

ADJUDICATION OF ‘ILLEGAL’ SECURITY COUNCIL RESOLUTIONS: A LEGAL RATIONALE FOR THE *KADI* DECISIONS

WILLIAM FIELD-PAPUGA

1. Introduction

The *Kadi* cases before the Court of First Instance of the European Communities and the European Court of Justice exposed clear conflict between duties owed by member states under the *United Nations Charter* (‘*UNC*’) to obey United Nations Security Council (‘UNSC’) resolutions, and fundamental human rights. They also expose a legal protection deficit in the *UNC* system,¹ whereby individuals affected by targeted sanctions mechanism, employed by the UNSC in response to the threat of international terrorism, are not given adequate avenues of redress. Efforts have been made to allow targeted individuals the opportunity to have their name delisted by way of an internal ombudsman procedure. However the lack of any judicial independence within this internal mechanism ultimately means that it falls short of a fair hearing under internationally recognized human rights standards.² The *Kadi* cases can be regarded as an attempt to resolve this legal protection deficit by allowing targeted individuals the opportunity to challenge domestic legislation aimed at giving effect to UNSC resolutions, thereby enabling them to exercise their human right to a fair trial. Yet without a United Nations (‘UN’) ‘constitutional’ court to oversee the verdicts reached by domestic courts, this in turn poses the risk of fragmenting the UN collective security system, which is based on the supremacy of UNSC resolutions.³

This seminar paper will assess the strengths and the weaknesses of the precedent established by the *Kadi* cases. In doing so it will answer the three central questions. Firstly, whether UNSC resolutions must be made in accordance with the right to a fair hearing. Secondly, what are the legal consequences regarding a UNSC resolution which denies the right to a fair hearing. Thirdly, to what extent can the domestic courts of UN member states be allowed to adjudicate on the UNSC resolution’s consistency with the right to a fair hearing. These questions will be answered exclusively regarding UN targeted sanctions.

¹ Ramses A Wessel, ‘The Kadi Case: Towards a More Substantive Hierarchy in International Law’ (2008) 5(2) *International Organisations Law Review* 323, 325.

² See Julianne Kokkot and Christoph Sobotta, ‘The Kadi Case – Constitutional Core Values and International Law – Finding the Balance’ (2012) 23(4) *The European Journal of International Law* 1015, 1021.

³ Erika De Wet and André Nollkaemper, ‘Review of Security Council Decisions by National Courts’ (2008) 45 *German Yearbook of International Law* 166, 197.

In answer to these questions it shall be submitted that, firstly, the UNSC in drafting its resolutions is bound to respect the right to a fair hearing, as a fundamental human right established under international law. Secondly any UNSC resolution contrary to this right is to be regarded as illegal under the *UNC*, however in spite of its illegality the resolution continues to be valid and have effect. Lastly, domestic courts of member states reserve the right not to implement such a resolution, or to interpret it in a way which does not conflict with the right to a fair trial. This adjudication should occur as a means of last resort, and in the absence review mechanism within the UN structure which could enable affected individuals to adequately exercise their right to a fair hearing. Unlike the Court of First Instance of the European Communities' ruling in *Kadi v Council and Commission* ('*Kadi I*'), review of the UNSC resolution should be incidental, thereby reviewing the domestic instrument implementing the resolution rather than the resolution itself. Furthermore, unlike the European Court of Justice in *Kadi v Council of the European Union* ('*Kadi II*'), the domestic measure implementing the UNSC resolution should be judged according to international human rights standards, rather than regional human rights standards.

2. Issues Presented by the *Kadi* judgements

The *Kadi* cases showcase the deficiencies of targeted sanctions against individuals regarding the right to a fair hearing. A fair hearing can be understood to consist of a hearing before a 'competent, independent and impartial tribunal'.⁴ In spite of improvements made to the delisting procedure, as at 2012 the delisting procedure still fell short of these standards.⁵ Notably delisting could still be denied through a referral from the Sanctions Committee to the UNSC.⁶ The UNSC could then vote against delisting, with the permanent five members having the capacity to veto any delisting proposal.⁷ Furthermore listing may still occur partly based on confidential information,⁸ and the ombudsman's method of review is not accessible.⁹ As such it is clear that the delisting procedure still suffers from a lack of transparency and judicial independence, as well as the lingering problem of targeted individuals being judged by their accusers.

⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1). ('*ICCPR*')

⁵ See Kokkot and Sobotta, above n 2, 1021.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid* 1022.

Kadi I and *Kadi II* present two distinct concepts of how domestic courts might adjudicate on the deficiencies of UNSC resolutions regarding the right to a fair hearing. In *Kadi I* the Court addressed the claims by the plaintiff, that they be delisted from targeted sanction measures enforced by UNSC resolutions, using a monist approach.¹⁰ This method upholds the primacy of UNSC resolutions over domestic law. As such it perceived the plaintiff's claim as a direct challenge to the UNSC resolution. It held that such a challenge could only therefore succeed if it could be demonstrated that the UNSC resolution had violated *jus cogens*.¹¹ The Court therefore upheld the notion of international constitutionalism whereby UNSC actions are to be held to account by the domestic courts of member states to the extent that they breach certain legal norms, such as *jus cogens* in this instance.¹² The Court construed the meaning of *jus cogens* to include a broad range of human rights, including the right to a fair trial, whilst determining that there was no violation of *jus cogens* by the UNSC in this instance.¹³

By contrast *Kadi II* takes a dualist approach to international law, meaning that the validity of the UNSC resolution is placed beyond the scope of review by national courts. Instead the domestic legislation, implementing the UNSC resolution, is scrutinized regarding its accordance with domestic law.¹⁴ In this respect the dispute was dealt with within the autonomous legal order of the European Union, with the UNSC resolution undergoing incidental review regarding its accordance with European Union law.¹⁵ Although the Court explicitly denied that its ruling amounted to a challenge to the primacy and legitimacy of the UNSC resolution,¹⁶ the effect is arguably the opposite, given the reliance of targeted sanctions on the cooperation of UN member states.¹⁷ The specific targeted sanctions in the *Kadi* cases involved freezing of financial assets. Therefore any ruling to overturn measures giving effect to these targeted sanctions in certain UN member states would leave numerous states outside the sanctions measure. This would in turn leave many states through which targeted individuals could redirect financial assets in order to evade the effect of the sanctions.¹⁸

¹⁰ Esme Shirlow, 'Taking Stock: Assessing the Implications of the Kadi Saga for International Law and the Law of the European Union' (2014) 15 *Melbourne Journal of International Law* 534, 551.

¹¹ *Ibid.*

¹² *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (T-315/01) [2005] ECR II-3659, II-3724–5. ('*Kadi I*')

¹³ *Ibid* [226-229]. Devika Hovell, 'Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts' (2016) 79(1) *The Modern Law Review* 147, 152.

¹⁴ Shirlow, above n 10, 552.

¹⁵ *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (C-402/05 P, C-415/05 P) [2008] ECR I-6351, [278, 317]. ('*Kadi II*')

¹⁶ *Ibid* [278].

¹⁷ Hovell, above n 13, 155.

¹⁸ *Ibid.*

In the forgoing analysis it will be submitted that both of these approaches are ultimately counter-productive. Although the *Kadi I* decision correctly asserts that UNSC resolutions are valid insofar as they accord with *jus cogens*, its direct judicial review of the UNSC resolution does not accord with the status of domestic courts in the judicial hierarchy of the international legal order. Furthermore its conception of *jus cogens* has been argued to be ‘excessively broad yet seemingly impossible to violate’.¹⁹ *Kadi II* makes certain improvements from *Kadi I*, such as subjecting the domestic implementing measure to judicial review rather than the UNSC resolution itself. However it makes the mistake of insisting that it was not engaging in indirect review of the UNSC resolution, and thereby holding the domestic implementing measure invalid according to European fundamental rights, rather than international human rights standards. This results from what Lorraine Finlay describes as the ‘illusory distinction’ between implementing measures and the UNSC resolution.²⁰

3. Are There Legal Constraints on the Security Council Resolutions

a. Application of a General Human Rights Constraints to Security Council Resolutions

The extent to which there are legal constraints on actions taken by the UNSC is subject to extensive interpretative debate. Much of the debate centers on the requirement in Article 24(2) of the *UNC* that the UNSC must discharge its duties ‘in accordance to the Purposes and Principles of the United Nations’.²¹ Notable aspects of the Purposes and Principles of the UN, contained in Article 1 of the *UNC*, include the duty to act ‘in conformity with the principles of justice and international law’,²² and ‘to achieve international cooperation in ... promoting and encouraging respect for human rights and for fundamental freedoms’.²³ It will be argued that this wording combined with the subsequent practice of international law creates a compelling case for establishing that there are legal constraints on UNSC.

The contrary argument suggests that the UNSC acts *legibus solutus*, and therefore is not bound by law. An aspect of this argument claims that the UNSC is an executive and political body of the UN and therefore needs to be unbound by legal constraints in exercising its functions.²⁴

¹⁹ Ibid 153.

²⁰ Lorraine Finlay, ‘Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions’ (2010) 18 *Tulane Journal of International & Comparative Law* 477, 493.

²¹ *Charter of the United Nations* art 24(2).

²² Ibid art 1.

²³ Ibid.

²⁴ August Reinisch, ‘Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions’ (2001) 91(4) *The American Journal of International Law* 851, 855.

This is especially necessary given that the UNSC is designed to efficiently ensure international peace and security, which often necessarily involves violating customary international law.²⁵ Additionally the order in which the Purposes and Principles are listed might indicate their relative importance.²⁶ In this respect the maintenance of international peace and security appears ahead of considerations regarding human rights. Furthermore in the *travaux préparatoires* to the *UNC*, there were attempts to grant the International Court of Justice (‘ICJ’) compulsory jurisdiction to review the legality of actions taken by the UNSC.²⁷ These efforts were defeated by the great powers in order to maintain the effective operation of the UNSC.²⁸ This may be seen as a clear effort by the drafters of the *UNC* to delimit the executive authority of the UNSC.

Other fundamental arguments in favor of the UNSC as *legibus solutus* refer to the general wording of the Purposes and Principles, suggesting that they do not reflect mandatory rules of law, but rather political aspirations. It has been argued that at the time of the drafting of the *UNC* human rights had not yet been elaborated on and developed to the extent that they now have been.²⁹

However these arguments do not displace the more compelling arguments in favor of establishing that the UNSC is legally bound under the terms of the *UNC*. According to the rules of treaty interpretation, as reflected in the *Vienna Convention on the Law of Treaties* (‘VCLT’), the purposes and principles should be regarded foremost in interpreting treaty provisions.³⁰ This suggests they have a far greater influence than a mere list of non-legally binding political aspirations. Furthermore although human rights are referred to broadly, the contents of internationally recognized human rights have since been elaborated on in legal instruments developed under the auspices of the UN. This would include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (‘ICCPR’), as well as

²⁵ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, 1st ed, 2004) 182.

²⁶ M Bedjaoui in J-P Cot and A Pellet (eds.), *La Charte des Nations Unies: Commentaire article par article* (Economica, 3rd ed, 2005) 315, 315, cited in Arman Savarian, ‘Splitting the Baby: Incidental Review of United Nations Security Council Resolutions by the European Court of Human Rights’ (2015) 12 *International Organisations Law Review* 169, 188.

²⁷ *Documents of the United Nations Conference on International Organisation*, Vol. XIII (7 June 1945) 645.

²⁸ Antonios Tzanakopoulos, *Disobeying the Security Council: Counter Measures Against Wrongful Sanctions* (Oxford University Press, 1st ed, 2011) 54.

²⁹ Bardo Fassbender, ‘The Role for Human Rights in the Decision-making Process of the Security Council’, in Bardo Fassbender (ed.), *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press, 2011) 74, 79.

³⁰ *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980) art 31. (‘*Vienna Convention*’)

the *International Covenant on Economic, Social and Cultural Rights*.³¹ In spite of the order in which the Purposes and Principles are presented, Article 24(2) merely states that the UNSC must respect them in their plurality.³² This suggests that the purpose of maintaining international peace and security must be balanced with the other Purposes and Principles, including achieving international cooperation in promoting and encouraging respect for human rights.³³

Regarding the suggestion that the *travaux préparatoires* indicate an intention to limit the ICJ's capacity to review UNSC resolutions, the rules of treaty interpretation again considered the *travaux préparatoires* as supplementary means of interpreting the *UNC*.³⁴ A lack of judicial oversight also should not in itself be considered as an indication that the UNSC is not bound by legal constraints.³⁵ Furthermore, as Antonios Tzanakopoulos argues, an over-reliance on the *travaux préparatoires* should be treated with caution, especially given the need to regard the *UNC* as a living instrument,³⁶ as well as the fact that not all of the eventual parties to the *UNC* were present during its preparation.

Outside of arguments based on the *UNC*, *jus cogens*, comprising the peremptory norms of international law which must be respected under all circumstances, represents a clear constraint to the actions taken by the UNSC.³⁷ Under Article 53 of the *VCLT* a treaty is void if, at the time of its conclusion, it conflicts with peremptory norms.³⁸ Furthermore Article 64 of the *VCLT* states that a treaty is void where it conflicts with newly emerged peremptory norms.³⁹ Tzanakopoulos states that these provisions show that the *UNC* must be considered to accord with *jus cogens*, or be considered void.⁴⁰ Moreover suggesting that states may create an international organization capable of breaching *jus cogens*, would suggest that states can evade their *jus cogens* obligations by forming an international organization. In effect this would suggest that states were transferring more powers to international organisations than they are capable of transferring.⁴¹ This shows that *jus cogens* obligations are incumbent on the UNSC

³¹ De Wet and Nollkaemper, above n 3, 173.

³² *Charter of the United Nations* Art 24(2).

³³ De Wet and Nollkaemper, above n 3, 172.

³⁴ *Vienna Convention* art 32.

³⁵ Tzanakopoulos, above n 28, 55.

³⁶ See *ibid*.

³⁷ Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council', above n 24, 859.

³⁸ *Vienna Convention* art 53.

³⁹ *Ibid* art 64.

⁴⁰ Tzanakopoulos, above n 28, 70.

⁴¹ *Ibid* 71.

in drafting resolutions, in spite of any lack of clarity regarding what might be classified as a *jus cogens* norm.

Erika De Wet has also construed the *UNC* as creating a good faith obligation to respect the human rights outlined in certain human right treaties created within the UN framework.⁴² De Wet states that the myriad of international human rights conventions created under the auspices of the UN ‘represent an elaboration upon the [*UNC*]’s original vision of human rights found in Article 1(3) and Articles 55 and 56’.⁴³ This should be combined with the UN’s purpose of achieving international cooperation in promoting and encouraging respect for human rights,⁴⁴ and the general obligation that all members conduct their obligations in good faith.⁴⁵ Furthermore the UN has established mechanisms as a way of monitoring implementation of these human rights instruments.⁴⁶ In combination, it is therefore argued that this creates the legitimate expectation that the UNSC will respect the obligations contained within these treaties, and by consequence, under the rule of equitable estoppel, it should be legally prevented from breaching the provisions of these conventions.⁴⁷ This perspective is complicated given that the UN as an international organization is not a party to treaties such as the *ICCPR*. Furthermore, as Arman Savarian suggests, Article 46 of the *ICCPR* appears to exempt the application of the *ICCPR* to UN agencies.⁴⁸

Aside from legal theory there is ample support in the jurisprudence of courts and tribunals established under the UN auspices for regarding the UNSC as bound by legal parameters. Regarding the *Namibia* advisory opinion of the ICJ, De Wet argues that although the Court stated that it had no capacity to conduct judicial review of the UNSC resolution concerned,⁴⁹ the advisory opinion amounted to a de facto review the legality of the relevant resolution.⁵⁰ The ICJ in this instance assessed of UNSC Resolution 276, reaffirming the UNSC’s consideration of South Africa’s continued presence in Namibia as illegal.⁵¹ By stating that this Resolution was adopted in accordance with the Purposes and Principles contained in the *UNC*, as well as Articles 24 and 25, De Wet finds that this amounted to an implicit review of UNSC

⁴² De Wet, above n 25, 199.

⁴³ *Ibid.*

⁴⁴ *Charter of the United Nations* art 1(3).

⁴⁵ *Ibid* art 2(2).

⁴⁶ De Wet, above n 25, 199.

⁴⁷ *Ibid* 200.

⁴⁸ Savarian, above n 26, 188.

⁴⁹ De Wet, above n 25, 35.

⁵⁰ *Ibid* 48.

⁵¹ SC Res 276, UN SCOR, 1527th mtg, UN Doc SC/RES/276 (28 January 1970).

Resolution 276.⁵² This is especially so given that certain judges, such as Judge Fitzmaurice, held certain reservations about the Resolution's validity.⁵³ Judicial review of the legitimacy of the UNSC Resolution 276, albeit implicit, can be considered as an acknowledgment of the legal limitations on the UNSC in drafting such resolutions. This point is made even clearer in *Tadić* in which the International Criminal Tribunal for the Former Yugoslavia stated that 'neither the text nor the spirit of the [UNC] conceives the Security Council as *legibus solutus*'.⁵⁴

It is submitted that, when viewed in totality, there is a strong case for the proposition that the UNSC is bound by legal obligations, and is not *legibus solutus*. Where this case is strongest is regarding the obligation on the UNSC to respect *jus cogens* norms. Even accepting De Wet's proposition that the UNSC owes good faith obligations to act in accordance with international human rights covenants, which have been created and monitored under the UN's institutions, one must accept that, under the *ICCPR* at least, only certain rights are considered non-derogable.⁵⁵ Consequently even though it may be argued that the UNSC is bound by such conventions, it arguably could derogate from these rights in order to fulfill its mandate of maintaining international peace and security.

b. Obligation on Security Council in Drafting Resolutions to Uphold the Right to a Fair Hearing

Having established that the UNSC is bound by legal constraints, when analyzing the *Kadi* cases it is then necessary to establish that the UNSC is bound to respect the right to a fair hearing, even where executing its function of maintaining international peace and security. It will be submitted that the right to a fair hearing may have achieved a status similar to a *jus cogens* norm, and as such it is legally incumbent on the UNSC to respect this right when implementing targeted sanctions. This is in spite of evidence against this proposition, including the fact that Article 4(1) of the *ICCPR* allows parties to derogate from the right to a fair hearing in times of emergencies.⁵⁶

Even though the *ICCPR* does not list the right to a fair hearing as a non-derogable right in times of emergencies, it still suggests that any derogation must accord with the rules of strict

⁵² De Wet, above n 25, 48.

⁵³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 294 (Judge Fitzmaurice). ('*Namibia*')

⁵⁴ *Tadić (Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia), Case no. IT-94-1-AR72 (2 October 1995) [28].

⁵⁵ *ICCPR* art 4(1).

⁵⁶ *Ibid.*

proportionality, as such the UNSC must still respect this right when imposing targeted sanctions. Article 4(1) of the *ICCPR* only allows for derogation from rights in times of emergencies ‘to the extent strictly allowed for by the exigencies of the situation’.⁵⁷ De Wet and André Nollkaemper suggest that this demonstrates that there is not a complete negation of the right to a fair hearing, although it may be temporarily suspended to enable the UNSC to address the immediacy of the threat posed by terrorism.⁵⁸ They argue that an indefinite suspension of the right to a fair hearing would therefore not be allowed under the *ICCPR*.⁵⁹ A strict need to adhere to the right to a fair hearing is also strengthened by the consideration that this right is essential in order to achieve enjoyment of the non-derogable rights, listed under Article 4(2) of the *ICCPR*, and providing an effective remedy for their violation.⁶⁰ These arguments in effect portray the right to a fair hearing as a far more nuanced than merely a derogable right, according to the *ICCPR*.

Aside from the *ICCPR* it may be considered that the right to a fair hearing has generally achieved non-derogable status, or even *jus cogens* status, under international law. Concerning the imposition of criminal charges at least, the Human Rights Committee noted that in situations of armed conflict that the Common Article 3 of the *Geneva Conventions of 1949* mandates that the right to a fair hearing is upheld, and that there is no derogation from this guarantee during other emergencies.⁶¹ By *argumentum a maiore ad minus* it may be submitted that if this right is non-derogable in times of conflict or emergencies, it should also be non-derogable in times of peace. The Committee also stated that peremptory norms extended beyond the list of non-derogable rights under Article 4(2) of the *ICCPR*, and that non-derogable quality of a right does not automatically qualify it as a *jus cogens* norm, but is nonetheless a partial recognition of its peremptory character.⁶² Furthermore it stated that under no circumstances could states use Article 4(2) of the *ICCPR* in order to deny the ‘fundamental principles of a fair trial’.⁶³ It could therefore be argued that this analysis by the Human Rights Committee establishes the right to a fair hearing, at least regarding criminal proceedings, as *jus cogens*. De Wet also argues that the UNSC has acknowledged the fundamental elements of the right to a fair trial through establishing the International Criminal Tribunal for the Former

⁵⁷ Ibid.

⁵⁸ De Wet and Nollkaemper, above n 3, 180.

⁵⁹ Ibid 180-1.

⁶⁰ Ibid 183.

⁶¹ United Nations Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 72nd sess, UN doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [16].

⁶² Ibid [11].

⁶³ Ibid.

Yugoslavia and the International Criminal Tribunal for Rwanda as two international tribunals explicitly bound by these elements.⁶⁴ Viewed in its totality this would appear to justify the absolute primacy of the right to a fair hearing, even in cases where the UNSC is taking action in order to maintain international peace and security.

A problem associated with this argument is that it establishes a *jus cogens* norm regarding a right to a fair hearing, exclusively with respect to criminal trials. As such this may not include non-criminal trials regarding targeted sanctions, such as the *Kadi* cases. As De Wet acknowledges, the more drastic the measures imposed, the stronger the obligation to respect the right to a fair trial.⁶⁵ Therefore there is a particularly strong argument to be made for equating the right to a fair hearing in criminal proceedings to a *jus cogens* norm.⁶⁶ However in the past the European Court of Justice has not considered the freezing of assets as a criminal punishment.⁶⁷ Instead it has been regarded as a more of an administrative precautionary measure.⁶⁸

In spite of this Luis M Hinojosa Martinez claims this is a ‘formalistic assumption’, since in effect, the freezing of assets ‘involves such severity that, at some point it should be qualified as a criminal punishment’.⁶⁹ He highlights the fact that the plaintiff in *Kadi* suffered from a freezing of his assets for more than eight years, suggesting the measure was more than merely precautionary.⁷⁰ De Wet concurs on this point stating that the freezing of assets is highly punitive in nature and is a response to alleged involvement in terrorism.⁷¹ In addition the freezing of assets could become the basis for criminal charges made by domestic authorities.⁷² It is therefore submitted that the severity of asset freezes, although not specifically associated with criminal proceedings, nonetheless carries the punitive nature of a criminal punishment resulting from criminal charges. As such it warrants being subjected to the non-derogable right to a fair trial, as is afforded in criminal proceedings.

⁶⁴ De Wet, above n 25, 346.

⁶⁵ Ibid 352.

⁶⁶ CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, UN doc CCPR/C/21/Rev.1/Add.11, [16].

⁶⁷ Luis M Hinojosa Martinez, ‘Bad Law for Good Reasons: The Contradictions of the Kadi Judgment’ (2008) 5 *International Organizations Law Review* 339, 350.

⁶⁸ Ibid 350-1.

⁶⁹ Ibid 351.

⁷⁰ Ibid.

⁷¹ De Wet, above n 25, 353.

⁷² Ibid.

The severity of an asset freeze means that it ought to be considered as subject to a non-derogable, and arguably *jus cogens*, right to a fair trial. Proceedings in *Kadi I* show the limitations of claiming *jus cogens*, however there is a growing acknowledgement of the non-derogable character of right to a fair trial. This primacy is bolstered in circumstances such as the freezing of assets, which carry an effect similar to criminal punishment. As such the UNSC should be bound by the right to a fair hearing as a non-derogable human right, as part of their duty to make resolutions in accordance with the Purposes and Principles under the *UNC*.

4. What Are the Implications of ‘Illegal’ Security Council Resolutions on States

If it is accepted that the UNSC is not *legibus solutus*, and is instead bound to uphold certain core principles of international law when making resolutions, the question that follows is whether UNSC resolutions, which are in violation of such core principles, have any legal effect, and whether member states are still bound to implement them. The approach advocated by Tzanakopoulos claims that although such UNSC resolutions may be illegal, they are nonetheless valid and convey legal obligations on member states. However given that UNSC resolutions rely on member states implementing them into domestic law, this grants a legitimate justification for states to not implement such a resolution. Although in some respects counterintuitive, it is submitted that this approach preserves the inherent hierarchy of the *UNC* system.

Those who suggest that states are obliged to implement UNSC resolutions, regardless of any illegality, or perceived contradiction to core principles of international law, suggest that Article 25 of the *UNC* contains an absolute obligation on states to carry out UNSC resolutions. Article 25 states that ‘members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with* the present Charter’.⁷³ In this context it might be suggested that ‘in accordance with’ merely qualifies the way in which member states implement the UNSC resolutions, and therefore contains no such conditional link qualifying which UNSC resolutions should be enacted upon.⁷⁴ Furthermore the General Assembly in 1979 condemned the United Kingdom’s unilateral interpretation that sanctions, imposed by UNSC resolution against Southern Rhodesia, had achieved their purpose and could therefore be

⁷³ *Charter of the United Nations* art 25 (emphasis added).

⁷⁴ Tzanakopoulos, above n 28, 164.

removed.⁷⁵ This was suggested to be a breach of the absolute obligation on member states to carry out UNSC resolutions, under the *UNC*.⁷⁶

Tzanakopoulos suggests that the aforementioned interpretation that Article 25 merely states the means through which the states implement UNSC resolutions must be in accordance with the *UNC*, would be absurd. This is because there are no other means of implementing a UNSC resolution, other than in accordance with the *UNC*.⁷⁷ Furthermore a state cannot be allowed to implement a decision of an international organization whilst also violating other rules of that international organization's charter.⁷⁸ One is therefore forced to accept that this part of Article 25 either has no meaning and merely states the obvious, or preferably, give it *effet utile* by suggesting that it qualifies the types of decisions that the member states must implement.⁷⁹

De Wet and Nollkaemper agree stating that 'the letter and spirit of Article 25 and 2 para 5 of the [*UNC*] permit member states of the United Nations to refuse to implement binding Security Council resolutions, where their illegality is beyond doubt'.⁸⁰ As justification for this interpretation they cite the fact that Article 2(5) of the *UNC* which makes it more clear which interpretation is to be preferred, by stating that 'member states shall give the United Nations every assistance in any action it takes in accordance with the present Charter'.⁸¹ They argue that whilst it is unclear in Article 25 whether there is an obligation on the UN as an organization or the member states to act in accordance with the *UNC*, Article 2(5) adds clarity in confirming that it is the UN that owes such an obligation.⁸² With regard the General Assembly's denouncement of the United Kingdom regarding Southern Rhodesia, this might be regarded as an isolated incident which does not necessarily establish a legal principle that states must implement all UNSC resolutions.⁸³

However it is submitted that the preferred approach, suggested by Tzanakopoulos, is recognizing that in itself Article 25 of the *UNC* alone cannot explain what the legal effects of a UNSC resolution, which is not in accordance with the *UNC*, would be.⁸⁴ Instead it is just as arguable that in a constitutional system, if the *UNC* is said to establish one, all decisions from

⁷⁵ GA Res 34/192, GAOR, 34th sess, 108th plenary mtg, UN doc A/RES/34/192 (18 December 1979) [9].

⁷⁶ *Ibid.*

⁷⁷ Tzanakopoulos, above n 28, 165.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ De Wet and Nollkaemper, above n 3, 187.

⁸¹ *Charter of the United Nations* art 2(5).

⁸² De Wet and Nollkaemper, above n 3, 186.

⁸³ Tzanakopoulos, above n 28, 122.

⁸⁴ *Ibid* 166.

its supreme body must be carried out, given that there is a lack of any routine procedure to challenge the validity of actions taken.⁸⁵ Instead the legal effects of UNSC resolutions, not in conformity with the *UNC*, remains unanswered by using Article 25 alone, regardless of the interpretation used.⁸⁶

Using this constitutional approach to the *UNC*, Tzanakopoulos suggests that UNSC resolutions not in conformity with the *UNC* are illegal and yet valid. This concept of being valid and yet illegal at the same time can be explained as a common feature in domestic legal orders. For example domestic legislation might be illegal under international law, and yet it still remains valid law until overturned.⁸⁷ Tzanakopoulos grounds this theory in the *Certain Expenses* advisory opinion which suggests that the UN decisions that are made with irregularities regarding internal procedures are ultra vires and therefore illegal, and yet they continue to have a valid legal effect on the member states.⁸⁸ Judge Morelli's separate opinion also stated that 'it must ... be supposed that that the [*UNC*] confers finality on the [General] Assembly's resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based'.⁸⁹ He also states that the *UNC* does not confer authority on member states to determine that certain resolutions have 'never had any legal effect' on account of a wrong interpretation of the *UNC*.⁹⁰ The *Namibia* advisory opinion contains a similar statement suggesting that a resolution of a UN organ 'which is passed in accordance with that organ's rules of procedure ... must be assumed to have been validly adopted'.⁹¹

Tzanakopoulos suggests therefore that the presumption of legality of the UNSC resolutions is 'established by the jurisprudence of the ICJ' and means that 'only flagrantly or obviously ultra vires acts of a UN organ have the capacity to be called into question by member state'.⁹² De Wet also agrees on the existence of this presumption under the ICJ jurisprudence.⁹³ Drawing from these principles it is proposed that 'they can be proved to be ultra vires in rebuttal. But

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 168. ('*Certain Expenses*')

⁸⁹ Ibid 224 (Judge Morelli).

⁹⁰ Ibid.

⁹¹ *Namibia* [1971] ICJ Rep 16, 22.

⁹² Tzanakopoulos, above n 28, 120.

⁹³ De Wet, above n 25, 67.

this will not render them invalid, because even ultra vires acts produce legal effects. It will merely prove them illegal'.⁹⁴

If it is to be accepted that UNSC resolutions are still valid, in spite of their illegality, it is then necessary to ask whether a state is justified in not implementing such resolutions. Tzanakopoulos argues that a violation by the UN of the *UNC* necessarily affects all of its member states, by limiting their sovereignty.⁹⁵ By consequence, states may exercise 'countermeasures' in choosing not to implement UNSC resolutions in violation of the *UNC*.⁹⁶ The capacity to not implement such UNSC resolutions is inherent to member states' role as the agents of execution of UNSC resolutions. As suggested by August Reinisch, the *UNC* does not state the manner in which UNSC resolutions should be implemented by the members states. As such the majority of states have chosen to implement UNSC resolutions through implementing measures, rather than allowing them to apply directly in their domestic jurisdiction.⁹⁷ The step of implementation gives states the ability to apply their own interpretation of, or determine whether to apply, the UNSC resolution. Tzanakopoulos states that this is the necessary consequence of the international legal structure which lacks any adequate judicial review mechanism regarding UNSC actions.⁹⁸ Examples of 'auto-determination' and 'auto-interpretation' in this regard might include the variety of legal responses by states to the UNSC ordered sanctions on Libya. Whereas Belgium refused to freeze Libyan assets which were necessary for the functioning of embassies, other states did not implement specific legislation at all, instead relying on existing legislation to give effect to the sanction.⁹⁹ States therefore have the right to determine for themselves whether the UNSC has acted ultra vires, however this ability is contained by the aforementioned strong presumption of legality regarding the UNSC's actions.¹⁰⁰

The absence of any centralized judiciary, with the capacity to regularly and authoritatively interpret the *UNC*, has created difficulty with regard to the effect of illegal UNSC resolutions that are contrary to core aspects of international law. *UNC* Articles 25 and 2(5) offer insufficient clarity with regard to resolving this controversy. An appropriate way of resolving

⁹⁴ Tzanakopoulos, above n 28, 172.

⁹⁵ Ibid 182.

⁹⁶ Ibid 183.

⁹⁷ August Reinisch, 'Should Judges Second-Guess the UN Security Council?' (2009) 6 *International Organisations Law Review* 257, 270.

⁹⁸ Tzanakopoulos, above n 29, 112-3.

⁹⁹ Ibid 118.

¹⁰⁰ Ibid 120.

this dispute, and one which is consistent with the jurisprudence of the ICJ, would be to accept that, in spite of illegality, the UNSC resolution continues to be valid in effect. Nonetheless the decentralized nature of the UN system means member states have the ultimate control over whether to implement, and if so how to interpret, UNSC resolutions. Using this mechanism member states may deny the UNSC resolution any effect due to its illegality, however this is subject to the presumption of the resolution's legality. The final section will demonstrate the role that national courts may play in this process.

5. How Can Domestic Courts Exercise Judicial Review Over Security Council Resolutions?

In lieu of any proper delisting mechanism within the UN which is capable of bringing UNSC resolutions into accordance with the right to a fair hearing, national courts must be the default arbitrator regarding whether UNSC resolutions should be implemented into domestic law. By examining the key criteria for any judicial review, it becomes apparent that under current international law there is no judicial body that is capable of conducting a judicial review of UNSC resolutions. Although the ICJ appears as the de facto 'constitutional' court of the UN system, there are no procedures which can be used to regularly bring such claims before the Court. Therefore in the face of persistent violations of fundamental human rights through the targeted sanctions mechanism, domestic courts must exercise judicial review in order to compensate for the legal protection deficit. Importantly however the domestic court must restrain themselves to reviewing only the domestic implementing legislation. It must judge the legislation according to international human rights, rather than their regional equivalent, and must also disprove the strong presumption of the UNSC resolution's legality. This is a unique approach which seeks to correct defects in the approaches taken in the *Kadi I* and *Kadi II* cases.

Tzanakopoulos isolates certain key features that are characteristic of judicial review, these may be used to assess the capacity of various courts to conduct judicial review of the UNSC resolutions. These criteria include that the judicial review is inherent, hierarchical, internal, binding, and systemic in nature.¹⁰¹ Internal nature means that the judicial body belongs to the same legal order as the decision-making body,¹⁰² hierarchical means that a superior set of rules is used in the judicial review.¹⁰³ Judicial review must also be inherent to the judicial body's

¹⁰¹ Ibid 94-110.

¹⁰² Ibid 96.

¹⁰³ Ibid 99.

functions,¹⁰⁴ it must have the capacity to give binding rulings,¹⁰⁵ and its review mechanism must be systematically available for parties to use.¹⁰⁶ De Wet and Nollkaemper similarly state that a key feature of judicial review is the capacity to ‘annul, set aside or declare illegal the contested act’.¹⁰⁷ Tzanakopoulos deems that there is no domestic or international court which meets these criteria in order to perform judicial review.¹⁰⁸

The ICJ has at least some merit as a judicial review forum, and its jurisprudence shows the Court’s potential willingness to review UNSC resolutions. The ICJ at least benefits from being an internal court of the UN system,¹⁰⁹ it also can be described as applying the hierarchically superior law of the *UNC*.¹¹⁰ Martinez illustrates that the ICJ had been intentionally deprived of any direct capacity, through an article in the ICJ Statute, that would allow it to judicially review UNSC actions upon a complaint made by a member state.¹¹¹ Nonetheless he states that in practice, as reflected in the *Namibia* advisory opinion and the *Lockerbie* case, the ICJ has performed indirect review of UNSC resolutions.¹¹² The *Lockerbie* case involved pleadings by Libya that UNSC resolutions against it were illegal, however the case never proceeded to an examination of its merits, and as such the question was never resolved.¹¹³ The *Namibia* advisory opinion involved a question regarding the lawfulness of UNSC resolutions terminating South Africa’s mandate to administer Namibia, with the ICJ declaring South Africa’s continued presence in Namibia as illegal. In finding that the relevant UNSC resolution was adopted in conformity with the *UNC* and was binding on the parties, commentators such as De Wet, Reinisch and Martinez have acknowledged that the ICJ conducted de facto judicial review of the resolution.¹¹⁴ Judge Onyeama in his separate opinion from the *Namibia* advisory opinion was more explicit, stating that reviewing the validity of the decisions was inherent to the ICJ’s function.¹¹⁵

Nonetheless the ICJ lacks certain characteristics of a judicial review forum, and the nature of contentious proceedings or advisory opinions makes them inappropriate fora for judicial

¹⁰⁴ Ibid 102.

¹⁰⁵ Ibid 103.

¹⁰⁶ Ibid 107.

¹⁰⁷ De Wet and Nollkaemper, above n 3, 184.

¹⁰⁸ Tzanakopoulos, above n 28, 110.

¹⁰⁹ Ibid 96-7.

¹¹⁰ Ibid 100.

¹¹¹ Martinez, above n 67, 352.

¹¹² Ibid 352-3.

¹¹³ Reinisch, ‘Should Judges Second-Guess the UN Security Council’, above n 98, 258.

¹¹⁴ Ibid 259; De Wet, above n 25, 48; Martinez, above n 67, 352.

¹¹⁵ *Namibia* [1971] ICJ Rep 16, 143-144 (Judge Onyeama).

review, especially those regarding targeted sanctions. Contentious proceedings and advisory opinions are fundamentally not binding on the UN. Rulings in contentious cases are only binding upon the parties to the dispute, whilst advisory opinions lack any binding force.¹¹⁶ In addition neither mechanism is a systematic means of judicial review. Contentious proceedings may only raise questions of the validity of the UNSC resolution incidentally through claims by certain states against acts of other states. Advisory opinions on the other hand require a majority of states in the General Assembly to vote in favor of the request before it is put before the ICJ, or otherwise the more unlikely instance of the UNSC requesting an opinion regarding legality of its own resolution.¹¹⁷ Although the *Namibia* advisory opinion may be regarded as a form of judicial review, the ICJ in that case avoided confrontation with the UNSC by declaring the relevant UNSC resolution valid. As such this does not set a bold precedent for the ICJ ruling against the legality of a UNSC resolution. Moreover the state-centered approach of the ICJ is inappropriate for reviewing claims against UNSC resolutions on targeted sanctions. These UNSC resolutions harm the interests of individuals, and would require a state to therefore bring a case on behalf of such an individual. This clearly reflects the inadequacies of the ICJ as a means of judicially reviewing the UNSC actions, especially in the case of targeted sanctions.

National courts have even less claim to have a genuine jurisdiction to perform judicial review of UNSC actions. National courts operate outside the internal structure of the UN and they apply national law which cannot be considered hierarchical. Fundamentally, domestic courts have no binding authority on the UNSC, and cannot annul the UNSC resolutions. The concept of a lower authority, within the limits of member states, effectively overruling a higher authority at international level, runs counter to the established legal order at both international and national level.¹¹⁸ This reasoning also lies in the theory of the parallel competencies, whereby if a state has allocated certain decision-making competence to an international organization, the power to revoke that decision lies with the relevant organs of that international organization, in this case the UNSC.¹¹⁹

Domestic courts cannot validly perform judicial review of the UNSC's resolution, as established above, however they may perform a review of the manner in which UNSC resolutions are implemented, given the state's role as the agent of execution. The exercise of judicial review of UNSC resolutions would understandably lead to concerns regarding the

¹¹⁶ Tzanakopoulos, above n 28, 92.

¹¹⁷ De Wet, above n 25, 62-3.

¹¹⁸ De Wet and Nollkaemper, above n 3, 184-5.

¹¹⁹ Ibid 196.

possibility of fragmenting the *UNC* system, and the undermining of the UNSC's authority. We may therefore refer to a different type of review, whereby domestic courts do not determine whether a UNSC resolution may annulled, but rather in what manner it should be implemented by the member states, given the amount of latitude the state has when implementing such resolutions.¹²⁰ De Wet and Nollkaemper ground this approach in the theory that 'restricted delegation of power must have some system of control for ensuring that the institution ... functions the way it is designed to'.¹²¹

By default, in order to avoid such a legal protection deficit, domestic courts must, as a means of last resort, be capable of adjusting interpretation of UNSC resolutions so that its accords with the UNSC's own legal constraints that have been established above. In the situation, such as an individual suffering the effects of targeted sanctions, they would be left no recourse, except the manifestly inadequate UN delisting procedure, or initiating proceedings against the UN itself, from which it could claim immunity.¹²² This acknowledgement of the default responsibility of member states of international organizations to grant a right to a fair hearing, where there is no adequate procedure for guaranteeing a fair hearing at the level of the international organization, is acknowledged by the European Court of Human Rights in its *Waite and Kennedy v Germany* judgment.¹²³ The Court stated that in such circumstances 'it would be incompatible with the purpose and object of the [*European Convention on Human Rights* ('*ECHR*')] ... if contracting states were thereby absolved of their responsibilities under the [*ECHR*]'.¹²⁴ This principle is also reflected in the *Matthews v United Kingdom* judgment which again stated that even in cases where a member state to the *ECHR* has transferred certain capacities to an international organization, that state nonetheless must continue to uphold its obligations under the *ECHR*.¹²⁵ De Wet argues that this principle remains the same regardless of the international organization, that there is an inherent danger in allowing states loopholes to their human rights obligations when acting under the authority of an international organization.¹²⁶

¹²⁰ Ibid 185.

¹²¹ Ibid (citation omitted).

¹²² Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council', above n 24, 866.

¹²³ *Waite and Kennedy v Germany* [1999] I Eur Court HR 393, [67].

¹²⁴ Ibid.

¹²⁵ *Matthews v United Kingdom* [1999] I Eur Court HR 251, [32].

¹²⁶ De Wet, above n 25, 381.

When reviewing the implementation of a UNSC resolution it is crucial that domestic courts review the resolution's compliance with fundamental aspects of international human rights rather than domestic standards, as well as accepting the strong presumption of the resolution's legality. Martinez cautions that assessing the compatibility of UNSC resolutions with regional human rights treaties would have the effect of critically undermining the UNSC.¹²⁷ Finlay describes this as a central 'difficulty' regarding the *Kadi* cases given that Article 103 of the *UNC* clearly establishes the supremacy of *UNC* law over such regional treaties.¹²⁸ There is considerable merit to this reasoning. As established before, the UNSC is bound by certain international human rights, which are not necessarily the same as European human rights standards, or the standards elsewhere. Comparing the domestic measures, designed to give effect to UNSC resolutions, to standards in regional treaties, or standards that the UNSC is not bound by, usurps the established hierarchy of international law. This refers to what Reinisch describes as the need to 'avoid parochial concepts prevailing over truly international ones',¹²⁹ thereby suggesting that states refrain from holding the UNSC to account with their own notions of what constitutes fundamental human rights.¹³⁰

This solution is not without flaws, and might be regarded as still undermining the *UNC* system, and the obligations on member states to carry out UNSC resolutions. As such an even more ideal method regarding targeted sanctions should still be sought at UN level. This line of reasoning has been used by some commentators, such as Devika Hovell, to suggest that the judgments reached in the *Kadi* cases should not create the foundations for an 'enduring normative approach to the relationship between legal orders'.¹³¹ In this respect the *Kadi II* case has been likened to the reasoning in the case of *Solange I*, whereby the German Federal Constitutional Court reserved the right to review certain actions taken by the European Communities ('EC') with regard to their consistency with German Basic Law.¹³² In this instance it suggested that the EC law would be inapplicable 'so long as' it fell short of the standards enshrined in the German Basic Law.¹³³ In *Kadi II*, language used in argument by Advocate-General Maduro bore similarity to *Solange I*, stating that given the lack of 'genuine

¹²⁷ Martinez, above n 67, 344.

¹²⁸ Finlay, above n 20, 492.

¹²⁹ Reinisch, 'Should Judges Second-Guess the UN Security Council', above n 98, 290.

¹³⁰ *Ibid.*

¹³¹ Hovell, above n 13 149.

¹³² N Türküler Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' (2010) 16(5) *European Law Journal* 551, 560.

¹³³ *Solange I*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvL 52/71, 29 May 1974 reported in (1974) 37 BVerfGE 271, [35].

and effective mechanism of judicial control by an independent tribunal at the level of the United Nations ... the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions'.¹³⁴

Allocation of sole responsibility for the delisting process back to a reformed, and judicially independent, tribunal within the UN framework is ultimately preferable. As Howell states, the UN ombudsman is in a unique position to adjudicate on delisting individuals. For instance they apply a consistent standard to all listed individuals, they have expertise in reviewing intelligence, and most importantly they are in a position to request more intelligence reports from states where needed.¹³⁵ Review by domestic courts should therefore be regarded as a temporary measure while preferable review mechanisms are established at UN level.

The solution suggested, amounts to a simultaneous appraisal and criticism of the *Kadi* cases. In the absence of any adequate review mechanism within the UN system, such as in the instance of the UN ombudsman, for delisting individuals affected by targeted sanctions, a domestic court may legitimately review UNSC resolutions regarding their compliance with fundamental human rights. This is provided that they respect the strong presumption of legality, established in the jurisprudence of the ICJ. However unlike in *Kadi I*, domestic courts must not perform direct judicial review of the UNSC resolution but rather should review the domestic implementing measure. Lastly, unlike *Kadi II* the domestic court must apply the applicable fundamental international human rights, rather than regional human rights. This last qualification may often be more of a superfluous qualification, where the particular regional human right has an identical equivalent as a fundamental international human right, such as the right to a fair hearing, however the distinction is nonetheless a critical one.

6. Conclusion

The *Kadi* cases have prompted a beneficial degree of introspection over the capacity for UNSC resolutions to be considered illegal under international law, the necessary effect that such illegal resolutions will have on member states, and the extent to which domestic courts may protect the fundamental international human right of individuals to a fair hearing. At first this development may be regarded as a critical undermining of the UN system given the need for the UNSC to act swiftly with decisive resolutions in the interest of international peace and security. However over time steps such as the one made in the *Kadi* cases create more benefit

¹³⁴ *Kadi II* [2008] ECR I-6351, [256].

¹³⁵ Howell, above n 13, 162.

than harm to the UNSC's legitimacy. If the *Kadi* cases are to be compared with *Solange I*, the latter case ultimately led the EC to implement sufficient standards regarding fundamental rights, such that in the case of *Solange II* the German Federal Constitutional Court did not exercise its powers to review the EC's acts regarding their compliance with fundamental human rights.¹³⁶ Positive steps to improve the UNSC's consistency with its *UNC* commitments and legal limitations has the positive effect of maintaining the UNSC's legitimacy and efficiency.¹³⁷ As N Türküler Isiksel states, in the *Kadi* cases 'the court's refusal to give effect to UN obligations does not threaten the legal structure of the international order. Quite to the contrary, it protects the norms that are at the foundation of the edifice of international law'.¹³⁸

¹³⁶ Reinisch, 'Should Judges Second-Guess the UN Security Council', above n 98, 288, citing *Solange II*, Bundesverfassungsgericht [German Federal Constitutional Court], 2 BvR 197/83, 22 October 1986 reported in (1986) 73 BVerfGE 271.

¹³⁷ De Wet and Nollkaemper, above n 3, 202.

¹³⁸ Isiksel, above n 123, 564.

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