

Sanctions of the Security Council Against Individuals – Some Human Rights Problems

Noah Birkhäuser

1. Introduction

The whole system of the United Nations has been conceived to deal with the primary actors in international law: states. In this spirit, a mechanism of international security has been created that gives the United Nations Security Council a unique power to deal with threats to the international peace and security. The Security Council can deal with such threats by imposing sanctions against the source of the threat. But it has never been thought of during the San Francisco Conference to sanction individuals. Nevertheless, ever since the Security Council has applied sanctions,¹ it has targeted them also against individuals and other non-state actors. The very first time the Security Council chose to apply sanctions it did not target a state but the white minority government of Southern Rhodesia, at the time not a sovereign state but a British colony.² Virtually all United Nations sanction regimes in part directly affect individuals. In some cases, only members of governments and their closest associates and relatives were sanctioned.³ But in recent years, hundreds of individuals have been ‘blacklisted’ by the Security Council as suspected terrorists.⁴ Usually such sanctions include the freezing of assets and restrictions on travel.

A discussion of the legal problems that follow from international sanctions against individuals has not begun until recently. Human rights that might be threatened by Security Council action include the right to life, the right to health, property rights, the liberty of movement and freedom to choose a residence, the right to respect for private and family life and, above all, procedural rights.

Since the system of sanctions under Article 41 of the Charter of the United Nations has been created as a means to act against states, the procedures of the Security Council leave no room for problems in relation with other actors of international law. Targeted individuals have no instruments to defend themselves against Security Council action. When the Council directs its sanctions against a state, it usually demands a certain behaviour from the targeted state. The targeted state can decide whether or not to comply with the relevant Security Council resolution in order to obtain a lifting of the sanctions.

In the case of the sanctions against individuals and entities belonging to or associated with the Taliban or the Al-Qaida organization, the Security Council did not ask for any behaviour.⁵ It

¹ In this context the term ‘sanctions’ refers to measures that are available under Art. 41 of the Charter of the United Nations (UNC).

² SC Res. 232, 16 December 1966.

³ This was the case in Liberia (SC Res. 1343, 7 March 2001, para. 7) and very recently in Côte d’Ivoire (SC Res. 1572, 15 November 2004, paras. 9, 11).

⁴ Sanctions against individuals and entities belonging to or associated with the Taliban and Al-Qaida organization, SC Res. 1267, 15 October 1999; SC Res. 1333, 19 December 2000; SC Res. 1390, 16 January 2002.

⁵ Another issue are the demands the Council made on the Taliban (surrender of Usama bin Laden and closure of all terrorist camps, SC Res. 1333, 19 December 2000, para. 1 *et seq.*).

simply stated that acts of terrorism pose a threat to international peace and security⁶ and that in order to face this threat certain action was necessary against a list of individuals and entities. Affected individuals are not heard in front of the Security Council – this is a privilege reserved to states.⁷

Since affected individuals can not defend themselves against Security Council action, some of their human rights might be infringed. In the foreground are fair trial guarantees such as the right of access to court or the presumption of innocence and other procedural guarantees, because they are the key to other human rights. It is an open question whether affected individuals can bring proceedings against the states which implement the Security Council sanctions. Can individuals who are being affected by United Nations sanctions claim that states, by implementing these sanctions, violate human rights? Switzerland will serve as an example.

2. Sanctions Against Individuals

A. General Observations

The possibility of sanctions against individuals has already been discussed for a long time. After the Second World War the criminal responsibility of individuals has come to the fore and at the war tribunals of Nürnberg and Tokyo, individuals have been sanctioned for international crimes. But for a long time the imposition of multilateral sanctions in the sense of Article 41 UNC on individuals has only been subject to academic discussion.⁸

After the end of the Cold War the new unity of the Security Council led to an amplification of its activities, including an increased use of sanctions. In the wake of a large number of sanctions regimes problems became apparent. Especially sanctions with a very broad effect on whole populations such as the ones against Iraq came under scrutiny. In this context the call for more targeted sanctions grew very loud. Sanctions against individuals and other non-state actors that were identified as a more direct threat to international peace and security than entire populations of a state were the logical consequence.

When the Security Council directs sanctions against individuals, it has to use the member states as intermediaries. The decisions of the Security Council bind states, not individuals.⁹ Sanctions of the Council are being applied by the member states.¹⁰ This concept of indirect action against individuals is common in international organizations.¹¹ An exception in this regard are certain sanctions by the EC,¹² which bind individuals directly.¹³

⁶ Preamble of SC Res. 1390, 28 January 2002.

⁷ According to Rule 37 of the Provisional Rules of Procedure of the Security Council (S/96/Rev. 7, 1983), only members of the United Nations may be invited to participate in meetings of the Council. Rule 39 provides that the Council may invite other persons to supply information. But there is no provision allowing individuals and entities to appear before the Council in matters concerning themselves.

⁸ See for example Galtung, 'On the Effects of International Economic Sanctions with Examples from the Case of Rhodesia', 19 *World Politics* (1967) 381 *et seq.*

⁹ Art. 25 UNC.

¹⁰ Art. 41 UNC.

¹¹ H. G. Schermers/N. M. Blokker, *International Institutional Law* (2003) 830.

¹² Sanctions under Art. 301 EC.

B. Affected Human Rights

Which human rights are affected by Security Council sanctions against individuals?

When the Security Council imposes travel bans on individuals,¹⁴ it touches their liberty of movement and freedom to choose a residence.¹⁵ But these rights are not violated by the Security Council action, because they do not work in a cross-border way. The liberty of movement and the freedom to choose a residence are rights that are granted only in the country of nationality or residence. There is no universal human right that gives individuals a claim to enter any other country than that of their own nationality – and the Security Council does not require states to deny entry into their territory to their own nationals.¹⁶ But other human rights, such as the right to health¹⁷ and the right to life,¹⁸ can be affected by travel bans, for instance in a case where medical care can only be obtained in a foreign country. And restrictions on travel can affect the right to respect for private and family life.¹⁹

Another interference are the Security Council's financial sanctions. Especially in a case where financial funds remain frozen indefinitely²⁰ or are even transferred to a fund,²¹ the right of property,²² the right to work (which includes the right to gain ones living)²³ and other economic rights may be violated. The transfer of frozen funds to the Iraqi Development Fund constitutes a de facto expropriation.

The central set of human rights that is affected by sanctions against individuals are procedural rights. In order to resist sanctions, affected individuals must have access to a body that is able to review the measures in an effective way. As seen before, the Security Council is not such a body, since it is a political body and it does not receive complaints by individuals. The jurisdiction of the International Court of Justice is reserved to states. But several international human rights covenants guarantee the right to a fair trial.²⁴ The conditions for this right vary in the different conventions, but as a principle they grant the right to a fair trial where civil rights or obligations or criminal charges are at stake. There are several indications that the sanctions of the Security Council against individuals affect civil rights or even have a punitive effect like criminal

¹³ M. Herdegen, *Europarecht* (5th ed. 2003) 63 *et seq.*

¹⁴ Such as in SC Res. 1390, 28 January 2002, para. 2b.

¹⁵ Granted for example by Art. 12 para. 1 ICCPR (International Covenant on Civil and Political Rights, 16 December 1966) and in national constitutions, such as Switzerland's Art. 24 Bundesverfassung (BV), Systematische Rechtssammlung (SR) 101.

¹⁶ SC Res. 1390, 28 January 2002, para. 2b.

¹⁷ Art. 12 ICESCR (International Covenant on Economic, Social and Cultural Rights, 16 December 1966).

¹⁸ Art. 6 ICCPR; Art. 1 ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950).

¹⁹ Art. 8 ECHR.

²⁰ For example by SC Res. 1390, 16 January 2002, para. 2a.

²¹ SC Res. 1483, 22 May 2003, para. 23.

²² Art. 1 of the First Protocol to the ECHR; Art. 26 BV.

²³ Art. 6 ICESCR.

²⁴ Art. 14 ICCPR; Art. 6 ECHR; Art. 25 ACHR (American Convention on Human Rights, 22 November 1969).

charges.²⁵ One criteria to categorize a measure as ‘criminal’ is its nature and severity. The measure falls under the ‘criminal sphere’, when it has a punitive and deterrent character.²⁶ When the Security Council imposes its sanctions on individuals, it often seems that the means of the measures are both punitive and deterrent, especially in cases where the Council does not ask for a certain behaviour.

C. Sanctions Against the Taliban and Al-Qaida

1. Background

In the 1990ies the Taliban took over the control over most of the territory of Afghanistan. Early on they had been accused of providing safe haven to terrorists. Usama bin Laden and his terror organization Al-Qaida were suspected to be responsible for a number of terrorist attacks, especially against US targets. In August of 1998 two attacks were launched against US embassies in Tanzania and Kenya. The Security Council condemned these attacks²⁷ and called on the Taliban to stop sheltering and training terrorists.²⁸ In the same resolution the Council expressed its readiness to impose sanctions on the Taliban.²⁹

2. Resolution 1267

In October 1999 the Security Council determined that the refusal of the Taliban to stop providing sanctuary and training to terrorists and their refusal to bring suspected terrorists to justice constituted a threat to international peace and security.³⁰ The Council demanded again that the Taliban cease the provision of sanctuary and training for international terrorists and asked for cooperation in bringing indicted terrorists to justice.³¹ In particular, the Council demanded that the Taliban turn over Usama bin Laden to a third country, where he would be brought to justice.³² To put some pressure on the Taliban the Security Council imposed sanctions against them. Besides an embargo on the Afghan air traffic, these sanctions included financial measures against Taliban assets.³³ A new sanctions committee (hereinafter the ‘1267-committee’) was established to help implement the sanctions and to designate the aircraft and funds affected by the sanctions.³⁴ With this step the Security Council delegated the decision of naming the exact targets of its measures to a sub-organ.

²⁵ Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights’, 72 *Nordic Journal of International Law* (2003) 171.

²⁶ A. Peters, *Einführung in die Europäische Menschenrechtskonvention* (2003) 110.

²⁷ SC Res. 1189, 13 August 1998.

²⁸ SC Res. 1214, 8 December 1998, para. 13.

²⁹ *Ibid*, para. 15.

³⁰ SC Res. 1267, 15 October 1999, preamble.

³¹ *Ibid*, para. 1.

³² *Ibid*, para. 2.

³³ *Ibid*, para. 4.

³⁴ *Ibid*, para. 6.

3. Resolution 1333

A year passed and the Taliban still did not comply with the demands of the Security Council. The Council reacted by strengthening the sanctions regime and by targeting another group of persons: individuals around Al-Qaida. In resolution 1333 the Council decided that all states had to freeze funds and other financial assets of Usama bin Laden ‘and individuals and entities associated with him (...), including those in the Al-Qaida organization’.³⁵ Again it was the 1267-committee’s job to designate the affected individuals and entities.³⁶ In the public discussion of the Security Council these sanctions against presumable terrorists were not mentioned with a single word.³⁷ As already mentioned in the introduction, the Council made no demands *vis-à-vis* this group of persons. In lack of any demands the concerned individuals and entities had no possibility to act in a certain way in order to convince the Council to lift the sanctions.

4. September 11

After the terrorist attacks of 11 September 2001 the Security Council introduced a more general system of anti-terrorist measures that left the designation of presumable terrorists to the member states of the United Nations.³⁸ The United States and a number of other states invaded Afghanistan in October of the same year, but failed capturing Usama bin Laden and the leader of the Taliban. A new government was soon installed, but widespread turmoil throughout the country continued. An international peace force provides for a certain stability around Kabul.³⁹ It is uncertain whether international terrorists still use Afghanistan as a base for training and shelter. US troops remain in Afghanistan under the so-called ‘Operation Enduring Freedom’ in order to hunt down Taliban and terrorists.

5. Resolution 1390

In January 2002 the Security Council determined, in a very general way, that acts of international terrorism constitute a threat to international peace and security.⁴⁰ As a response to this threat the Council repeated its financial sanctions⁴¹ against Usama bin Laden, members of the Al-Qaida and the Taliban and associates,⁴² and expanded the sanctions regime by an arms embargo⁴³ and travel restrictions.⁴⁴ This was the first sanctions-resolution of the Security Council that did not have a

³⁵ SC Res. 1333, 19 December 2000, para. 8c.

³⁶ *Ibid*, para. 16b.

³⁷ Meeting of the Security Council, 19 December 2000, Provisional Verbatim Records S/PV.4251.

³⁸ SC Res. 1373, 28 September 2001 and subsequent resolutions dealing with the threat of terrorism.

³⁹ SC Res. 1386, 20 December 2001, installation of the International Assistance Security Force (ISAF).

⁴⁰ SC Res. 1390, 28 January 2002, preamble.

⁴¹ *Ibid*, para. 2a.

⁴² The persons on the list managed by the 1267-committee.

⁴³ SC Res. 1390, 28 January 2002, para. 2c.

⁴⁴ *Ibid*, para. 2b.

connection to a certain territory.⁴⁵ It did not relate to a certain state or regime and had no factual or temporal limitation.⁴⁶

From this time on, no state was allowed to accord the targeted persons entry to or transit through its territory. The supply, sale or transfer of arms and related material to said persons was forbidden and every financial asset was to be frozen. Again the Council did not ask the targeted persons for a certain behaviour.

In the wake of resolution 1390 some humanitarian and human rights concerns became obvious. Because of the absolute character of the financial restrictions targeted individuals had problems funding their costs of living. Switzerland decided to grant individuals certain exemptions from the sanctions regimes – even though the sanctions regime did not allow such a measure. In a clear and open violation of the sanctions, Switzerland said that payments from frozen accounts may be authorized, if they serve to protect Swiss interests or to prevent hardship cases. For similar reasons, Switzerland allowed the entry into or the transit through its territory.⁴⁷ Neither the Council nor the 1267-committee reacted to this open breach of the relevant resolutions.⁴⁸ But the Security Council reacted to the growing concerns and allowed exemptions from the financial sanctions.⁴⁹

6. De-listing

For a long time it was not clear in what way the 1267-committee made its decisions. After the Council asked for the promulgation of guidelines about the implementation of the sanctions,⁵⁰ the 1267-committee published a set of rules about the conduct of its work.⁵¹ The Security Council asked all implementing states to inform listed persons of the measures imposed on them and of the committee's guidelines.⁵²

According to these guidelines it is in the sole discretion of the 1267-committee to decide which names should be added to the sanctions-list.⁵³ Information about the individual persons that should be added to the list are mainly provided by designating states. Due to intelligence

⁴⁵ Cameron, *supra* note 25, at 164.

⁴⁶ Biehler, 'Individuelle Sanktionen der Vereinten Nationen und Grundrechte', 41 *Archiv des Völkerrechts* (2003) 171.

⁴⁷ Report Prepared by Switzerland in Pursuance of Security Council Resolution 1390 (2002), 21 June 2002, S/AC.37/2002/66.

⁴⁸ But the Swiss measures were noted, Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002), 20 September 2002, S/2002/1050, para. 42.

⁴⁹ SC Res. 1452, 20 December 2002.

⁵⁰ SC Res. 1390, 28 January 2002, para. 5d.

⁵¹ Guidelines of the Committee for the Conduct of its Work (adopted on 7 November 2002 and amended on 10 April 2003), http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf, last visited 12 April 2005.

⁵² SC Res. 1526, 30 January 2004, para. 18.

⁵³ Paragraph 5 of the Guidelines, *supra* note 51.

concerns, the grounds for the addition of a name to the list are often kept secret. Many states are reluctant to provide names for the list because of concerns of due process.⁵⁴

Persons requesting the deletion of their names from the list ('de-listing') have to petition their government of residence and/or citizenship to request a review of the case. The petitioned government should then approach the designating state and discuss the case. The two governments can exchange relevant information. In the end, the petitioned government can submit a request for de-listing to the 1267-committee, which has to decide unanimously (in this case in a no-objection procedure). If the designating state agrees, it can join the request or submit an own request for de-listing. Every single member of the committee can block every de-listing.⁵⁵

Since the vast majority of listed persons are designated by the United States,⁵⁶ a de-listing without the consent of this state is virtually impossible. The United States have an own list of presumable terrorists, which is managed by the Office of Foreign Assets Control (OFAC).⁵⁷ Formal basis for this list are often public sources such as newspaper articles or company records.⁵⁸ And US intelligence agencies have been heavily criticized for their flawed work.⁵⁹ Thus proof for an involvement in terrorist activities of the designated individuals and entities is often shaky. As a member of the 1267-committee, the US can block every de-listing. Governments who want to file a request for de-listing have to convince the authorities of the United States first.

At the time of writing, the list of the 1267-committee contained 143 individuals belonging to or associated with the Taliban and 179 individuals belonging to or associated with the Al-Qaida organization. Only one entity associated with the Taliban is listed, but 114 entities belonging to or associated with the Al-Qaida organization appear on the list. So far only five individuals have been de-listed.⁶⁰

The most famous case of de-listing is the one of two Swedes, Abdirisak Aden and Abdi Abdulaziz Ali.⁶¹ The two Swedes were listed because of their implication with the Somali banking network Al-Barakaat, an entity that is still listed. Al-Barakaat handles money transfers to Somalia and is one of the biggest employers of the country. The United States suspects the

⁵⁴ First Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, 31 July 2004, S/2004/679, para. 34.

⁵⁵ See for the procedure paragraph 7 of the Guidelines, *supra* note 51.

⁵⁶ Biehler, *supra* note 46, at 172.

⁵⁷ The list of the OFAC on Specially Designated Nationals and Blocked Persons can be downloaded under <http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>, last visited 12 April 2005.

⁵⁸ Cameron, *supra* note 25, at 165.

⁵⁹ 'Bush Panel Finds Big Flaws Remain in U.S. Spy Efforts', *New York Times*, 31 March 2005.

⁶⁰ All the quoted numbers refer to the New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organization as Established and Maintained by the 1267 Committee, <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>, last visited 12 April 2005.

⁶¹ The de-listing occurred on 26 August 2002, Security Council Press Release SC/7490.

company of channelling money to terrorist groups.⁶² The blocking of the company's assets had a devastating impact on Somali citizens who had deposits in Al-Barakaat.⁶³ After Sweden petitioned the US for a de-listing of Aden, Ali and a third listed individual, and after the individuals gave guarantees that they would refrain from engaging in peace-threatening activities in the future, the US treasury deleted the names of Aden and Ali from its own list. After this step Aden and Ali were de-listed from the UN sanctions list as well.⁶⁴ The third individual remains on the list.

In another case, Switzerland has been trying for years to de-list two of its nationals, Mohamed and Zeinab Mansour. The Swiss couple with Egyptian roots has been listed since January and November 2001. The Mansours were listed because they were sitting in the executive board of Al-Taqwa, a company that was suspected by US authorities to be connected to the financing of terrorism.⁶⁵ According to Swiss authorities, there is no evidence that suggests an involvement of the Mansours in international terrorism.⁶⁶ So far, Switzerland has been trying in vain to convince the United States to agree with a de-listing.

D. Sanctions Against Individuals in Iraq

1. Background

Throughout the 1990ies, sanctions of the Security Council against Iraq were in effect.⁶⁷ After the Gulf war of 1991 the sanctions remained in force to put pressure on the Iraqi government to tolerate weapons inspections in Iraq. The inspections were obstructed by Iraq on numerous occasions and the Security Council condemned these incidents repeatedly.⁶⁸ In 1997 the Council imposed travel restrictions on those Iraqi officials who were involved in the obstruction of the weapons inspections.⁶⁹ These restrictions remained the only sanctions against individuals throughout this period.

In March 2003 the United States and a number of other states invaded Iraq without a mandate of the United Nations. After the official end of combat operations the Security Council lifted all existing sanctions⁷⁰ and replaced them with new ones.⁷¹

2. Resolution 1483 and Swiss Implementation

⁶² 'Swedes Take Up the Cause of 3 on U.S. Terror List', *New York Times*, 26 January 2002.

⁶³ '5 Months After Sanctions Against Somali Company, Scant Proof of Qaeda Tie', *New York Times*, 13 April 2002.

⁶⁴ Cameron, *supra* note 25, at 201; 'U.S. Drops Names of 2 Swedes From Al Qaeda List at U.N.', *New York Times*, 23 August 2002.

⁶⁵ 'Automatikprofessor im "Unruhestand"', *Neue Zürcher Zeitung*, 31 December 2001.

⁶⁶ 'Terrorisierter Rechtsstaat', *Neue Zürcher Zeitung*, 6 July 2003.

⁶⁷ SC Res. 661, 6 August 1990.

⁶⁸ For instance in S/PRST/1991, 28 June 1991; SC Res. 707, 15 August 1991; S/PRST/1992, 11 March 1992; SC Res. 1060, 12 June 1996.

⁶⁹ SC Res. 1137, 12 November 1997, para. 4.

⁷⁰ With the exception of the arms embargo.

⁷¹ SC Res. 1483, 22 May 2003.

The Security Council determined that the situation in Iraq, although improved, still constituted a threat to international peace and security.⁷² In order to react to this threat, the Council ordered all states to freeze funds, other financial assets and economic resources of individuals and entities associated with the former regime and transfer them to the newly created Development Fund for Iraq.⁷³ The Council delegated the designation of the affected individuals and entities to the sanctions committee established pursuant to resolution 661.⁷⁴

After its last update in June 2004, the lists of the committee contained the names of 82 individuals and 206 entities.⁷⁵ Even though the committee has adopted guidelines for the conduct of its work, it did not regulate the de-listing of individuals and entities.⁷⁶

Switzerland has transmitted the letter of lawyers of an individual and an entity on the committee's assets-freeze lists who request a de-listing to the committee. The committee discussed the request and asked for additional justification and relevant information in support of the request.⁷⁷ So far, no individual or entity has been de-listed.

In order to implement the measures of the Security Council under Resolution 1483, Switzerland has amended its regulation of economic measures *vis-à-vis* the Republic of Iraq (hereinafter the 'Iraq Regulation').⁷⁸ The Iraq Regulation provides exemptions from the freezing of accounts to protect Swiss interests and to prevent hardship cases.⁷⁹ In a second regulation, Switzerland manages the procedures of freezing of Iraqi funds and the transfer to the Development Fund (hereinafter the 'Freezing Regulation').⁸⁰ Before the issue of a freezing order, the Swiss authorities inform the designated party and grant them a 30 day period to comment on the freezing decision.⁸¹ The designated party can then demonstrate a hardship and apply for an exemption.⁸² Even further goes the possibility of an appeal to the federal court of Switzerland.⁸³

⁷² *Ibid*, preamble.

⁷³ *Ibid*, para. 23.

⁷⁴ *Ibid*, para. 19; after the termination of the 661-committee these tasks were transferred to the newly created 1518-committee, SC Res. 1518, 24 November 2003.

⁷⁵ The lists of individuals and entities established pursuant to Security Council resolution 1483 can be downloaded at <http://www.un.org/Docs/sc/committees/1518/1518SanctionsCommEng.htm>, last visited 12 April 2005.

⁷⁶ See paragraph 3 of the very short Guidelines for the Application of Paragraphs 19 and 23 of Resolution 1483 (2003), 12 June 2003, Security Council Press Release SC/7791.

⁷⁷ Annual Report of the Security Council Committee Established Pursuant to Resolution 1518 (2003), 31 December 2004, S/2004/1036, para. 8.

⁷⁸ Verordnung vom 7. August 1990 über Wirtschaftsmassnahmen gegenüber der Republik Irak, SR 946.206.

⁷⁹ Art. 2 para. 3 of the Iraq Regulation.

⁸⁰ Verordnung vom 18. Mai 2004 über die Einziehung eingefrorener irakischer Gelder und wirtschaftlicher Ressourcen und deren Überweisung an den Development Fund for Iraq, SR 946.206.1.

⁸¹ Art. 2 para. 2 of the Freezing Regulation.

⁸² Art. 3 of the Freezing Regulation.

⁸³ Art. 4 of the Freezing Regulation.

By providing such procedures and exemptions, Switzerland once again violates a resolution of the Security Council. Switzerland justifies the legal remedies it provides with its Swiss, European and international human rights obligations. It especially refers to the right of access to a court.⁸⁴ The reason why Switzerland provides for an appeal to the federal court only in the case of Iraq, is the definite character of the financial sanctions: by the transfer of the frozen funds to the Development Fund for Iraq the affected individuals and entities de facto lose their property.

3. Human Rights Concerns

A. *The Security Council and Human Rights*

There are two strings of discussion as to the limitations of the power of the Security Council.⁸⁵ On the one hand, there is a discussion concerning the power of the Council to determine the terms of Article 39 UNC.⁸⁶ It is disputed whether such a determination is purely political or whether it is justiciable. Another discussion has arisen as to the question of the Council's discretion to choose enforcement measures under Articles 40, 41 and 42 of the Charter. The subsequent analysis deals with the second set of questions.

By imposing sanctions upon individuals, the Security Council also affects their human rights. The basic idea of human rights is that they protect the individual against state interference. The Security Council, of course, is not a state. But the Council is the trigger of certain state actions against individuals. When the Security Council imposes sanctions on individuals, it forces states to take action in a way that might infringe human rights. Thus the question arises whether the Council itself is bound by human rights.

When the Security Council acts under Chapter VII of the UNC, it has a very wide discretion to determine situations that pose a threat to the international peace and security. And once it has determined such a threat, it has a wide selection of measures under Articles 41 and 42 it can impose in order to meet this threat. But there are a number of limits to the Council's options. A majority of nine affirmative votes is required among the members of the Council to impose sanctions and none of the permanent members must cast a negative vote.⁸⁷ The Council can take military action under Article 42 only when non-military measures are inadequate.⁸⁸ And the measures under Article 41 must be chosen by the Council in a way as 'to give effect to its

⁸⁴ See the commentary of the Swiss State Secretariat for Economic Affairs on the implementation of the sanctions against Iraq, accessible under <http://www.seco-admin.ch/>, last visited 12 April 2005.

⁸⁵ E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004) 15, who distinguishes questions about the 'when' and 'how' of Security Council action.

⁸⁶ The main determination being the decision whether there is a threat to the peace.

⁸⁷ Art. 27 para. 3 UNC.

⁸⁸ Art. 42 UNC.

decisions'.⁸⁹ Thus the means must correlate with the end. One can deduce that the Security Council must choose its measures in a proportionate way.⁹⁰

The promotion of respect for human rights is one of the purposes of the United Nations.⁹¹ The Security Council has to act in accordance with the purposes and principles of the United Nations.⁹² Thus the Security Council is principally bound to human rights.⁹³ Its members have pledged their commitment to international law and to the Charter.⁹⁴ And in its fight against terrorism, the Security Council has reminded the member states of their human rights obligations.⁹⁵

The scope of human rights mentioned as a purpose of the United Nations is very vague, and the purposes and principles of the Charter were designed to provide guidelines to the organs of the United Nations in a flexible manner.⁹⁶ During and after the Second World War, when the Charter was drafted, there existed no universal consensus about a certain catalogue of human rights. But in the following years, the United Nations and its member states were highly active in the drafting and implementing of human rights instruments such as the Universal Declaration of Human Rights⁹⁷ and the two Human Rights Covenants.⁹⁸ Through this development and accompanying state practice, a human rights standard has evolved that represents the vision of

⁸⁹ Art. 41 UNC.

⁹⁰ Delbrück, 'Staatliche Souveränität und die neue Rolle des Sicherheitsrates der Vereinten Nationen', 26 *Verfassung und Recht in Übersee* (1993) 20; Gardam, 'Legal Restraints on the Security Council Military Enforcement Action', 17 *Michigan Journal of International Law* (1996) 307; Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 517.

⁹¹ Art. 1 para. 3 UNC.

⁹² Art. 24 para. 2 UNC.

⁹³ De Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime', 14 *LJIL* (2001) 284 *et seq.*; Gardam, *supra* note 90, at 301; Kulesa, 'Von Märchen und Mechanismen - Gefahren und Chancen der Sanktionen des Sicherheitsrates', 44 *VN* (1996) 92; Segall, 'Economic Sanctions: Legal and Policy Constraints', 836 *RevICR* (1999) 763 *et seq.*

⁹⁴ Meeting of the Security Council, 31 January 1992, Provisional Verbatim Records S/PV.3046, para. 143 (President): 'The members of the Council pledge their commitment to international law and to the United Nations Charter.'

⁹⁵ SC Res. 1456, 20 January 2003, para. 6: 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.'

⁹⁶ Wolfrum, 'Article 1', in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, (2nd ed. 2002), Vol. I, 40.

⁹⁷ GA Res. 217 A (III), 10 December 1948.

⁹⁸ The ICCPR and the ICESCR.

human rights found in Articles 1 paragraph 3 and 55 of the UNC.⁹⁹ Fundamental human rights may attain the status of *jus cogens* and are non-derogable.¹⁰⁰

Most human rights treaties provide for deviations in certain cases. The most prominent cause of derogation is the state of emergency.¹⁰¹ But such a derogation is subject to a strict principle of proportionality.¹⁰² When the Security Council determines that a certain situation constitutes a threat to international peace and security, it practically declares a state of emergency.¹⁰³ But even under a state of emergency a core of human rights remains untouchable. Some human rights are non-derogable. And as noted before, when the Security Council imposes measures that infringe human rights, it is also bound to the principle of proportionality.

But even if the Security Council is bound to certain human rights, member states still have to comply with its decisions.¹⁰⁴ What if the Council disregards the question of human rights completely when it imposes its sanctions? What if the Council asks the member states to impose sanctions that violate *jus cogens*? Are they still bound to comply with the sanctions regime, or can they challenge or even disobey such a decision of the Council? One famous example by judge Lauterpacht shows that there have to be some human rights limits to the Security Council: if the Council asks member states to participate in a genocide, it becomes obvious that such a request is unacceptable.¹⁰⁵

Of course it is highly unlikely that such a scenario ever comes true. This argumentation is a bit as if to go like a bull at a gate, but it makes clear that there have to be some legal restraints to the Security Council's actions.

B. The Problem of Article 103

Article 103 of the Charter of the United Nations states that obligations under the Charter prevail over obligations under any other international agreement. It is generally accepted that decisions of the Security Council are obligations under the Charter in the sense of Article 103.¹⁰⁶ More

⁹⁹ De Wet, *supra* note 85, at 199; D. Seiderman, *Hierarchy in International Law* (2001) 100, who states that the ICCPR 'may before long, be considered generally as the authoritative expression of "fundamental" or "basic" rights.'

¹⁰⁰ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, (7th ed. 1997) 220; Art. 4 para. 2 of the ICCPR contains the non-derogable rights of this covenant.

¹⁰¹ For instance in Article 5 of the IVth Geneva Convention (Relative to the Protection of Civilian Persons in Time of War, 12 August 1949); Article 15 of the ECHR; Article 4 of the ICCPR.

¹⁰² De Wet, *supra* note 85, at 201.

¹⁰³ Compare Cameron, *supra* note 25, at 181, who is critical.

¹⁰⁴ Art. 25 UNC.

¹⁰⁵ Judge Lauterpacht, Separate Opinion, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Yugoslavia (Serbia and Montenegro))*, ICJ Reports (1993) 440, at para. 100.

¹⁰⁶ Bernhardt, 'Article 103', in B. Simma (ed.), *The Charter of the United Nations – A Commentary*, (2nd ed. 2002), Vol. II, 1295 *et seq.*; Flory, 'Article 103' in J.-P. Cot/A. Pellet (eds), *La Charte des Nations Unies* (2nd ed. 1991) 1373.

disputed is the question, whether other actions of the Council, such as recommendations and authorizations, also fall under the norm.¹⁰⁷

Another disputed problem is the question whether Charter obligations prevail over general international law. Article 103 only speaks of ‘obligations under international agreements’. After the narrow wording of the Article, general international law does not fall under its scope. But there is a strong opinion today, that the Charter also prevails over other norms of international law.¹⁰⁸ The binding of Security Council decisions to all provisions of general international law would undermine the meaning of Articles 25 and 103¹⁰⁹ and render the measures of the Council toothless. But it is still not clear, which obligations deriving from other sources of international law fall under Article 103.¹¹⁰ For instance, in case of the rights under the ICESCR the Committee on Economic, Social and Cultural Rights has stated, that the core of the rights under the Covenant must be respected even in the case of a contradicting decision by the Security Council under Chapter VII.¹¹¹

It is universally agreed that norms of *jus cogens* prevail over all other norms, including obligations to the contrary under the Charter of the United Nations.¹¹² Most norms of *jus cogens* can be found in the Charter itself.¹¹³ The Charter’s human rights clauses can be counted to the *jus cogens* provisions that are contained in the Charter.¹¹⁴ Thus Security Council decisions that contradict the Charter’s own human rights provisions and other *jus cogens* norms cannot prevail under Article 103.¹¹⁵ When the Security Council imposes sanctions on individuals that clearly

¹⁰⁷ See for a discussion of this question Kolb, ‘Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?’, 64 *ZaöRV* (2004) 21 *et seq.*

¹⁰⁸ Bernhardt, *supra* note 106, at 1298 *et seq.*

¹⁰⁹ N. Meyer-Ohlendorf, *Gerichtliche Kontrolle des Sicherheitsrates der Vereinten Nationen durch den Internationalen Gerichtshof* (2000) 142.

¹¹⁰ Kolb, *supra* note 107, at 22.

¹¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 8*, 12 December 1997, E/C.12/1997/8, para. 7: ‘The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State’.

¹¹² Flory, *supra* note 106, at 1377; Kolb, *supra* note 107, at 33.

¹¹³ Macdonald, ‘The Charter of the United Nations and the Development of Fundamental Principles of International Law’, in B. Cheng/E. D. Brown, *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday* (1988) 202: ‘Given the generality and comprehensiveness of the Charter, it is not easy to imagine a principle of *jus cogens* that is not mentioned or at least implied in the document.’

¹¹⁴ Seiderman, *supra* note 99, at 99.

¹¹⁵ Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 590 *et seq.*; Fischer-Lescano/Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of

violate human rights which have attained *jus cogens* status, the implementing states are not bound to comply with the relevant resolution under Articles 25 and 103 of the Charter.

As seen before, several human rights can be violated by Security Council decisions. But which of these rights prevail over the provision of Article 103 UNC? The right to life is among the non-derogable rights of the ICCPR¹¹⁶ and can be counted to the *jus cogens*.¹¹⁷ Therefore in the unlikely cases where an individual's life is threatened by the Security Council's sanctions the implementing states can derogate from their implementing duty.

A more central question is whether the right to a fair trial and access to court prevails over Article 103 UNC. Affected individuals who are unable to challenge Security Council action against them, cannot assert the violation of other human rights. It is therefore essential for them to be able to obtain some kind of effective review of their situation. Since the Security Council action excludes all forms of challenging its measures before some form of independent tribunal that satisfies the standards of the ECHR and the ICCPR, 'the very essence of the right of access to court is impaired'.¹¹⁸ Even though Article 14 of the ICCPR is not included in the list of non-derogable rights of Article 4 paragraph 2 of the ICCPR, its core must remain untouchable even to the Security Council.¹¹⁹ Judicial guarantees relating to due process can even be counted to the *jus cogens*.¹²⁰

C. Effective Review

Reviewing bodies must have the power to deal with the cases before them in an effective manner.¹²¹ A review is effective when a judicial body can fully review the factual and the judicial grounds of the case.¹²² In its pragmatic approach to the new sanctions regime in Iraq, Switzerland has opened such a procedure for individuals whose funds are ordered to be frozen. The appeal to the federal court¹²³ satisfies the standards of an effective review. Under the discussed

Global Law', 25 *Michigan Journal of International Law* (2004) 1038; see also Judge Lauterpacht, *supra* note 105, at para. 100: 'The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*.'

¹¹⁶ Art. 4 para. 2.

¹¹⁷ De Wet, *supra* note 85, at 201.

¹¹⁸ Cameron, *supra* note 25, at 195.

¹¹⁹ Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant* (ICCPR), 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 6: 'In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.'

¹²⁰ Seiderman, *supra* note 99, at 85.

¹²¹ *Cruz Varas v. Sweden*, ECHR (1991), Series A, No. 201, 99: '[I]t flows from the very essence of this procedural right that it must be open to individuals to complain of alleged infringements of it in Convention proceedings. In this respect also the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory'.

¹²² M. Schefer, *Die Kerngehalte von Grundrechten* (2001) 521.

¹²³ Art. 4 of the Freezing Regulation, see *supra* note 80.

procedure¹²⁴ the Swiss federal court enjoys full cognition (factual and judicial)¹²⁵ and could even review the Security Council resolution that forms the base of the freezing order. So far, no such appeal has been made. But due to the delicate and political nature of the problem it is probable that the Swiss federal court would examine such a matter with judicial self-restraint.

Switzerland is not the only state where procedures are available to individuals whose rights might be violated by Security Council action. It has been observed by a monitoring team of the 1267-committee, that around the world at least 13 lawsuits have been filed by affected individuals and entities.¹²⁶ The litigants generally did not challenge the Security Council resolutions directly, but instead acted against the implementing states, alleging human rights violations. At least five cases that challenge the implementation of the Security Council sanctions in the European Union are pending before the Court of First Instance of the European Court of Justice, and in a number of states proceedings are pending before national courts.¹²⁷ It appears that so far, no court has invalidated a listing or a national or regional implementation. The examples show, that several states have found a way to deal with some of the human rights problems they face. The Security Council is aware of such proceedings but has not acted against them.

D. Unilateral State Action

When a state determines that complying with a decision of the Security Council would violate fundamental human rights or other peremptory norms of international law, it should always inform the Council before taking unilateral action.¹²⁸ If every state decides for itself which decisions of the Security Council are illegal, the instruments under Chapter VII will erode.

When the Security Council imposes sanctions, it is dependent on all states to implement its decisions. The member states have a legitimate interest that the Security Council acts within the legal limits of the Charter, to which they have consented.¹²⁹ The Security Council has always had problems with the effectiveness of its sanctions. The major reason is the reluctance of many states to comply with the decisions of the Council.¹³⁰ Whenever political considerations of the implementing states (such as national security) stand in the way, sanctions are being

¹²⁴ Verwaltungsgerichtsbeschwerde, Art. 97 *et seq.* OG (Bundesgesetz über die Organisation der Bundesrechtspflege, SR 173.110).

¹²⁵ Art. 104 and 105 OG.

¹²⁶ Second report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities, 15 December 2004, S/2005/83, para. 50.

¹²⁷ A list of the pending cases is available in Annex II of the second report of the Monitoring Team, *supra* note 126.

¹²⁸ Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences', 1 *Max-Planck Yearbook of United Nations Law* (1997) 106 *et seq.*

¹²⁹ Matsui, 'The Gulf War and the United Nations Security Council', in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1994) 511.

¹³⁰ Conlon, 'The UN's Questionable Sanctions Practice', 53/54 *Law and State* (1996) 136.

circumvented or violated.¹³¹ Generally the Security Council does not react to violations of its sanctions regimes.¹³²

It is therefore in the interest of the Security Council to respect the legal limits of the Charter and other central provisions of international law. The effectiveness of its sanctions depends heavily on the perception of the implementing states. Member states must have the possibility to refuse the implementation of an illegal Security Council decision – but only as a last resort.¹³³

In order to allow a state to use this right of last resort to refuse the implementation of a Security Council decision, certain conditions have to be fulfilled. Such conditions could be the following: The state has to protest against the alleged illegality of a Security Council decision and give the Council enough time to react. The violation of human rights through the Council action must be severe. And there has to be a certain unity among a large number of states – the opinion of only one state is not sufficient.

One possible application for this right of last resort is a violation of relevant Security Council resolutions by granting the right to a fair trial to individuals affected by sanctions of the Council. The procedural rights deficit of Security Council sanctions against individuals has been discussed for years, and yet the Council has not reacted in a satisfying way. The absence of any procedural guarantees in some sanctions regimes of the Council affects the core of the right to a fair trial. I therefore argue that public international law allows states faced with this human rights problem to grant affected individuals some form of effective judicial review, like Switzerland has done in the case of the sanctions against individuals in Iraq.

¹³¹ For instance, the United States openly violated the Security Council sanctions against Rhodesia by importing chrome ore due to ‘reasons of national security’, see *Statement by Ambassador Phillips*, 11 ILM (1972) 680 *et seq.*

¹³² Conlon, *supra* note 130, at 139.

¹³³ Angelet, ‘Protest Against Security Council Decisions’, in K. C. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (1998) 281; de Wet, *supra* note 93, at 280.