



# Falling Short

## UN Security Council Delisting Procedural Reforms Before European Courts

Antonios Tzanakopoulos

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**Sanctions & Security** Research Program

Enhancing sanctions as instruments of international peacemaking





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## Overview of Challenges to the 1267/1989 Regime

Individually targeted anti-terrorist measures imposed on UN member States by virtue of Security Council Resolution (SC Res) 1267 (1999) and subsequent resolutions have increasingly been challenged before a number of national and regional international courts.<sup>1</sup> These attacks commenced in earnest in 2001–2 and led to court-imposed disobedience of the measures for the first time in 2008, when the European Court of Justice (ECJ) annulled European Community (EC) implementing measures in the *Kadi* case.<sup>2</sup>

In response to judicial challenges to the measures before various domestic courts and to augmenting criticism of the 1267 regime,<sup>3</sup> the Security Council introduced a major reform of the process for listing and delisting in SC Res 1904 (2009), which, inter alia, established an Office of the Ombudsperson with independent investigative and recommendatory powers in the delisting process.<sup>4</sup> SC Res 1989 (2011) further developed the process, notably by providing that measures against a designated individual or entity cease quasi-automatically 60 days after the Ombudsperson has recommended delisting, unless the Sanctions Committee decides by consensus to retain such measures.<sup>5</sup>

SC Res 1904 introduced its delisting process reforms in time for their consideration by domestic courts in a number of cases: in *Kadi II* before the European Union (EU) courts,<sup>6</sup> in *Ahmed* before the United Kingdom Supreme Court,<sup>7</sup> and in the complaint by *Nada* against Switzerland before the European Court of Human Rights (ECtHR).<sup>8</sup> This report examines the manner in which challenges to Security Council sanctions are mounted in domestic courts. Such courts can point to no apparent basis on which to exercise jurisdiction over the UN or its Security Council. Specific cases are discussed in section II below.

The report focuses on the concept of ‘effective judicial protection,’ which domestic and regional international courts seem to require before they will allow any deference to procedures at the UN level. It then discusses the implications of the relevant judgments for the ability of European States to continue to comply with Security Council measures imposed under the 1267/1989 regime, and concludes by setting out the prospects for the Office of the Ombudsperson in view of the recent jurisprudence discussed in the paper.

Most challenges against 1267 sanctions in domestic courts have not targeted the relevant Security Council resolutions directly. In order

to circumvent the lack of jurisdiction of domestic courts to directly pronounce upon UN conduct, including Security Council decisions, the attacks are ‘collateral,’ focusing on domestic measures implementing the SC-imposed sanctions. Domestic courts have only entertained challenges against SC-imposed measures when these are collateral, and have focused on reviewing the domestic implementing decision under ‘domestic’ law,<sup>9</sup> while arguing that the review does not affect the hierarchy and content of obligations of States under international law.

In those cases where domestic courts review domestic measures implementing 1267 sanctions under domestic law, they find them problematic primarily on account of the lack of respect for the right of fair trial/ due process as guaranteed in the relevant domestic (constitutional) law, in particular as regards the right of access to a court and the right to an effective remedy. In all such cases, domestic courts make reference to the remedies available at the international level (i.e., a level other than that of the partial legal system in which the relevant court is operating), and they leave open the possibility of eventually deferring to the remedies available at the international level. This is done by adopting what is known as the ‘*Solange* argument’ (or reasoning), first developed by the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) in a series of decisions regarding the domestic implementation of obligations binding on Germany under EU (then European Economic Community, EEC) law.<sup>10</sup>

In *Solange I* the BVerfG decided that *as long as* the (then) EEC had not introduced human rights protections equivalent to those of the German Basic Law (Grundgesetz, the Constitution) at the EEC level, the German courts would review EEC acts for compliance with these basic human rights protections.<sup>11</sup> In *Solange II* the BVerfG found that the EEC had in the meantime introduced such equivalent protection and thus German courts would in the future abstain from review of EEC acts, while retaining a residual right to reestablish such review if protection dropped below the level of being equivalent.<sup>12</sup> The *Solange* reasoning was adopted by the ECtHR in cases dealing with State action in implementation of decisions or obligations under the constitutive instruments of international organizations (in its *Solange II* incarnation).<sup>13</sup> It was also implicitly adopted, in its *Solange I* incarnation, by the ECJ in *Kadi* and by the General Court of the EU (formerly the Court of First Instance) in *Kadi II*, as well as by the UK Supreme Court in *Ahmed* (see sections II and III below). In line with the *Solange* argument, domestic courts will continue to review domestic implementing measures of 1267 sanctions *as long as* the procedures for relief available at the UN level do not meet standards of ‘effective judicial protection’.



## Office of Ombudsperson in Domestic Court Decisions

The first domestic court decision in which SC Res 1904 reforms could be taken into consideration was the UK Supreme Court's January 2010 judgment in the *Ahmed* case.<sup>14</sup> The case reached the Supreme Court on appeals from two separate cases before the Court of Appeal and the High Court respectively, where domestic measures implementing the sanctions under both the 1267 and the SC Res 1373 (2001) regime had been challenged for violating the constitutionally protected right to a fair trial.<sup>15</sup> The Supreme Court, following to some extent the reasoning of the ECJ in *Kadi*, struck down the domestic measures implementing the 1267 sanctions. At the same time, the Supreme Court recognized the implications its decision would have for the UK, in terms of the State's ability to comply with the sanctions regime (see further section IV).

In the process of deciding the case, the Supreme Court heard argument on the reforms introduced at the UN level by SC Res 1904. The provision for an Office of the Ombudsperson was argued to have substantially changed the situation at the UN level, but the Supreme Court did not accept that it had the effect of introducing the changes required for satisfying the right to a fair trial under UK law. In this connection, Lord Hope (with whom Lord Walker and Lady Hale agreed) remarked that,

While these improvements [i.e. the establishment of an Office of the Ombudsperson to function as provided for in SC Res 1904] are to be welcomed, the fact remains that there was not when the designations were made, *and still is not, any effective judicial remedy*.<sup>16</sup>

Lord Rodger (with whom Lady Hale agreed) further remarked that,

*even after the reforms introduced in the last two years, there is little that individuals can do to launch an effective challenge to their listing after it has occurred. The Committee is not obliged to publish more than a narrative summary of reasons for their listing. There is no appeal body outside the Committee to which they can complain. The individuals themselves cannot apply directly to the Committee to have their names removed from the list. Such requests now go to the Ombudsperson. And, if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaida may be tenuous at best.*

182. *The Security Council is a political, not a judicial, body – as is the 1267 Committee. And it may be that the Committee's procedures are the best that can be devised if it is to be effective in combating terrorism. But, again, the*

harsh reality is that mistakes in designating will inevitably occur and, when they do, the individuals who are wrongly designated will find their funds and assets frozen and their lives disrupted, *without their having any realistic prospect of putting matters right.*<sup>17</sup>

Finally, Lord Mance echoed the other Law Lords in his assessment of SC Res 1904 improvements:

The most recent Resolution 1904 (2009) adopted on 17 December 2009 reflects in a number of respects concerns expressed about the effects of the United Nations Resolutions and the Committee's procedures; it reverses the onus by deciding that 'the statement of case shall be releasable upon request, except for the parts a Member State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing' to be published on the Committee's website (para 11); *and it provides for an Ombudsperson* ('an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions') to assist the Committee in delisting requests. *But nothing in it affects the basic problems that there exists no judicial procedure for review and no guarantee that individuals affected will know sufficient about the case against them (or even know the identity of the Member State which sought their designation) in order to be able to respond to it.*<sup>18</sup>

The position taken by the Law Lords in *Ahmed*, i.e. that the adoption of SC Res 1904 and the establishment of an Office of the Ombudsperson did not provide an effective judicial remedy for those targeted by 1267 sanctions, was also adopted—and in part elaborated upon—by the General Court of the EU in *Kadi II*. This was a challenge by Kadi against new EU measures implementing the 1267 sanctions against him, adopted in the aftermath of the European Court of Justice's decision to strike down the first EU (then EC) implementing measures in 2008. During argument before the General Court of the European Union (GCEU), counsel for the Commission and the interveners sought to rely on the reformed procedures introduced by virtue of SC Res 1904.

The GCEU, however, confirmed the position taken by the ECJ in *Kadi* that 'in circumstances such as those of this case, [the Court's] task is to ensure – as the Court of Justice held at paragraphs 326 and 327 of *Kadi* – “in principle the full review” of the lawfulness of the contested regulation in the light of fundamental rights, without affording the regulation any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.'<sup>19</sup> It went on to state,

[t]hat must remain the case, at the very least, *so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guar-*

*antees of effective judicial protection*, as the Court of Justice considered to be the case at paragraph 322 of *Kadi* (see also, to that effect, point 54 of the Opinion of Advocate General Poiares Maduro in that case).

128. The considerations in this respect, set out by the Court of Justice at paragraphs 323 to 325 of *Kadi*, in particular with regard to the focal point, *remain fundamentally valid today, even if account is taken of the 'Office of the Ombudsperson', the creation of which was decided in principle by Resolution 1904 (2009) and which has very recently been set up*. In essence, *the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee*. Furthermore, *neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee*. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list). *For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee* (see also, in that regard, the observations made at paragraphs 77, 78, 149, 181, 182 and 239 of the UK Supreme Court judgment in *Ahmed and Others* and the considerations expressed in Point III of the Ninth Report of the Monitoring Committee).<sup>20</sup>

In *Nada* before the Grand Chamber of the ECtHR, the respondent State mentioned its efforts to improve the 1267 sanctions regime and cited the establishment of the Office of the Ombudsperson as evidence of such improvement.<sup>21</sup> The Court briefly described the procedure for delisting and characterized SC Res 1822 (2008) and 1904 (2009) as a 'subsequent reinforcement' of the notification and delisting procedure in the section where it sets out the 'Relevant Domestic and International Law and Practice.'<sup>22</sup>

However, the Court did not refer to the Office of the Ombudsperson and SC Res 1904 or 1989 in the main part of its judgment in the case. This was because *Nada* had been removed from the Consolidated List in September 2009,<sup>23</sup> three months before the adoption of SC Res 1904, and thus the introduction of the new procedure for delisting had no bearing in this case. The Court however did pronounce on *Nada's* complaint, considering that he retained the status of a 'victim' (a requirement for an application to be admissible) since his delisting was not enough to deprive him of such status. *Nada* would cease being a victim of a violation of the European Convention on Human Rights

(ECHR) only if and when national authorities *also* acknowledged (expressly or in substance) and afforded redress for the breaches of the ECHR complained of.<sup>24</sup> A parallel development is noteworthy in this connection. The EU Commission brought an appeal against the *Kadi II* decision of the GCEU on 13 December 2010.<sup>25</sup> The appeal is still pending as of this writing, but *Kadi* was delisted on 5 October 2012<sup>26</sup>—this constitutes the flip side of the situation in *Nada*, and it remains to be seen whether the Court of Justice of the EU will entertain any admissibility objections in this regard.

### ‘Effective Judicial Protection’

A common feature of the three cases mentioned above, the only ones to have either struck down domestic implementing measures of 1267 sanctions (*Ahmed and Kadi II*) or to have found States internationally responsible for the implementation of such measures (*Nada*), is the consideration that the individuals in those cases had no effective remedy at their disposal. The lack of such an effective remedy was due to the fact that delisting procedures of the 1267 sanctions regime did not meet the standard of ‘effective *judicial* protection,’ even after the improvements introduced in late 2009. At the domestic level, the executive branch would argue that it had no independent power to vary the content of the domestic implementing measures, as these were strictly conditioned by the terms of the relevant Security Council decisions. On the international (UN) level, the ‘remedies’ available were clearly found lacking when compared with domestic law requirements for the protection of individuals targeted by wide-ranging and long-term sanctions.

In *Ahmed*, the Supreme Court quashed the relevant domestic orders implementing 1267 sanctions as being *ultra vires* the relevant UK legislation which allows for the implementation of UN sanctions in the domestic legal order (the UN Act 1946). The latter was not read to have allowed the executive to override fundamental rights protected under UK law—such as the right to a fair trial. Lord Hope noted that,

there is nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provides for basic procedural fairness. Some steps have been taken to address this problem, but there is still much force in these criticisms.<sup>27</sup>

Individuals designated by the Security Council under the 1267 regime and the UK orders implementing it were denied their right to have the

designation judicially reviewed:

seeking a judicial review of the Treasury's decision to treat him as a designated person will get him nowhere. G answers to that description because he has been designated by the 1267 Committee. What he needs if he is to be afforded an effective remedy is a means of subjecting that listing to judicial review. This is something that, under the system that the 1267 Committee currently operates, is denied to him.<sup>28</sup>

Lord Rodger, in turn, was

struck by the traumatic consequences of implementing SCR 1267: the long-term radical restrictions upon the lives of those designated by the Sanctions Committee without there being afforded any judicial means of challenging that designation.<sup>29</sup>

These 'judicial means of challenging' a designation were understood by Lord Mance as an 'effective right to access to a court or judicial tribunal to challenge the basis upon which [an individual or entity] had been categorised as associates of Al-Qaida...with the limitations on their rights...that followed from that categorisation.'<sup>30</sup> And no such means were afforded in the instance as 'the Sanctions Committee [does not equate] with a court or judicial tribunal', despite the steps taken to address relevant concerns in, inter alia, SC Res 1904.<sup>31</sup> Provision of any means by which designated individuals could challenge the justification for their designation before any judicial tribunal or court would have allowed the Supreme Court to let the domestic implementing measures stand, irrespective of whether such means were provided 'at a domestic or international level.'<sup>32</sup>

In *Kadi II*, the GCEU confirmed, despite some reservations,<sup>33</sup> that it must ensure 'in principle the full review' of the contested domestic implementing act in light of fundamental rights, which 'must remain the case, at the very least, *so long as* the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection', a situation not altered by the new procedures put in place by SC Res 1904.<sup>34</sup> The reasons for which the Ombudsperson procedure was held to be insufficient were 'at least' because (i) there was 'no independent and impartial body responsible for hearing and determining, *as regards matters of law and fact*, actions against individual decisions taken by the Sanctions Committee'; (ii) removal from the List *still required consensus* within the Committee; and (iii) the disclosure of evidence continued to be a matter entirely within the discretion of the State which proposed inclusion to the list, with no mechanism to ensure that sufficient information would be made avail-

able to the designated person to allow for effective defense.<sup>35</sup> Furthermore, the GCEU rejected the arguments of the Commission and interveners, who were seeking to limit the scope of review by EU courts to the apparent basis for the adoption of the domestic implementing measures, and decided that the review, which according to the ECJ should be ‘in principle full’, should extend to ‘the evidence and information on which the findings made in the measures are made.’<sup>36</sup>

As concerns the substance of the complaint, the GCEU found that,

the few pieces of information and the imprecise allegations in the summary of reasons appear *clearly insufficient* to enable the applicant to launch an effective challenge to the allegations against him so far as his alleged participation in terrorist activities is concerned.<sup>37</sup>

The GCEU went further to expressly endorse Kadi’s view that the ‘summary contains a number of general, unsubstantiated, vague and unparticularised allegations against the applicant. No evidence to support those serious allegations is enclosed. In those circumstances, it is impossible for the applicant to rebut the allegations against him and effectively to make known his views in response.’<sup>38</sup>

The Grand Chamber of the ECtHR in *Nada* cited both the ECJ in *Kadi* and the UK Supreme Court in *Ahmed* in the process of finding a breach of Article 13 ECHR, which guarantees the right to an effective remedy for Convention violations.<sup>39</sup> The Court’s assessment of the merits of the Article 13 complaint is limited to less than two pages. About half of those recount settled case law of the Court concerning the right to an effective remedy for ECHR violations: this should be provided at the national level, allow for dealing with the substance of the complaint *and* for granting appropriate relief, and should not be ‘unjustifiably’ hindered by the acts or omissions of the authorities of the State.<sup>40</sup> Even if *Nada* could (and did) petition the Swiss authorities to have his name removed from the Swiss list (mirroring the 1267 list), the authorities did not examine the merits of his complaints alleging violations of the Convention.<sup>41</sup> In parallel, the Court noted that there was no effective remedy at the UN level, ‘even after [delisting procedure] improvement by the most recent resolutions’ (which for this case did not include SC Res 1904 seq), by admission of the Swiss Federal Court itself.<sup>42</sup> In effect the ECtHR seems to impose an obligation on Switzerland (and its courts) to review domestic measures implementing 1267 sanctions for compliance with ECHR rights (as these may be reflected in substance in domestic law) and to offer effective remedies (such as striking down of the domestic measures or removal of the interested individual or entity from the scope of those measures).

## Implications for European Compliance

The implications of these decisions for the ability of States to comply with Security Council sanctions under the 1267/1989 regime (and potentially under other regimes with less ‘advanced’ procedures for delisting) are far-reaching. There is little doubt that the imposition by domestic and regional international courts of an obligation on domestic executives and courts to provide effective judicial remedies at the national level for those targeted under the 1267/1989 regime results in a breach of those States’ international obligations under Article 25 of the UN Charter.<sup>43</sup> The GCEU in *Kadi II* came as close as possible to explicitly acknowledging this,<sup>44</sup> as did individual Law Lords of the UK Supreme Court.<sup>45</sup>

How the EU courts, the ECtHR, and the UK Supreme Court have achieved this outcome is a question dealt with in detail in the works cited in note 43 and briefly summarized in section I above. The basic move is a radical disengagement of the domestic implementing measure from the Security Council decision that strictly conditions it. In fact, the ECtHR explicitly acknowledges that the Charter imposes an ‘obligation of result’<sup>46</sup> (which in the instance must be the result demanded by the Security Council, i.e. that the individuals and legal entities identified by the Security Council must be made subject to the measures provided for by the Security Council), yet seems unperturbed that any meaningful ‘effective remedy’ at the national level will have the effect of putting the execution of such obligation of result in extreme danger. This radical disengagement, which the courts pretend is legitimate because the Charter does not impose any particular method of implementation of Charter (and Security Council) obligations, allows the domestic measures to be reviewed for conformity with domestic law—irrespective of the fact that such review may well result (as it has in the cases here discussed) in the violation of the obligation under the Security Council decisions and the Charter.

Effectively, domestic and regional international courts are forcing disobedience upon their States, whether the UK (in the case of the UK Supreme Court), the 27 member States of the EU (in the case of the EU courts), or the 47 member States of the Council of Europe (in the case of the ECtHR). The recent *Nada* decision of the ECtHR Grand Chamber takes the wave of potential enforced disobedience to a whole new level, since it now covers almost one quarter of the UN membership. The last time a similar number of States decided to disobey Security Council sanctions happened when the (then) Organization of African

Unity decided to stop implementing sanctions against Libya in 1998—with the concomitant result that the sanctions were quickly suspended.

## Prospects for the Office of the Ombudsperson

The decisions discussed here clearly demand that States introduce an accessible and effective judicial procedure at the domestic level for those targeted by 1267/1989 sanctions to have their designations reviewed in full. For such procedure to be both accessible and effective, the individual attacking her designation (or at the very least the domestic court) will need to have access to the evidentiary material that led to the designation. Given that such material is not currently made available either to the targeted individual or to the domestic court, domestic implementing measures will continue to be (partially) annulled by domestic courts for failure to respect the fundamental right to a fair trial in its incarnations of access to a court and to an effective remedy.

The three courts have implied, more or less clearly, the possibility that they will adopt a deferential stance towards implementation of the 1267/1989 sanctions if an appropriate procedure (which includes guarantees of effective judicial protection) is introduced at the UN level. The ECtHR has settled jurisprudence (*Bosphorus* and cf *Waite and Kennedy*) according to which it will defer to the decisions (or even generally to the partial legal order) of an international organization if the latter guarantees ‘equivalent protection’ of Convention rights. Even though this was not discussed in *Nada*, the reference of the Court to the remedies available at the UN level in para 211 of its judgment clearly points towards potential future deference. The discussion of the remedies available at the UN level by the UK Supreme Court also points in the same direction.

The courts have also indicated what they would consider to be an adequate procedure deserving of deference. The requirements have been most clearly set out by the GCEU in *Kadi II*, but all decisions converge on the basics (see section III above). Taking the more detailed list of the GCEU as the common denominator, a UN level procedure would require:

*(i) an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. The Office of the Ombudsperson as currently set up does not seem to fulfil this*



requirement, as both the GCEU and the UK Supreme Court have confirmed. This is presumably not because the Office of the Ombudsperson is not an independent and impartial body, which it is expressly set up to be under SC Res 1904, but rather because it may not *determine, as regards matters of fact and law*, actions against individual decisions taken by the Sanctions Committee. This is what Lord Mance should be understood to mean when he consistently refers to ‘a court or a judicial tribunal’. SC Res 1989 has not introduced any change in this regard. The Ombudsperson presents to the Sanctions Committee ‘observations’ and a ‘recommendation’ regarding the delisting of individuals or entities that have requested their removal from the Consolidated List, but does not ‘determine’ the actions of the applicants against the decisions taken by the Sanctions Committee ‘as regards matters of fact and law’. The Ombudsperson merely gathers information, engages in dialogue and compiles a Comprehensive Report based on available information (see Annex II of SC Res 1989).

*(ii) the removal from the List being independent of consensus within the Committee.* This relates to some extent to point (i) above: a body competent to determine actions against individual decisions of the Sanctions Committee, even more so ‘a court or judicial tribunal’, would have compulsory, rather than merely recommendatory powers. SC Res 1989 introduces significant change in this regard, by reversing the consensus requirement within the Sanctions Committee: in the face of a recommendation by the Ombudsperson to remove an individual or entity from the List, the Sanctions Committee must decide by consensus to *retain* the listing, otherwise delisting follows quasi-automatically 60 days after the completion of consideration by the Sanctions Committee of the Ombudsperson’s Comprehensive Report (para 23). However, in the final analysis delisting remains a matter of consensus within the Committee. While the courts have not yet pronounced on the significance of the procedural change brought about by SC Res 1989, it is quite possible that they might find it insufficient. This is particularly so given that the Chair of the Sanctions Committee may, at the request of any member of the Committee, remove the question of delisting to the Security Council, where the normal decision-making procedure, including the right of veto, applies (*ibid*).

*(iii) the disclosure of evidence as a matter of obligation of the designating State or the introduction of a mechanism ensuring that sufficient information would be made available to the designated person (or the independent and impartial body) in order to allow for effective defense.* This remains the most important shortcoming of the procedure introduced by SC Res 1904. Even SC Res 1989 merely

‘strongly urges’ States to provide all relevant information to the Ombudsperson, ‘including providing any relevant confidential information, *where appropriate*’ (para 25, emphasis added). It seems that courts demand that there be an *obligation* on States to provide all relevant information *to the designated person*, while for confidential information, an *obligation* to provide those to the Office of the Ombudsperson might suffice.

In conclusion, it appears that the procedures set up for delisting under SC Res 1904 and 1989, including the Office of the Ombudsperson, do not meet the standard of ‘effective judicial protection’ required by domestic courts in order for them to allow deference to the UN level. Domestic courts might be open to finding that the UN offers equivalent protection of listed individuals and entities and their fundamental rights even if UN procedures do not meet the precise requirements set out in the paragraphs immediately above. But these procedures would have to be substantially amended to address the most important concerns, in particular the last point on the disclosure of evidence.

## NOTES

<sup>1</sup> These will be called collectively ‘domestic’ courts in the remainder of this paper. Even though the term is not strictly accurate, as references are made to jurisprudence of courts set up under regional international treaties (such as the EU treaties and the European Convention of Human Rights), it is convenient and signifies decisions by courts set up under partial legal systems, whether national or international.

<sup>2</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

For an analysis of challenges brought against the 1267 sanctions regime up until 2010 (including analyses of some of the cases discussed in this paper) see generally Antonios Tzanakopoulos, ‘Domestic Court Reactions to UN Security Council Sanctions’ in August Reinisch (ed.), *Challenging Acts of International Organisations before National Courts* (OUP, Oxford: 2010) 54–76. This paper draws from the latter publication in relevant parts.

<sup>3</sup> See the relevant concessions in the preambles of both SC Res 1904 (2009) and SC Res 1989 (2011).

<sup>4</sup> SC Res 1904 (2009) at paras 20–1 and Annex II.

<sup>5</sup> SC Res 1989 (2011) at para 23. See further section V of this paper.

<sup>6</sup> Case T-85/09 *Yassin Abdullah Kadi v European Commission* [2010] ECR II-5177.

<sup>7</sup> *HM Treasury v Mohammed Jabar Ahmed and Others (FC); HM Treasury v Mohammed Al-Ghabra (FC); R (on the application of Hani El Sayed Sabaei Yussef) v HM Treasury* [2010] UKSC 2.

<sup>8</sup> *Nada v Switzerland*, App No 10593/08, ECtHR Grand Chamber, 12 September 2012.

<sup>9</sup> The term ‘domestic’ is understood here in the sense introduced in note 1 above, i.e. as the law of the partial legal system to which the court belongs—e.g. UK law for the UK Supreme Court, EU law for the EU courts, and the ECHR for the European Court of Human Rights.

<sup>10</sup> See further Antonios Tzanakopoulos, ‘Judicial Dialogue in Multi-level Governance: The Impact of the *Solange* Argument’ in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart, Oxford: 2012) 185–215 with further references. The analysis in this paper also draws from this work.

<sup>11</sup> *Solange I* (1974) 93 ILR 383.

<sup>12</sup> *Solange II* (1986) 93 ILR 403.

<sup>13</sup> *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (ECtHR (GC) 2005) App No 45036/98; cf *Waite and Kennedy v Germany* (ECtHR (GC) 1999) App No 26083/94 and *Beer and Regan v Germany* (ECtHR (GC) 1999) App No 28934/95. In the latter two cases, the ECtHR relied on the existence of reasonable alternative means of protection of ECHR rights within the partial legal order of the international organization in order to accept that State compliance with obligations owed to the international organization under international law (in the instance, immunity) did not result in violations of the ECHR.

<sup>14</sup> See note 7 above.

<sup>15</sup> See *A, K, M, Q and G v HM Treasury* [2008] EWCA Civ 1187 and *Hay v HM Treasury* [2009] EWHC 1677 (Admin).

<sup>16</sup> *Ahmed*, note 7 above, para 78 (emphasis added).

<sup>17</sup> *Ibid*, paras 181–2 (emphasis added).

<sup>18</sup> *Ibid*, para 239 (emphasis added).

<sup>19</sup> *Kadi II*, note 6 above, para 126.

<sup>20</sup> *Ibid*, paras 127–8.

<sup>21</sup> *Nada*, note 8 above, para 64.

- <sup>22</sup> Ibid, para 78.
- <sup>23</sup> Ibid, para 62.
- <sup>24</sup> Ibid, para 128.
- <sup>25</sup> Case C-584/10 P, *Official Journal* C 072 of 5 March 2011 at 9.
- <sup>26</sup> See UN doc SC/10785 of 5 October 2012, available at <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm>.
- <sup>27</sup> *Ahmed*, note 7 above, para 80, quoting the Federal Court of Canada in *Abousfian Abdelrazik v Minister of Foreign Affairs and Attorney General of Canada* [2009] FC 580, at para 51. For comment on the latter case see Antonios Tzanakopoulos, 'United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v Canada* (2010) 8 *Journal of International Criminal Justice* 249–67 with further references.
- <sup>28</sup> *Ahmed*, note 7 above, para 81.
- <sup>29</sup> Ibid, para 203.
- <sup>30</sup> Ibid, para 239.
- <sup>31</sup> Ibid.
- <sup>32</sup> Ibid, para 249 (emphasis added).
- <sup>33</sup> See *Kadi II*, note 6 above, paras 115 seq.
- <sup>34</sup> Ibid, paras 126–8 (emphasis added).
- <sup>35</sup> Ibid, para 128.
- <sup>36</sup> Ibid, para 135. See further para 142: 'The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it' and para 143: 'The General Court must also ensure that the rights of the defence are observed and that the requirement of a statement of reasons is satisfied and also, where applicable, that any overriding considerations relied on exceptionally by the competent Community institution in order to justify disregarding those rights are well founded.' See further paras 145–7, which require the transmission of confidential information at the very least to the Court, if not the person concerned.
- <sup>37</sup> Ibid, para 174 (emphasis added).
- <sup>38</sup> Ibid, para 177, referring to para 157.
- <sup>39</sup> *Nada*, note 8 above, paras 212 and 213 respectively.
- <sup>40</sup> Ibid, para 207.
- <sup>41</sup> Ibid, para 210.
- <sup>42</sup> Ibid, para 211.
- <sup>43</sup> See generally Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP, Oxford: 2011) 194–7, the works cited in notes 2 and 10 above, as well as Antonios Tzanakopoulos, 'Collective Security and Human Rights' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP, Oxford: 2012) 42–70, all with further references.
- <sup>44</sup> *Kadi II*, note 6 above, paras 115 seq.
- <sup>45</sup> *Ahmed*, note 7 above, para 84 (Lord Hope) and cf expressly *HM Treasury v Mohammed Jabar Ahmed and Others (FC)*; *HM Treasury v Mohammed Al-Ghabra (FC)*; *R (on the application of Hani El Sayed Sabaei Yussef) v HM Treasury (No 2)* [2010] UKSC 5, para 13 (Lord Hope, dissenting).
- <sup>46</sup> *Nada*, note 8 above, para 176.