relevant and sufficient.⁶⁶ On the facts of the case, the Court found that Switzerland's delay in informing the 1267 Sanctions Committee of its decision to conclude investigations against Mr Nada probably led him to be subjected to restrictions for a longer period than was necessary.⁶⁷ Further, the scope of the sanctions was deemed severe as Switzerland's imposition of the travel ban prevented Mr Nada from entering Italy, his country of nationality.⁶⁸ Ultimately, the Court ruled that this combination of factors and the fact that Switzerland had failed to consider the particularities of Mr Nada's case, for example, the geographical location of his home, the duration of the restrictive measures and the failure to adapt the sanctions to Mr Nada's specific situation meant that an adequate balance was not struck between the applicant's right to private and family life and the sanctions' intended objectives.

The Court's finding that the sanctions were disproportionate because Switzerland had not adapted the measures to Nada's situation is significant. It emphasises the importance of implementing sanctions in a way that minimally intrudes on a particular individual's fundamental rights. Also, the ECtHR's assertion that states should take note of an individual's personal circumstances verifies the need for an even more targeted or tailored approach to sanctions. While certain judges disagreed with the majority's conclusion, arguing that Switzerland had no room for manoeuvre when implementing sanctions,⁶⁹ the *Kadi I*, *Kadi II* and *Sayadi* decisions reveal that review bodies are finding ways to indirectly comment on the human rights implications of UNSC actions. As such, if states in fact do not enjoy discretion in the way sanctions are implemented, then there is a strong argument to be made that UN sanctions committees, which actually have power, should exercise authority in a principled

64 Ibid.

65 Ibid at paras 184–5.

66 Ibid.

67 Ibid.

68 Ibid.

69 Ibid at para 72.

way. Hence, UN sanctions committees should consider the effects of restrictive measures on the rights of each individual listed, adopting a case-by-case, rather than a blanket approach.

Moreover, in *Al Dulimi*, the Strasbourg Court was required to determine whether the Swiss Federal Court's refusal to examine the merits of the applicants' complaints regarding a UNSC assets freeze, violated the right to access a court. This case is seminal in that it examines sanctions under the Iraq sanctions regime, while the majority of case law in this area focuses on the ISIL & Al Qaida sanctions regime.

In assessing this complaint the Court first acknowledged that the right to access a court can be restricted if there is a legitimate purpose for doing so. As with all other cases relating to sanctions examined thus far, the ECtHR accepted Switzerland's assertion that the restriction was imposed to pursue the maintenance of international peace and security.⁷⁰ However, the Court found that the lengthy duration of time that the applicant had been subjected to sanctions, in combination with the Swiss Federal Court's refusal to allow the applicant to 'submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary' was a disproportionate restriction on their right to access a court.⁷¹

The Court also found that the Focal Point, the mechanism which allows individuals (and entities) listed under all sanctions regimes (except the ISIL and Al-Qaida Sanctions regime) to submit de-listing requests, 'does not afford satisfactory protection.'⁷² This is because the Focal Point cannot make an independent assessment on whether a petitioner should be de-listed and can only transfer this request to the relevant sanctions committee to make a decision.

3.4 *Common Standards*

In the cases analysed, sanctions were deemed disproportional in light of the specific circumstances of the cases examined. Despite the small sample size, the case law suggests that restrictive measures may be deemed more proportional if:

70 Case of *Al-Dulimi and Montana Management Inc v Switzerland* No 5809/08, Judgment, 21 June 2016 at para 124.

71 Case of *Al-Dulimi and Montana Management Inc v Switzerland* No No 5809/08, Judgment, 21 June 2016 at para 151.

72 Case of *Al-Dulimi and Montana Management Inc v Switzerland* No No 5809/08, Judgment, 21 June 2016 at para 153.

- (1) Prior to the submission of an individual's name for listing, there must be an adequate factual basis for doing so;
- (2) Sanctions must be imposed in a way that takes into account the particularities of the case at hand. While sanctions may be proportional in theory, they must also be proportional in practice, meaning that sanctions must not disproportionality restrict the rights of the specific individual in question. Herein, factors that may be taken into account when imposing sanctions include, the targeted individual's age, health, nationality and place of residence;
- (3) Listed individuals must be afforded sufficient and detailed reasons for their listing;
- (4) Listed individuals must have a right to be heard and an independent avenue to challenge their listing; and
- (5) Listed individuals must have access to an effective remedy where there has been a wrongful listing, including de-listing.

Where the UN sanctions regime itself and the regional and/or domestic bodies implementing sanctions disregard these factors, restrictive measure may be deemed disproportional. Though these judicial and quasi-judicial bodies cannot directly review UNSC measures, they managed to indirectly hold the UNSC accountable to IHRL. By doing so, pressure has been exerted on the UNSC and its subsidiary organs to improve their practices.⁷³ Given that states have very little leeway when implementing sanctions, it is imperative that the UNSC itself responds to these criticisms to improve the legitimacy and effectiveness of the UN sanctions framework.

4 Refining The System: Making Smart Sanctions 'Smarter'

This section evaluates how the current sanctions framework could be refined in order to be more compliant with the minimum standards set out in the jurisprudence, and reflective of the proportionality framework which can limit the rights impact of rights restricting measures. This section explores possible amendments to current sanctions listing, review and delisting procedures and whether these amendments are practically and politically feasible.

73 See Milanovic, 'The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity' (2009) 1 (3) *Goettingen Journal of International Law* 519.

4.1 *Amendments to Listing Procedures*

4.1.1 Possible Amendments

If the restrictive measures imposed on an individual are measured, tailored and proportional in the first place, they may not be challenged at a later stage. Hence sanctions committees should employ proportionality based reasoning during the listing phase, improving the substantive decision-making process. This means once a person is listed because they satisfy, for instance, the 'association' criterion, they should not automatically be subjected to all restrictive measures. Instead, objective criteria is needed when imposing sanctions after a listing decision is made. Thus, sanctions committees should conduct nuanced case-by-case proportionality assessments using the four-limbed test outlined in section 2 of this article. That is, the decision-maker should first ensure that actions limiting fundamental rights serve a legitimate purpose that justifies their limitation.

Second, the means employed, for example an assets freeze, must rationally connect to the objective. It is not enough that an assets freeze is rationally connected in a general way but must connect in relation to the named individual. Third, the Committee should demonstrate that there are no better alternatives and the means employed minimally impair fundamental rights. Since sanctions can act as a 'civil death penalty'⁷⁴ due to their severe impact, it is important to show that alternative methods are not as effective. Fourth, the Committee should conduct a strict proportionality test in each case, asking whether a fair balance is struck.

This type of proportionality reasoning should be included in narrative summaries so that listed individuals are aware that the Committee conducted an assessment in which any impact on their fundamental rights was duly considered. In this way sanctions committees must provide detailed justifications for their actions, regulating their discretionary power and compelling them to satisfy a legal standard before measures are ordered. It also means that narrative summaries will be more detailed, as they should be.

In addition to the substantive aspect, procedural safeguards should be added to the listing procedure to ensure that the whole process is proportional and consistent with the case law analysed. Pursuant to *Sayadi* and *Kadi I*, before someone is listed, there must be an adequate factual basis for doing so. Presently there is no internal mechanism to check the veracity of information relied upon when making a listing. To rectify this shortfall some academics argue

74 European Association of Lawyers for Democracy & World Human Rights, *For the Abolition of the UN and EU Terrorist Lists*, 2011. Retrieved 1 June 2016, www.eldh.eu/publications/publication/for-the-abolition-of-the-un-and-eu-terrorist-lists-79/.

that individuals should be afforded a chance to respond when nominated for listing, guaranteeing the right to be heard.⁷⁵ In fact, some argue that nominated individuals should benefit from this right at the national level, before their names are even transmitted to the UN. This stance is confirmed in the *Sayadi* judgement.⁷⁶ However, this suggestion may be difficult to implement as I will discuss later.

Once a name is proposed for listing, the duty to ensure the factual basis of that proposal rests with the UNSC. At this stage an independent body consisting of security and judicial experts at the UN level could review the information to determine its validity and whether designating states are justified in recommending a listing.⁷⁷ This may be important for individuals who claim they have been wrongly identified.

Finally, proportionality dictates that only restrictive measures necessary to achieve an intended aim should be imposed. As such, flexibility clauses should be introduced. Specifically:

The Security Council could consider introducing flexibility-clauses in each sanctions regime which would allow the application of specific sanctions to a specific listing to be decided at the moment of the listing or of its review and based on all the information available. By introducing flexibility-clauses in the different sanctions regimes, the Committees responsible for listing could be empowered to decide on a case-by-case basis, which kind of sanction is the most appropriate to be applied to a specific listing. This would allow the Sanctions Committees to apply for instance only an asset freeze, without resorting to a travel ban (or vice-versa) for each listing at the moment of the listing or of the review based on all the information available to the Committee. The criteria for the application of the different measures would have to be clearly mentioned in the resolution. The concrete measures for each listing would have to be specified in the Consolidated List and not impede the national implementation process. By imposing only the type of sanction that is necessary to achieve the intended result, the sanctions could become more

75 Michaelsen, 'The Security Council's Practice of Blacklisting Alleged Terrorists and Associates: Rule of Law Concerns and Prospects for Reform' (2010) 8 (1) *New Zealand Journal of Public and International Law* 71 at 77.

76 *Sayadi and Vinck v Belgium* (1472/2006), Views, CCPR/C/94/D/1472/2006 at para 20.

77 See for example Michaelsen, 'Human Rights as Limits for the Security Council: A Matter of Substantive Law or Defining the Application of Proportionality?' (2014) 19 *Journal of Conflict and Security Law* 451.

proportionate (e.g. if in the *Nada* case before the European Court of Human Rights only an asset freeze was applied).⁷⁸

4.1.2 Practical Feasibility of Reforms

While these recommendations are important for ensuring respect for human rights, it is important to determine if they are practically feasible. A former UN Ombudsperson to the 1267 regime opines that a proportionality test is theoretically beneficial, as a tailored approach to sanctions could not only enhance rights protection but also help change people's behaviour in a more targeted way.⁷⁹ Nonetheless, because sanctions committees have very little information about a named individual at their disposal, it is unlikely that they can conduct a proper balancing exercise. However, I argue that if an independent body is able to review classified information to determine whether they really are of a classified nature, more information may become available to decision-makers, allowing for a thorough proportionality analysis at the listing stage, before restrictive measures are imposed. This of course relies on the fact that the UNSC would be willing to establish an independent body mandated to review classified information. Given the politicised nature of the UNSC and states' reluctance to reveal sensitive information, this could be a difficult feat. Alternatively, committees' fact-finding powers could be enhanced so that they can directly probe designating states for more information. However, states may be more unwilling to share classified information with other states which make up the sanctions committees than with an independent body of experts. In that case, establishing an independent body to review classified information seems more viable.

Additionally, providing a person who has been named for listing the chance to challenge this proposal at the domestic or UNSC level may undermine the whole point of sanctions, which is to implement them efficiently and quickly, even against those who cannot be prosecuted.

Due to these practical hurdles and the need to balance refining the system without comprising its objectives, Milanovic believes most procedural safeguards should be implemented in the post-listing phase to correct errors after

78 Group of Like-Minded States on targeted sanctions, Fair and clear procedures for a more effective UN sanctions system, New York, 2015 at p 15. Retrieved 16 March 2019, https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf.

79 Interview with Ms Kimberly Prost, Former UN Ombudsperson to the Al-Qaida Sanctions Committee, Faculty of Law, Leiden University (Leiden, The Netherlands, 17 May 2016).

a listing is made.⁸⁰ However, I propose that designating states should still conduct thorough checks before naming someone, even if the individual does not have the opportunity to be heard. Establishing an independent body at the UN level to authenticate the information relied on by designating state(s) could be useful, as presently, the listing process lacks oversight. Given the occurrence of wrongful listings in the past and the broad 'association' criterion, there is utility in having an impartial mechanism to check the validity of the information. This could increase the likelihood of identifying the right person and reduce the risk of sanctions possibly amounting to collective punishment.

4.2 *Amendments to Review and Delisting Procedures*

4.2.1 Possible Amendments

Once listed, an individual should have access to review processes that adhere to the principle of proportionality in both substance and procedure. For the listed individual, this means having access to a substantive proportionality review of the sanctions imposed. It also means improved procedural safeguards so that the whole regime is more proportional because there are fairer, more transparent and accountable processes in place.

Presently, individuals on sanctions lists remain there for an indefinite period. An individual faces the restrictions until state(s) request a delisting or the individual applies for delisting through the Ombudsperson or the Focal Point. While periodic reviews of listings take place, the process is rather perfunctory with member states in sanctions committees voting to retain the listing or to delist without qualifying their decisions. To address these shortfalls there have been calls to impose time limits on sanctions. However, time limits on their own would not improve the protection of human rights. Instead, Cameron and Prost both advocate that when the 1267 Committee reviews listings, it has to re-justify that the individual fulfils the 'association' criterion.⁸¹ Where they cannot do so, the individual must be delisted. Cameron goes even further, recommending a sliding temporal scale of justification.⁸² This means 'the longer the measure continues, the more the onus of proof shifts more and more to

80 Milanovic, 'The Human Rights Committee's Views in Sayadi v. Belgium: A Missed Opportunity' (2009) 1 (3) *Goettingen Journal of International Law* 519 at 535.

81 Interview with Kimberly Prost, Former UN Ombudsperson to the Al-Qaida Sanctions Committee, Faculty of Law, Leiden University (Leiden, The Netherlands, 17 May 2016); Cameron, *Targeted Sanctions and Legal Safeguards* (Report to the Swedish Foreign Office, 2003) at 37.

82 Cameron, *Targeted Sanctions and Legal Safeguards* (Report to the Swedish Foreign Office, 2003) at 38.

the State wanting to keep a name on the list.⁸³ Further when reviews are being conducted, the Committee could also review whether all restrictive measures are necessary for a particular individual or whether a flexibility clause can be exercised, meaning that an individual should be subjected to only some of the sanctions, rather than all of them.

Moreover, human rights experts and adjudicators have called on the UNSC to establish an independent body authorised to conduct substantial judicial reviews of listing decisions and provide remedies.⁸⁴ Following the *Kadi I* judgment, there were calls to create this body at the UN level.⁸⁵ The Ombudsperson was created as a compromise. However, this compromise has arguably not gone far enough. As aforesaid, the Ombudsperson cannot conduct a substantive review of the original listing decision nor provide remedies for wrongful listings (except delisting). Further, the Ombudsperson cannot compel states to provide information. Therefore, the substantive review of listing decisions by an independent organ is still lacking at the UN level. It is proposed that an autonomous and impartial body with the capacity to conduct binding judicial reviews, have access to information underlying listing decisions and hand down remedies must be set up if the UN sanctions regime is to be fully compliant with human rights norms.

Furthermore, when this body conducts judicial reviews, it could employ the four-limbed proportionality assessment to adjudicate not only on whether there was sufficient evidence for the listing but also on whether the decision-maker conducted an appropriate balancing exercise. The existence of an external body with powers of review would also encourage sanctions committees to provide well thought out decisions, reducing the risk of arbitrariness. As Dyzenhaus asserts, adjudicators who use proportionality assessments are able to challenge decisions, fostering a culture of reasoned and measured decision-making at all levels of authority.⁸⁶

83 Ibid.

84 See for example Fassbender, *Targeted Sanctions and Due Process* (Findings of study commissioned by the United Nations' Office of Legal Affairs, 2006) at 30, available at: www.un.org/law/counsel/Fassbender_study.pdf [last accessed 29 June 2016].

85 See annex 2 of J. Cockayne, R. Brubaker and N. Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures*, United Nations University, New York, 2018. Retrieved 16 March 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf for a comprehensive list of reform proposals put forward by different actors.

86 Dyzenhaus in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (2014) at 235.

Having suggested that an independent body be set up, it is necessary to explore which form this body could take. Michaelsen lists an independent arbitral panel, court or tribunal as viable options.⁸⁷ Cameron recommends creating an arbitral body made up of judges who are experienced in assessing classified material.⁸⁸ All members of the UNSC would propose an individual from their State to be an adjudicator and the arbitral body could sit in panels of three members at one time.⁸⁹ This means that when an individual seeks a review of their listing, the panel that hears the review would consist of one judge from the Designating State and two judges from two other states which the Designating State trusts.⁹⁰ The listed individual can veto the composition of the panel once.⁹¹ Also, the listed individual would be represented by a security-cleared lawyer.⁹² The arbitral panel would be permitted to access classified information, hand down binding judgments on the original decision and order remedies. Compensation could be paid for by the Designating State or through a trust fund set up by the UNSC to which designating states must also contribute in case the arbitral panel finds that their designation was incorrect.⁹³ Finally, the arbitral body could be used to review decisions of all sanctions committees.

The proposed arbitral system has its advantages and disadvantages. It fulfils most procedural requirements for due process and the norms derived from the case law on the proportionality of sanctions. Therefore, it is largely human rights compliant. However, listed individuals may feel that the panel is not truly impartial as one judge would be a national of the Designating State and the other two of allied states. Also, designating states would be revealing intelligence information to two foreign judges. Another significant issue is that a judicial review is usually based on information relied on at the time when the original decision was made. This means that new evidence is often inadmissible. This could prejudice individuals who are requesting to be delisted due to a change of conduct rather than a wrongful listing. In these situations, the

87 See Michaelsen, 'The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts' (2010) 33 *Studies in Conflict and Terrorism* 448 at 455.

88 Cameron, *Targeted Sanctions and Legal Safeguards* (Report to the Swedish Foreign Office, 2003) at 39.

89 Ibid.

90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid.

Ombudsperson procedure could be more advantageous as the information is examined on a *de novo* basis. Yet, for those challenging the original decision, an arbitral panel would be a valuable avenue for recourse.

4.2.2 Practical Feasibility of Reforms

Now to the vital question, are these measures workable in practice? The literature indicates that the UNSC is usually hesitant to approve measures that could erode its authority.⁹⁴ Thus, the discourse on review mechanisms reveals a quandary. Measures that fulfil IHRL standards and the proportionality doctrine are rejected by the UNSC on account of being politically unfeasible, yet those that it accepts fall short of the established standards. However, if sanctions are to remain effective, change is necessary and in fact possible. One of the UNSC's main concerns, the protection of classified information can be addressed. For instance, the arbitral proceedings could be held in a closed environment with counsel being vetted and security-cleared.

The compensation fund is also achievable and the argument for establishing one is strengthened by the fact that the UN, following years of denial, finally agreed to create a compensation plan to provide material assistance to victims of the cholera outbreak in Haiti. This is due to the outbreak being directly attributable to the actions of UN peacekeepers. Similarly, the violation of individual rights within the context of UN counterterrorism measures should also be compensated.

Further, recent case law indicates that courts may be more accepting of the Ombudsperson process and recognising of the fact that it does offer certain due process protections. As such, the expansion of the Ombudsperson's mandate to all other sanctions regimes could also be an important reform, especially given that the Focal Point falls short of providing an independent avenue of recourse to listed individuals. In this case, the Ombudsperson may also be able to conduct a proportionality test, and in cases where the Ombudsperson decides that an individual should remain listed, can decide that only certain restrictive measures should be imposed, rather than all of them (exercise of a flexibility clause).

Despite consistent calls for these proposals, the UNSC's resistance to independent oversight remains palpable. When asked whether the Ombudsperson should be able to conduct judicial review, Prost stressed that the UNSC was willing to accept the Ombudsperson mechanism because it *cannot* review

94 See Hoerauf, 'The United Nations Al-Qaida Sanctions Regime After UN Resolution 1989: Due Process Still Overdue?' (2012) 26 *Temple International & Comparative Law Journal* 213.

the 1267 Committee's original decisions.⁹⁵ Moreover, Prost also stated that if a proportionality assessment were to be incorporated into the Ombudsperson mechanism, this would encroach on the UNSC's political sphere, as it is not the Ombudsperson's role to determine when and why a listing should be made. Further, expanding the Ombudsperson's mandate to other sanctions regimes has been met with resistance for a number of additional reasons.⁹⁶

These insights demonstrate the complexities involved in trying to implement legal solutions to a political body. The UNSC's albeit gradual movement towards institutional oversight reveals that it does respond to calls for reform. It also highlights that incorporating a proportionality analysis at the listing stage, conducted by committees themselves, might be the most feasible solution at this point in time. It provides limits to discretionary power and makes sanctions more proportional from the start but stops short of full judicial review that the UNSC might be unwilling to immediately accept.

5 Conclusion

UN targeted sanctions are used to counter threats to international peace and security without resorting to force. While a noble pursuit, the system is not without fault. Sanctions targeting individuals, particularly within the context of counterterrorism have negatively impacted several fundamental rights.

The system has undergone significant reform in recent years in response to adverse human rights decisions. Notably, the 1267 Committee's Ombudsperson mechanism has strengthened due process rights. In particular, because for the first time, listed individuals are afforded the opportunity to tell their side of the story. However, weaknesses remain. Through a comparative analysis of the UN Human Rights Committee, the CJEU and the ECtHR's jurisprudence, this article concludes that sanctions are only proportional and human rights compliant if a number of key standards are in place. First, there must be safeguards at the listing stage to ensure that information underlying a listing nomination is correct and reasons provided to listed individuals must be detailed. Second, the system should have a body empowered to conduct reviews of listing decisions.

95 Cameron, *Targeted Sanctions and Legal Safeguards* (Report to the Swedish Foreign Office, 2003) at 38.

96 See J. Cockayne, R. Brubaker and N. Jayakody, *Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures*, United Nations University, New York, 2018. Retrieved 16 March 2019, https://collections.unu.edu/eserv/UNU:6450/UNU_FairlyClearRisks_FINAL_Web.pdf.

This would ideally be a body capable of conducting judicial reviews, or at the very least, the Ombudsperson mechanism should be extended to all sanctions regimes. Third, restrictive measures should not be imposed in a blanket manner without considering the particularities of each case. Fourth, there must be a mechanism to grant remedies for wrongful listings or measures that disproportionately restrict fundamental rights.

The current sanctions framework does not fulfil these standards. In fact, most sanctions regimes lack significant safeguards because they do not incorporate an Ombudsperson mechanism to impartially review delisting requests. These weaknesses have enabled the current debate on sanctions to focus on whether sanctions committees are subject to any legal standards when employing coercive measures. In this regard, this article postulates that the UNSC and its subsidiary bodies are limited by human rights norms, including the proportionality doctrine. This article provides seven recommendations for refining UNSC targeted sanctions in order to fulfil human rights and proportionality standards. The recommendations are not mutually exclusive and can be adopted together or one-by-one.

First, sanctions committees should employ proportionality reasoning in the form of the four-limbed proportionality test when imposing sanctions on listed individuals. They could conduct a balancing exercise, weighing the harm caused by the restrictive measures against their benefits. Even if they have limited information at their disposal, implementing a proportionality assessment at the listing stage could encourage sanctions committees to provide reasoned justifications for their actions. This is imperative because a fair decision is defined not only by the result achieved but also by the fairness of the procedure by which the outcome was reached and the reasoning provided to affected individuals.⁹⁷

Second, a flexibility clause should be incorporated in all sanctions regimes, offering those imposing sanctions the option to impose different types of sanctions on the targeted individual, depending on the conduct that the sanctions are aiming to change.

Third, an independent body made up of security experts could be set up to test the veracity of the information underlying a listing nomination. Nominated individuals need not be notified, as this would undermine the element of surprise crucial to the efficacy of the regime. Alternatively, sanctions committees could have greater fact-finding powers.

97 Franck, *Fairness in International Law and Institutions* (1995) at 7.

Fourth, when reviewing a name that has remained on a list for three years, sanctions committees must re-justify the listing, demonstrating that the individual still fulfils the relevant listing criteria. There could be a sliding temporal scale, whereby the longer someone remains on the list, the more the onus of proof shifts to the state that wishes to maintain the listing. The review should occur with reference to all new and relevant information that has come to light since the initial listing, and reviewers should be able to utilise the flexibility clause.

Fifth, an arbitral body (this could be the same body mentioned in the third recommendation) should be set up with the powers to: (1) verify information relied on by designating states before a listing even occurs (2) conduct judicial reviews of listing decisions (3) have access to all information designating states relied on to justify a listing that has already been made (4) hand down binding decisions and (5) order remedies where appropriate. This arbitral body can be used for all UN sanctions regimes.

Sixth, a trust fund should be set up to provide compensation where appropriate. Designating states could contribute to this fund.

Seventh, because judicial review does not allow for the examination of new evidence, the Office of the Ombudsperson should be retained for the 1267 regime. This allows individuals who were listed correctly but have since changed their conduct to apply for delisting. The Ombudsperson process should extend to other sanctions regimes and states should be required to provide greater information to the Ombudsperson.

Whether these reforms are practically feasible is a question fraught with complexities. Changes to the existing sanctions framework will be difficult to negotiate with power rivalries in the UNSC coming into play. There are also concerns that judicial review would be a step too far, encroaching upon the UNSC's political sphere. On the other hand, judicial review is possible if a body has access to all relevant information. Also, for those who have been wrongfully listed, judicial review is a necessary path to seek compensation. At a time when the legitimacy of the sanctions regime is called into question, such reform is imperative as damage to institutional credibility can be difficult to overcome. Thus, incremental change may provide the best hope for securing a fairer process and a stronger rule of law. In this regard, UNSC members can build upon the body's previous institutional reforms to further strengthen the system. A good place to start is to implement proportionality assessments into sanctions committees' listing processes, enabling a line to be drawn on rights restricting measures before a case even reaches the review stage.

Finally, these recommendations are not the end of the story. Additional research is required to gauge how this could all work in practice. For example, how can an independent body gain access to classified information without undermining a state's national security? Questions like this must be explored so that an adequate balance is struck between securing international peace and security and protecting fundamental rights.