TOO “SMART” FOR LEGAL PROTECTION? UN SECURITY COUNCIL’S TARGETED SANCTIONS AND A PLADOYER FOR ANOTHER UN TRIBUNAL

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A. Introduction

Until 1999 sanctions imposed by the UN Security Council were exclusively directed against States; individuals were affected, if at all, only indirectly, one might say as “collateral damage”. Those sanctions, in the majority of specific or more general economic embargos, mostly had little impact on the behaviour of the State concerned. A popular definition of the consequences of those embargos was “[i]t takes a little longer and costs a bit more”, but almost all exports and imports in the end arrived where they were expected to arrive. Possible legal concerns under public international law were related to whether the preconditions of using Chapter VII of the UN Charter were fulfilled, or to how wide the discretion of the UN Security Council could be, even if there was no international conflict or danger to peace and international security. Human rights were no topic in that respect.

But ever since—beginning with Resolution 1267—such sanctions have been directly aimed at individuals or associations within the framework of combating terrorism and its supporters (so-called “smart” or “targeted sanctions”). The question came to the forefront whether such sanctions do have to consider the human rights of the “targets”, whether those concerned have access to full and independent judicial review and, more general, whether the UN Security Council or those who have to implement its resolutions are bound to respect and protect human rights.

The European Courts, after some hesitation, have given an answer to these questions for themselves, but the UN Human Rights Committee has also done so for the UN system, i.e. the Covenant on Civil and Political Rights. Before having a look at these decisions,
the more general question will be addressed whether the UN Security Council, in the light of its obligation and task to maintain international peace and security, has to consider (other) international law and in particular human rights which are nowadays guaranteed almost identically on the universal, regional and national levels.

B. THE UN SECURITY COUNCIL AND INTERNATIONAL HUMAN RIGHTS

The debate is old but still unresolved whether the Security Council of the United Nations is bound to respect international law—and which—and whether the Security Council’s decisions are subject to judicial review—and by which courts. There is agreement, however, that the Security Council cannot be challenged as a Party before the International Court of Justice (ICJ), nor before a national or regional court, due to the immunity the United Nations enjoys, like all other international organizations, before such courts.

There seems to be agreement, also, that decisions of the Security Council may be reviewed incidentally in other proceedings before—at least—international courts. The Lockerbie Case before the ICJ might have provided an opportunity, had it not been solved “diplomatically” outside the Court. But in other instances the ICJ as well as the International Criminal Tribunal for the Former Yugoslavia did address the legality of Security Council decisions, however finding no illegality.

If one accepts that the Security Council is bound by international law, the question remains by which. Is it only jus cogens, as the (then) Court of First Instance of the European Communities seemed to say in its decisions in Yusuf and Kadi? That military forces under the command of the United Nations are bound by the Geneva Conventions and Additional Protocols has been confirmed by a Bulletin of the Secretary General of the United Nations, although the United Nations is not a Party to these Conventions.

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3 ICJ Reports 1992, 114.
4 Cf. the Advisory Opinion of the ICJ in the Namibia Case (ICJ Reports 1971, 15) and the decisions of the Appeals Chamber of the ICTY in Tadic (case No. IT-94-1-AR72, 35 ILM 32 (1996)).
5 Case T-306/01, 2005 ECR II-3353.
6 Case T-315/01, 2005 ECR II-3649.