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**The Interfaces between the National and International
Rule of Law:
The Case of UN Targeted Sanctions**

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The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions

Machiko Kanetake*

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Abstract: The interfaces between national and international law have significantly evolved due to subject-matter overlap between national and international law. The restriction of governmental authority by the ‘rule of law’ is no exception in this regard. International scholarship has so far largely examined the *national* reception of the international rule of law. Much less recognised is the *international* perspective: namely, as to how the international rule of law understands, accepts, or resists the national rule of law. This paper examines the *international* reception of national rule of law practices within a specific regulatory context of UN targeted sanctions. Member states’ exercise of authority and the UN Security Council’s listing decisions bear resemblance to each other, which creates the conditions for the interfaces between the national and international rule of law. A series of judicial contestations formally based on the national rule of law were translated into normative, theoretical, and political forces at the international level, leading to the generation and materialisation of the principles of fairness and transparency as one of the elements of the international rule of law.

INTRODUCTION

The interfaces between national and international law are the points where the actors, norms and procedures belonging to respective legal orders interact with one another. The possibilities for the interactions between two branches of law are generated by an increasing overlap between the subject matters of national and international law.¹ The respect for human rights, investment protection, the maintenance of public health, and environmental conservation are some of those areas to which national and international law commonly extend their regulatory reach.² The restriction of governmental authority by the 'rule of law'³ is no exception to this subject-matter overlap. Both national and international law dictate how the national government ought to exercise its authority against individuals and entities within its jurisdiction.

International scholarship has so far largely examined the interfaces from the perspective of *national* rule of law; namely, as to how the national rule of law

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¹ In this paper, a 'subject-matter' is not the same as the 'substance' of law. The subject-matter denotes factual or legal scenarios which sustain the need for legal regulation, and with respect to which law extends its regulatory reach. For instance, environmental degradation or the need for environmental conservation is a broad subject-matter of environmental law. The subject-matter of the 'rule of law' is the exercise of authority by institutions in a society.

² See, e.g., William Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000); J.H.H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547 at 559–561.

³ In this paper, the 'rule of law' is defined as an umbrella notion which includes both formal and substantive requirements of the rule of law: see Section I-B-1 (Rule of Law Elements) in this paper.

understands, accepts, or resists the international rule of law.⁴ Much less recognised is the *international* perspective: namely, as to how the international rule of law understands, accepts, or resists the national rule of law.⁵ Now that General Assembly resolutions have given recognition to the rule of law at *both* the national and international levels,⁶ it is worth examining the question of how the international rule of law finds connection with domestic rule of law practices.

This paper is an attempt to explore the *international* reception of national rule of law. It examines the international side of the interfaces within a specific regulatory context concerning the decisions of the UN Security Council and its subsidiary organs. More specifically, it analyses the ‘principles of fairness and transparency’ developed in response to a series of national rule of law practices as standards which regulate the decisions of the Council and its sanctions committees regarding the designation of specific individuals as the targets of restrictive measures imposed under the Council’s economic sanctions.⁷ The principles are regarded as part of the rule of law issues at the UN. This is illustrated, for instance, by the ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law and the National and International Levels’

⁴ Existing studies reveal that the national reception of the international rule of law is multi-faceted. On the one hand, national courts proactively invoke international law, including international human rights law, to challenge the governmental acts: see E. Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102:2 *American Journal of International Law* 241 at 243. On the other hand, the extension of international law’s arms into the domestic rule of law has also invited domestic resistance: see Michael Zürn, Andre Nollkaemper & Randy Peerenboom (eds.), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge University Press, 2012); Anne Peters, ‘The Globalization of State Constitutions’ in Janne E Nijman & André Nollkaemper (eds.), *New Perspectives on the Divide Between National and International Law* (Oxford; New York: Oxford University Press, 2007) 251.

⁵ In this paper, the ‘international’ rule of law concerns *international law* regulating states, international organisations and other subjects of international law. It does *not* matter which *relations* the rule of law purports to regulate. Namely, the ‘international’ rule of law may purport to regulate not only state-to-state relations, but also government-individual relations, or the relations between international organisations and individuals: see Section I-A of this paper.

⁶ 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), at para. 134. Since 2006, the General Assembly adopts resolutions entitled ‘The Rule of Law at the National and International Levels’: see, e.g., UN Doc. A/RES/61/39 (18 December 2006).

⁷ Individuals and entities can be the specific objects of overall ‘strategic’ targets of sanctions regimes themselves, and/or ‘tactical’ targets of restrictive measures such as asset freeze and travel ban. ‘Targeted sanctions’ in this paper is used in the latter, tactical, sense.

adopted in September 2012.⁸ In the Declaration, states have first recognised that ‘the rule of law applies to all States equally, *and to international organizations, including the United Nations and its principal organs*’, and, on that basis, encouraged the Security Council to continue to ensure that ‘fair and clear procedures are maintained and further developed’.⁹

The unique feature of the targeted sanctions, that the international listing decisions leave little discretion to the national government, renders the targeted sanctions as good material for the study of the interfaces. Namely, the feature creates a situation in which international and national institutions exercise authority in a similar manner and gives rise to a subject-matter connection between the international and national rule of law. Through this example, the paper aims at illustrating normative, theoretical, and political modes through which the national rule of law practices connect with the international rule of law and ultimately bring about changes to the latter.

The paper starts by articulating the *relations* regulated by the international rule of law examined in this paper, and giving an overview of the established *elements* of the international rule of law (Section I). Based upon the assumption that the international rule of law regulating the UN is formalistic and thin, the paper examines the principles of fairness and transparency developed in response to a series of national and EU court decisions (Section II).¹⁰ While the decisions of specific national courts cannot legally alter the international rule of law beyond their limited role as part of state practice, they still connect with the international rule of law through normative, theoretical, and political points of connection between the two branches of the rule of law, as will be illustrated in Section II.

⁸ Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, adopted on 24 September 2012.

⁹ *Ibid.*, paras. 2, 29 (emphasis added).

¹⁰ Within the binary national-international classification, this paper situates the decisions of EU courts on the ‘national’ side. Apparently, the national-international classification does not sit easily with EU law which is considered as autonomous and has many distinct characters. Yet the purpose of this paper is to examine how the rule of law regulating the UN’s authority has developed through the interactions with other legal orders, and, for that purpose, I situate the decisions of the EU courts on the national side. Also, this paper is not to examine the reception of EU law under domestic law or the reception of international law under EU law.

I. THE INTERNATIONAL RULE OF LAW?

A THREE DIFFERENT RELATIONS REGULATED BY THE INTERNATIONAL RULE OF LAW AND THEIR SUBJECT-MATTER OVERLAP WITH THE NATIONAL RULE OF LAW

The rule of law refers to ‘a principle of governance’¹¹ nurtured historically in the domestic legal order.¹² The ‘national’ rule of law primarily governs the relations between the national government and individuals under its jurisdiction. While the precise scope of the governmental entities and the applicability of the rule of law to private entities which exercise *de facto* governmental authority may still be disputed, a historically embedded general idea is that the core addressee of the rule of law is the national government. With respect to the ‘international’ rule of law, however, it is by no means clear whose relations it purports to regulate in the first place.¹³ This elementary ambiguity stems from the absence of centralised governmental authority in international society, which has traditionally made the rule of law a less pressing issue therein.¹⁴

¹¹ Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616 (23 August 2004), para. 6.

¹² The modern elements of the rule of law were first formulated by A. V. Dicey. Three meanings of the rule of law developed by Dicey are: (i) the rule by regular law, and not by arbitrary power; (ii) equality before the law; and (iii) the protection of individual rights by judicial decisions: Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982) at 110–122. For the earlier roots of the rule of law, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) at 7–31 (chapters 1–2) (Greek, Roman and Medieval roots); Simon Chesterman, ‘An International Rule of Law?’ (2008) 56:2 *American Journal of Comparative Law* 331 at 334–336 (referring to Sir Edward Coke, Samuel Rutherford, and Thomas Hobbes).

¹³ In this paper, the ‘international’ rule of law concerns *international law* regulating states, international organisations and other subjects of international law. It does *not* matter which *relations* the rule of law purports to regulate. Namely, the ‘international’ rule of law may purport to regulate not only state-to-state relations, but also government-individual relations, or the relations between international organisations and individuals.

¹⁴ This no longer holds true, and the growth of international and global governance institutions has increased the importance of the rule of law at the international level, producing studies such as the NYU-based ‘global administrative law’ initiative, and the Max Planck Institute’s studies on ‘international public authority’: see Benedict Kingsbury, Nico Krisch & Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2004) 68 *Law and Contemporary Problems* 15. Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by*

Broadly, there are three levels of relations governed by the 'international' rule of law: (1) horizontal state-to-state relations, (2) vertical relations between a state and individuals, and (3) vertical relations between international organisations and individuals. (See the diagram regarding the three levels of the international rule of law.)

The focus of this paper will be on the third relation; namely, the regulation of the authority of *international organisations* exercised vis-à-vis *individuals*.¹⁵ The distinction between three different levels of the international rule of law bears significance when one considers the interfaces between the national and international rule of law. It is important because the degree of subject-matter connection between the national and international rule of law varies depending on the level of the international rule of law to which one refers.

The international rule of law is most commonly invoked for the regulation of horizontal relations between states (i.e., the relations indicated as No. 1 in the above diagram). It is also used for the regulation of vertical international relations between state and international organisations (indicated as Nos. 1a and 1b in the diagram).¹⁶ At this level, the subject-matter connection between the national and international rule of law would be the least extensive among the three. The rule of law developed in order to constrain governments within a national legal system is different from the regulation of state-to-state relations.

International Institutions: Advancing International Institutional Law (Springer, 2009).

¹⁵ See the diagram above. The focus of this paper is indicated as No.3.

¹⁶ The regulation of the authority of *states* exercised against international organisations (indicated as No. 1a), and the regulation of the authority of *international organisations* exercised against states (indicated as No. 1b in the diagram) involve many different aspects from the regulation of horizontal state-to-state relations (i.e., No. 1). The former two relations are regulated primarily by specific constitutive instruments. It is, however, not the main focus of this paper to discuss the differences between No.1 on the one hand, and Nos. 1a and 1b on the other. The focus of this paper is instead on the differences between the relations No. 1/1a/1b on the one hand, and the relations Nos. 2 and 3 involving *individuals* on the other.

While both regulate the exercise of authority by governments, they differ in terms of subjects against which authority is exercised, the substance of decisions governed by the rule of law as well as their wider legal and political contexts. The subject-matter *disconnection* renders Jeremy Waldron's observation particularly pertinent here. In this first scenario, the rule of law at the international level ought not to be constructed as protecting sovereign states and their freedom in the same manner as does the domestic rule of law for individuals and their autonomy.¹⁷ The two branches of the rule of law address very different regulatory relations.

By contrast, the subject-matter overlap between the national and international rule of law would be extensive if the latter is used for the regulation of vertical relations between a state and individuals (i.e., the relations indicated as No. 2 in the above diagram). As exemplified by the case of international human rights law, an extensive body of treaties and customary international law purport to regulate the relationships between the national government and individuals.¹⁸ In this second level of the international rule of law, the question is not so much about how the international rule of law can be more extensive through the interactions with the national rule of law, but more about how the international rule of law could and should keep distance from the national rule of law practices, leaving the latter the margin of discretion.

The international rule of law examined in this paper (indicated as No. 3 in the above diagram) can be situated in the middle of these two scenarios. There is a subject-matter *disconnection* between the national and international rule of law in terms of the kind of *institutions* which exercise authority, in that the former regulates the government, and the latter addresses international organisations. Yet the subject-matter disconnection is mitigated, insofar as the exercise of

¹⁷ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22:2 *European Journal of International Law* 315. See also Janne E. Nijman, 'Non-State Actors and the International Rule of Law: Revisiting the "Realist Theory" of International Legal Personality' in Math Noortmann & Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law from Law-Takers to Law-Makers* (Ashgate, 2010) 91 at 97–100 (observing that the beneficiaries of the rule of law are human individuals, and that such rule of law (perhaps inherently) has a substantive element of justice).

¹⁸ Also, the UN, the World Bank and the EU regularly provide the assistance to a government in post-conflict situations by, for instance, drafting rule of law-based constitution and legal mechanisms that support it: see Laura Grenfell, 'The UN and 'Rule-Of-Law Constitutions' (2012) *Working Paper No 16, Centre for International Governance and Justice, Canberra*.

authority by international organisations bears resemblance to the exercise of authority by national government, with respect to *subjects* against which authority is exercised, and the *substance* of decisions rendered by the institutions. The case of the UN Security Council's targeted sanctions, which I will discuss in Section II below, can be seen as one of such occasions in which the UN Security Council and its subsidiary organs exercise authority against individuals in a similar way that the national government does against those individuals.

B. THE FORMALISTIC AND THIN INTERNATIONAL RULE OF LAW

1 Rule of Law Elements

Having clarified the relations regulated by the international rule of law, the next question is its contents. Whether national or international, the rule of law is one of the lexicons about which few raise an objection as a matter of abstract ideal,¹⁹ but on which many disagree on more specific content. Attempts to give specific contents to the rule of law may be destined to find disagreements, as the concept of the rule of law constantly inspires contestation regarding its core meaning, specific requirements, and benefits that its observance brings to a society.²⁰

This paper is not to make a definitional inquiry of the rule of law. While I do not discount the controversy over the definition, this paper moves its attention to the consideration of more specific elements. In this paper, the rule of law is employed as an umbrella notion, which can cover both formal and substantive requirements.²¹ In identifying those requirements, I analytically rely upon the

¹⁹ At least within the UN fora, the rule of law as an ideal is hard to object to. It is so especially since the General Assembly recognised it in 2005 as one of the universal and indivisible core values and principles of the UN: 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), para. 119. On the rule of law initiatives within the UN, see Security Council Report, 'Cross-Cutting Report on the Rule of Law' (28 October 2011).

²⁰ See Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21:2 *Law and Philosophy* 137 at 148–159. While the 'rule of law' is linked to one's understanding about law itself, the term 'rule of law' is better regarded as a package which has its own significance separately from the definition of 'law' *per se* and the philosophical inquiry about it. See Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1 at 10–13.

²¹ The distinction between 'formal' and 'substantive' requirements was articulated by Paul Craig: Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public law* 467. The distinction was further progressively graded by Brian

major rule of law elements adopted at the national level, and see if they can be found in international legal practices. The reliance upon the national rule of law does not mean that the national rule of law is actually transferable to the international level, or that there indeed exists the overarching rule of law for national and international institutions. What the national concept provides is analytical support for ascertaining the development of the international rule of law. A drawback of the broad definition may be to dilute the distinct function of the rule of law *per se*.²² Yet this paper focuses not on the definition of the term but on the aspect of whether and how specific rule of law requirements are adopted at the international level.

‘Formal’ requirements under the umbrella of the rule of law typically include: law-based decision-making (namely, the ‘rule by law’ requirement),²³ democratic and participatory decision-making,²⁴ and certain non-substantive qualities of the law, such as non-retrospectivity, openness, and certainty of law.²⁵ ‘Substantive’ elements, on the other hand, require the content of the law and law-based decisions to conform to justice and the protection of individual rights.²⁶ Each element can of course be defined in a number of different ways.²⁷

Z. Tamanaha, in accordance with the ‘thinner’ and ‘thicker’ axes: Tamanaha, *supra* note 12 at 91, and chapters 7–9.

²² See Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195 at 195–196, 210–211; Craig, *supra* note 21 at 468–471, 487 (observing that Raz and Dworkin seem to agree on this point).

²³ Dicey, *supra* note 12 at 110–113 (first requirement). See Chesterman, *supra* note 12 at 342 (a ‘government of laws’ as the first core definition of the rule of law).

²⁴ See Tamanaha, *supra* note 12 at 91, 99–101. In addition to these three requirements, one may also add some other formal elements, such as the equality before the law, the independence of the judiciary, and the access to courts. See Chesterman, *supra* note 12 at 342 (the second and third core definition); Raz, *supra* note 22 at 200–201 (fourth and seventh principles).

²⁵ Raz, *supra* note 22 at 198–199 (first principle); Tamanaha, *supra* note 12 at 93–99.

²⁶ See Tamanaha, *supra* note 12 chapter 8 (substantive theories). On the relationships between formal and substantive elements, see R. P. Peerenboom, ‘Varieties of Rule of Law: An Introduction and Provisional Conclusion’ in R. P. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S* (London; New York: Routledge, 2004) 1 at 5–6 (observing that a state’s adoption of a formal conception of the rule of law reflects a particular conception about substantive elements).

²⁷ For instance, the ‘rule by law’ requirement can be met by every modern state if it only required (whatever) laws to be adopted. See Tamanaha, *supra* note 12 at 92–93; Raz, *supra* note 22 at 197. By contrast, if it is contrasted with the rule by ‘arbitrary power’ as Dicey did,

One requirement can also be both formal and substantive. Democracy, for instance, could be defined procedurally as popular election, or more substantively as the respect for human rights.²⁸

2 Traditional Elements of the International Rule of Law

The application of these rule of law elements to the case of the UN and its peace and security arm at the international level would expose the formal and thin features of the international rule of law. It is well-established that the 'rule by law' element applies to international organisations, including the UN. The decisions of the UN and its organs are ruled by the UN Charter as a constituent instrument. As the International Court of Justice (ICJ) affirmed this at the outset of the UN, the 'political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations of its powers'.²⁹ The same was reconfirmed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* (1995), in which the Tribunal stated 'neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)'.³⁰

Nevertheless, first, this 'rule of law' requirement is a formalistic one in that it does not exclude the arbitral exercise of power.³¹ Also, the constitutive instrument itself provides wide discretion to the UN organs, especially to the Security Council. By not referring to the 'principles of justice and international law' in the first part of Article 1(1) of the UN Charter regarding collective measures, the Charter failed short of constraining the exercise of Chapter VII

it may serve to restrict the use of public powers for private ends. See Dicey, *supra* note 12 at 110, 120. See Raz, *supra* note 22 at 203.

²⁸ See Brett Bowden & Hilary Charlesworth, 'Defining Democracy in International Institutions' in Brett Bowden, Hilary Charlesworth & Jeremy Matam Farrall (eds.), *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations* (Cambridge; New York: Cambridge University Press, 2009) 90 at 90–100 (analysing various international statements regarding the definition of democracy).

²⁹ *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, [1948] ICJ Reports 57 at 64.

³⁰ *Prosecutor v. Duško Tadić* (Case No. IT-94-1-AR72), Appeals Chamber, Decision on Jurisdiction, 2 October 1995, para. 28 (in relation to the Council's power under Article 39 of the UN Charter).

³¹ See Chesterman, *supra* note 12 at 351.

authority by the UN Security Council to the same degree as in Chapter VI.³²

Other major formal and substantive requirements of the rule of law have yet to be established. The UN and the Security Council's decision-making is certainly not democratic, nor are they required to be democratic. One cannot realistically claim that the Council should ensure democracy with elections and equitable representation.³³ In addition, there remains a surprising degree of uncertainty as to whether the UN is bound by international human rights law which the organisation itself has promoted.³⁴

One may observe that the human rights obligation attaches *a priori* to the legal personality of international organisations, inclusive of the UN, enjoyed under international law.³⁵ However, international personality has, in principle, no predetermined content in international law.³⁶ While the UN is 'capable of possessing international rights and duties', ³⁷ this capacity does not automatically dictate what rights and obligations the Organization has.³⁸ The presumption that international organisations are born with no predestined entitlement and obligations is, of course, increasingly subject to qualification by the development of common rules on international organisations.³⁹ Yet the

³² On the drafting history of Article 1(1) of the UN Charter, see T.D. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) 26 *Netherlands Yearbook of International Law* 33 at 65–68.

³³ See R.O. Keohane, 'The Concept of Accountability in World Politics and the Use of Force' (2003) 24 *Michigan Journal of International Law* 1121 at 1136.

³⁴ Chesterman, *supra* note 12 at 352.

³⁵ August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions' (2001) 95:4 *American Journal of International Law* 851 at 858–859; Nigel D. White, *The Law of International Organisations*, 2d ed. (Manchester Univ Pr, 2005) at 217. Similarly, Henry G. Schermers & Niels Blokker, *International Institutional Law Unity Within Diversity*, 4th revised ed. (Boston: Martinus Nijhoff Publishers, 2003) at 1002; Felice Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986) at 32.

³⁶ Schermers & Blokker, *supra* note 35 at 990, 992–993; White, *supra* note 35 at 40–41.

³⁷ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Reports 174 (ICJ) at 179. The ICJ observed that 'rights and duties [of the UN] are [not] the same as those of a State': *ibid.*

³⁸ The personality refers to the capacity of a person, but his entitlement and duties requires separate scrutiny: see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999) at 75–87.

³⁹ Some examples include an *ultra vires* doctrine, the legal personality of international

variance among international organisations has so far hampered the development of substantive rules, such as human rights law, into the corps of common institutional rules.

There is a divergence of views as to whether the UN Charter, particularly Article 1(3), imposes obligations, not only to 'promote' respect for human rights, but also to 'ensure' respect for human rights *strictu sensu*.⁴⁰ The textual reading of Article 1(3) suggests that the UN organs are required to 'promote' respect for human rights, but not to 'ensure' respect for human rights.⁴¹ While subsequent practice has developed to provide greater guidance as to how the UN and its organs take into account human rights, the practice does not go so far as to suggest that the organs are formally bound by human rights law.

Overall, the international rule of law for the authority of the UN Security Council is not an empty box, but a very thin one. The only well-established rule of law element is the 'rule by law', which itself is understood in a formalistic manner. This formalistic and thin international rule of law leaves a gap between the more substantive and thicker national rule of law, and the domestic implementation of the international decisions brings a gap to the visible problem in practice, especially before domestic courts which are circumscribed both by the *national* rule of law and *international* obligations owed by their

organizations, an implied power doctrine, interpretation of constituent instruments, and a series of rules on immunities and privileges: see Dapo Akande, 'International Organizations' in Malcolm D. Evans (ed.), *International Law*, 3d ed. (Oxford: Oxford University Press, 2010) 252 at 255–276.

⁴⁰ One side observes that the compliance *strictu sensu* with human rights obligations, both under treaties and customary law, is not assumed by the Charter (i.e., obligation to promote): see Jochen A. Frowein & Nico Krisch, 'Introduction to Chapter VII' in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary*, 2d ed. (Oxford; New York: Oxford University Press, 2002) 701 at 711. The other side argues that Charter obliges the Security Council to comply with human rights established under customary law and those under major human rights treaties (i.e., obligation to ensure): see José E. Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003) 119 at 125, 129–132 (with respect to the obligations established as customary international law); Erika De Wet, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View' in Erika De Wet, André Nollkaemper & Petra Dijkstra (eds.), *Review of the Security Council by Member States* (Antwerp; New York: Intersentia, 2003) 7 at 8–14.

⁴¹ See Frédéric Mégret & Florian Hoffman, 'The UN as a Human Rights Violator - Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 314.

states.⁴²

II. THE DEVELOPMENT OF THE INTERNATIONAL RULE OF LAW: THE CASE OF UN TARGETED SANCTIONS

A INTERNATIONAL DECISIONS TO DESIGNATE INDIVIDUALS AND ENTITIES AS TARGETS OF ASSET FREEZE AND TRAVEL BAN

The decisions of the UN Security Council and its sanctions committees are some of those occasions which revealed the gaps between the substantive national rule of law and the formalistic international rule of law. Under targeted sanctions, the Council and its committees make, at the international level, the decisions which are normally undertaken by the national government.⁴³ The UN Security Council and its sanctions committees *prescribe* the status of specific individuals and entities as the targets of restrictive measures such as asset freeze and travel ban.⁴⁴ The unique feature of the sanctions regimes, which allows virtually no discretion to member states with respect to the target designation,⁴⁵ creates the resemblance between member states' exercise of authority and the UN Security Council's decision-making, and thereby giving rise to a subject-matter connection between the national and international rule

⁴² In this sense, domestic courts are therefore placed in a 'double bind': see André Nollkaemper, *National Courts and the International Rule of Law* (Oxford; New York: Oxford University Press, 2011) at 13–15.

⁴³ Targeted sanctions such as those against Al Qaeda are contrasted with the sanctions regime based upon Council Resolution 1373, under which the designation of targets is carried out by member states: UN Doc. S/RES/1373 (28 September 2001).

⁴⁴ For the details of the listing procedures, see, e.g., Clemens A Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' in Armin Bogdandy, Rüdiger Wolfrum, Jochen Bernstorff, Philipp Dann & Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions* (Springer Berlin Heidelberg, 2010) 101.

⁴⁵ It is noted that the European Court of Human Rights (ECtHR) in *Nada* (2012) considered that a state enjoyed certain 'latitude' in implementing the UN's listing decisions: see *Nada v. Switzerland* (Appl. No. 10593/08) (ECtHR Grand Chamber) (Judgment of 12 September 2012) para. 180. The ECtHR in *Nada* was able to find the violation by Switzerland of Articles 8 (right to privacy) and 13 (right to an effective remedy) of the European Convention on Human Rights on the basis that the latitude was left to the state to harmonise its international obligations under Security Council resolutions and its human rights obligations.

of law governing states and the Security Council, respectively.

Of course, the decisions to *prescribe* the specific targets and measures are *executed* not by the Council or its subsidiary organs themselves but by member states which implement the asset freeze measures under domestic law by ordering their banks to freeze the accounts of the designated individuals. Yet as far as the prescription of individual targets is concerned, the Council-led sanctions against specific non-state actors replace states' authority to choose specific individuals and entities as targets of asset freeze (and of other restrictive measures).

The UN's targeted sanctions were originally devised to mitigate adversarial humanitarian effects of comprehensive sanctions such as those introduced for Iraq in the 1990s. Since Security Council Resolution 917 for the Haiti sanctions regime,⁴⁶ it has been a common practice for the Security Council to employ targeted sanctions.⁴⁷ While the use of targeted sanctions succeeded in avoiding widespread humanitarian effects, it has brought a new controversy with respect to its disrespect for the human rights of those individuals listed by the UN.⁴⁸

⁴⁶ UN Doc. S/RES/917 (6 May 1994). For a detailed account on the Haiti sanctions, including the adoption of Resolution 917, see David Malone, *Decision-Making in the UN Security Council: The Case of Haiti, 1990-1997* (Oxford: Clarendon Press, 1998).

⁴⁷ Between 1994 and May 2012, the Council instigated eighteen sanctions targeting specific individuals and entities. (i) Haiti: S/RES/917 (6 May 1994), paras. 3, 4. (ii) Bosnian Serbs: S/RES/942 (23 September 1994), para. 14. The list was not drawn: see Final Report of the Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia, S/1996/946 (15 November 1996), para. 63. (iii) Angola: S/RES/1127 (28 August 1997), para. 4(a), (b); S/RES/1173 (12 June 1998), para. 11. (iv) Sierra Leone: S/RES/1132 (8 October 1997), para. 5; S/RES/1171 (5 June 1998), para. 5. (v) Al Qaeda and Taliban: S/RES/1267 (15 October 1999), para. 4; S/RES/1333 (19 December 2000), paras. 8, 10, 11; S/RES/1390 (28 January 2002), para. 2. In June 2011, the sanctions regime was split into two: for Al Qaeda, S/RES/1989 (17 June 2011); for Taliban, S/RES/1988 (17 June 2011). (vi) Liberia: S/RES/1343 (7 March 2001), para. 7(a). (vii) Iraq: S/RES/1483 (22 May 2003), para. 23(b). (viii) Liberia, S/RES/1521 (22 December 2003), para. 4(a); S/RES/1532 (12 March 2004), para. 1. (ix) DRC: S/RES/1533 (12 March 2004), paras. 13, 15; S/RES/1596 (18 April 2005); S/RES/1807 (31 March 2008). (x) Côte d'Ivoire: S/RES/1572 (15 November 2004), paras. 9, 11. (xi) Sudan: S/RES/1591 (29 March 2005), para. 3; cf. S/RES/1054 (26 April 1996), para. 3(b). (xii) Lebanon/Syria, S/RES/1636 (31 October 2005), para. 3. (xiii) North Korea: S/RES/1718 (14 October 2006), para. 8. (xiv) Iran: S/RES/1737 (27 December 2006), paras. 10, 12. (xv) Eritrea/Somalia: S/RES/1844 (20 November 2008); S/RES/1907 (23 December 2009). (xvi) Libya: S/RES/1970 (26 February 2011). (xvii) Taliban: S/RES/1988 (17 June 2011). (xviii) Guinea-Bissau: S/RES/2048 (18 May 2012). For the summary and analysis of each sanctions regime, see Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007).

⁴⁸ There are a number of human rights critiques regarding the Council-led sanctions. See,

Criticisms have been particularly levelled against the sanctions regime imposed against Al Qaeda instigated by Council Resolution 1267,⁴⁹ under which the targets geographically proliferated across the globe and the proliferation augmented political and legal forums to contest the listing decisions.

An assets freeze certainly has a significant impact on the listed individuals' right to property,⁵⁰ and a person's privacy, reputation and family rights.⁵¹ Despite the scale of impact on human rights, when individuals are designated as specific targets, no hearing is conducted prior to or following the designation of targets, nor are they informed of the detailed grounds for listing.⁵² No direct petition mechanisms had been institutionalised for the targeted individuals and entities claiming their non-involvement until the adoption of Council Resolution 1730 in late 2006.⁵³ The lack of procedural safeguards and the highly political nature of the designation have thus led to criticism directed against the Council for failing to ensure the right to a fair hearing⁵⁴ and the right to an effective remedy for those who are targeted by the Council and its sanctions committees.⁵⁵ Individuals are entitled to a fair hearing if the asset freeze, the deprivation of

e.g., Reinisch, *supra* note 35; Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72:2 *Nordic Journal of International Law* 159; Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford; Portland Oregon: Hart Publishing, 2004) chapter 6; Alvarez, *supra* note 40.

⁴⁹ UN Doc. S/RES/1267 (15 October 1999). In December 2000, Resolution 1333 extended the reach of the assets freeze to members of Al Qaeda: UN Doc. S/RES/1333 (19 December 2000), para. 8(c). In January 2002, Resolution 1390 further expanded the targets of the assets freeze to those 'associated with' members of Al Qaeda, and imposed a travel ban and arms embargo not limited to the territory of Afghanistan: UN Doc. S/RES/1390 (28 January 2002), para. 2. The sanctions regime was initially established against Al Qaeda and Taliban. The sanctions regime was split into two different sanctions regimes on 17 June 2011: for Al Qaeda, S/RES/1989 (17 June 2011); for Taliban, S/RES/1988 (17 June 2011).

⁵⁰ Universal Declaration of Human Rights, UN GA Res. 217A (III) (10 December 1948), Art. 17.

⁵¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR'), Article 17. See Cameron, *supra* note 48 at 159–173; Peter Gutherie, 'Security Council Sanctions and the Protection of Individual Rights' (2004) 60 *New York University Annual Survey of American Law* 491 at 499–511.

⁵² For the procedural improvement regarding the Al Qaeda sanctions regime, see Section II-D and Annex II of this paper.

⁵³ UN Doc. S/RES/1730 (19 December 2006).

⁵⁴ ICCPR, *supra* note 51, Art. 14.

⁵⁵ ICCPR, *ibid.*, Art. 2(3).

property, amounts to a 'criminal charge'⁵⁶ or if it involves the determination of a person's 'rights and obligations in a suit at law'.⁵⁷ Arguably, the longer a suspected individual remains on the list, the more likely it is that the effect of sanctions will resemble a criminal charge.⁵⁸ In order to preserve coerciveness of sanctions, the end date of restrictive measures is rarely articulated at the time when the Council adopts sanctions. This would mean that the termination of sanctions regimes themselves would be subject to the veto power of permanent Council members. Human rights criticisms have been particularly levelled against the sanctions regime imposed against Al Qaeda. Notably, in 2004, the UN High-Level Panel warned against the Al Qaeda sanctions regime's listing procedure as 'possibly violat[ing] fundamental human rights norms and conventions'.⁵⁹

B NATIONAL RECEPTION OF THE INTERNATIONAL DECISIONS

These human rights concerns which have been bypassed by the formalistic and thin international rule of law readily appeared problematic in the eyes of the guardians of the national rule of law. The Council's sanctions against Al Qaeda have invited avoidance and contestation at the national level. Some states did not formally incorporate the lists under their domestic law.⁶⁰ A series of

⁵⁶ ICCPR, *ibid.*, Art. 14(1). Compare, e.g., De Wet, *supra* note 40 at 15–16; Strengthening Targeted Sanctions through Fair and Clear Procedures: White Paper prepared by the Watson Institute Targeted Sanctions Project (Brown University), 30 March 2006, UN Doc. A/60/887-S/2006/331 (14 June 2006) (2006) at 14–18.

⁵⁷ ICCPR, *ibid.*, Art. 14(1). See Cameron, *supra* note 48 at 192, and fn. 91. Compare with Paper by the Watson Institute, *ibid.*, 14–15.

⁵⁸ See Alvarez, *supra* note 40 at 132, 134–135; Guthrie, *supra* note 51 at 503–506. See also Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/63/223 (6 August 2008) (the Special Rapporteur, Martin Scheinin, observes that the indefinite freezing of the assets amounts to a criminal punishment due to the severity of the sanction).

⁵⁹ Report of the High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc. A/59/565 (2 December 2004), para. 152.

⁶⁰ According to member state reports pursuant to Resolution 1455 (2003): see Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview' (2006) 4:5 *Journal of International Criminal Justice* 1044 at 1058. For instance, Guinea regarded the Committee's list as something that provides information, and not as a legal instrument subject to constitutional proceedings: Note Verbale Dated 20 October 2003 From the Permanent Mission of Guinea to the United Nations addressed to the Chairman of the Committee, UN Doc. S/AC.37/2003/(1455)/78 (21 October 2003), para. 2.

national court proceedings were launched by targeted individuals and entities, contesting domestic and EU law which has implemented the decisions of the UN Security Council and its sanctions committees.⁶¹ The list of reported cases is found in Annex I of this paper.

The most well-known case is *Kadi* before the EU courts,⁶² which has also shaped the fate of other similar cases in EU courts and its member states. Extensive debates have been conducted with respect to the case,⁶³ and I will not repeat the details of the decisions. The then Court of First Instance (CFI), which is now the General Court (EGC),⁶⁴ in September 2005 found itself structurally limited in carrying out the review (*'Kadi I, CFI'*).⁶⁵ The Court of Justice (ECJ) in September 2008 (*'Kadi I, ECJ'*) set aside the CFI's judgment and conducted the 'full review' by upholding the autonomy of the EU legal order based upon the 'rule of law'.⁶⁶

⁶¹ A large number of studies have been carried out on other sanctions-related cases and wider domestic court decisions contesting the exercise of authority by the Council and its subsidiary organs. For a useful overview see Christina Eckes, 'The Role of Judges Confronted with Norms from Different Origins: The Case of Counter-Terrorist Sanctions' in K.E. Joergensen & K. Laatikainen (eds.), *Handbook on Europe and Multilateral Institutions* (Forthcoming); August Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford; New York: Oxford University Press, 2011) chapter 2 (Hilpold), 3 (Tzanakopoulos), 4 (Wouters and Schmitt), 5 (d'Aspremont and Brölmann).

⁶² EU courts are apparently not the same as 'national courts', but for the purpose of this study, they are included as part of the 'national' side: see *supra* note 10.

⁶³ For a useful overview of literature on *Kadi*, see Sara Poli & Maria Tzanou, 'The Kadi Rulings: A Survey of the Literature' (2009) 28:1 *Yearbook of European Law* 533.

⁶⁴ For the purpose of this paper, I continue to use the CFI (instead of EGC) as it would be convenient to distinguish *Kadi* decisions rendered in 2005 (by the CFI) and 2010 (by the EGC).

⁶⁵ Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-03649 (CFI) (Judgment of 21 September 2005) (*'Kadi I (CFI)'*). On the CFI judgment, see, e.g., August Reinisch, 'Introductory Note to Court of First Instance of the European Communities: *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*' (2006) 45 *International Legal Materials* 77; C Tomuschat, 'Case Note on Yusuf and Kadi [2006]' 43 *Common Market Law Review* 537; Mielle Bulterman, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' (2006) 19:3 *Leiden Journal of International Law* 753; Christina Eckes, 'Judicial Review of European Anti-Terrorism Measures—The Yusuf and Kadi Judgments of the Court of First Instance' (2008) 14:1 *European law journal* 74.

⁶⁶ Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (ECJ) (Judgment of 3 September 2008) (*'Kadi I (ECJ)'*). On the ECJ judgment, see, e.g., Deirdre Curtin & Christina Eckes, 'The Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe' (2008) 5 *International Organizations Law Review* 365; Christina

The EGC in September 2010 (*Kadi II*, EGC) then followed the ECJ's decision in *Kadi I* and conducted the 'full and rigorous' review of the measures, although the EGC still voiced criticism on the formalistic divide adopted by the ECJ with respect to EU and UN legal orders.⁶⁷

What needs underlining, however, is the substantive interactions with the international rule of law governing states, and the international rule of law regulating the UN Security Council. In a formal sense, *Kadi* cases and other domestic and EU court decisions apply the rule of law under respective national and EU legal orders. However, in substance, the standards of review applied by the courts have international origins. The review standards applied by domestic and EU courts are no longer parochial national (or EU) conceptions, but often substantively formulated by international human rights law and more broadly, the international rule of law.⁶⁸

The substantive connection with the international rule of law regulating *state-individuals relations* (i.e., the relations indicated as No. 2 in the diagram appeared in Section I-A above) can be found, for instance, in *Kadi I* before the ECJ. Fundamental rights as part of the general principles of EU law with respect to which the ECJ found a violation are at least inspired or guided by international treaties, especially the European Convention on Human Rights (ECHR).⁶⁹ Similar substantive connections can be found insofar as the

Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford University Press, 2009) chapter 5; Paul James Cardwell, Duncan French & Nigel White, 'European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Joined Cases C-402/05 P and C-415/05 P) Judgment of 3 September 2008' (2009) 58:01 *International & Comparative Law Quarterly* 229; Grainne De Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2010) 51:1 *Harvard International Law Journal* 1.

⁶⁷ Case T-85/09, *Kadi v. European Commission and Council of the European Union* (EGC) (Judgment of 30 September 2010) (*Kadi II* (EGC')). See *ibid.*, para. 151 ('full and rigorous judicial review').

⁶⁸ See André Nollkaemper, 'The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20:3 *European Journal of International Law* 862 at 868–870.

⁶⁹ See Case 4/73 *Nold v Commission* [1974] ECR 491; Robert Schütze, 'Three "Bills of Rights" for the European Union' (2011) 30:1 *Yearbook of European Law* 131 at 135. The general principles do not entirely depend on the national or international origins, but are part of autonomous standards: Schütze, *ibid.* In addition, the ECJ used both general principles of EU law and the ECHR: e.g., Case C-60/00, *Carpenter* [2002] ECR I-6279; Case C-112/00, *Schmidberger* [2003] ECR I-5659. After the Lisbon Treaty, the ECHR is not only the component of general principles, but is a treaty to be acceded by the EU: The Treaty on

standards of review applied by domestic courts are based upon international human rights law.

The substantive connection with the international rule of law regulating the *UN Security Council* (i.e., the relations indicated as No. 3 in the above diagram) existed in the CFI's decision in *Kadi I* (2005). As is well-known, the CFI engaged in *jus cogens* review despite the respect that the Court itself paid to the UN Charter's primacy which structurally limited its judicial review.⁷⁰ By this engagement, the CFI applied the international rule of law standards regulating the UN's exercise of authority. The CFI has thus, in substance, a stronger connection with the international rule of law concerning the UN Security Council than with the case of the ECJ. While the ECJ, in principle, could have also considered *restrictions* imposed on the UN as part of the 'relevant rules of international law' when it interpreted a pertinent EU measure,⁷¹ the application of more substantive and thicker fundamental rights under EU law apparently rendered it unnecessary to consider international law restricting the UN itself. What is then revealed by the CFI's conclusion which upheld the validity of the contested regulation was once again the formalistic and thin character of the international rule of law regulating the UN, as contrasted with more substantive and thicker standards applied by the ECJ in *Kadi I*.

C CHARACTERISING THE POINTS OF CONNECTION: LEGAL, NORMATIVE, THEORETICAL, AND POLITICAL CONNECTIONS

European Union (TEU), Art. 6(2) and (3).

⁷⁰ See *Kadi I* (CFI), *supra* note 65, para. 226. The CFI's *jus cogens* review was, however, based upon the extremely brief assessment on the concept and scope of *jus cogens* norms and proceeded with its own notion of *jus cogens*: see Joris Larik, 'Two Ships in the Night or in the Same Boat Together? Why the European Court of Justice Made the Right Choice in the Kadi Case' (2009) *College of Europe EU Diplomacy Paper No 3/2009* at 6–10. Cf. Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 *Berkeley Journal of International Law* 203 at 216–222 (observing that the right to a fair hearing is part of *jus cogens*, and that the 1267 sanctions regime breaches the core procedural guarantees protected by the right to a fair hearing).

⁷¹ See Cardwell, French & White, *supra* note 66 at 237–239. The ECJ noted that an EU measure 'must be interpreted, and its scope limited, in the light of the relevant rules of international law': see *Kadi I* (ECJ), *supra* note 66, para. 291.

1 Legal

No matter what EU courts and domestic courts decide, the legal effect of the decisions formally stays within respective legal orders and does not reach to the UN Security Council's exercise of authority. The proposition of dualism⁷² to separate domestic and international legal orders still has a powerful explanatory force as a matter of formal relations between them. A question is then posed as to how national and EU court decisions, which, by reviewing the internal decisions, effectively assessed the decisions of the UN Security Council and its sanctions committees under national and EU law, find connection with the international rule of law, which is part of international law and generated within the international legal order.

A starting point for understanding the connection between the national and international rule of law is that there appears that there are no *overarching* 'legal' rules and procedures to resolve the gaps and tensions between the national and international rule of law.⁷³ In an absence of overarching legal framework, national and international legal practices must be connected by either national or international law or by other connecting points which are not strictly part of these two spheres of law but are still, in substance, relevant to rule of law regulatory agendas.

A classic answer to the question of how national rule of law practices connect with the international rule of law would be that under international law,

⁷² The monism-dualism classification is used in two different contexts: (1) to see the relationships between national and international law from a distance, and provide a general theory about the relationship, and (2) to describe a particular state's policy with regard to the effect of international law under its domestic law: David Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge; New York: Cambridge University Press, 2009) 1 at 6. Here, the term 'dualism' is used in the *former* sense (i.e., general theory, as opposed to particular states' policy).

⁷³ On the point that there is no overarching legal framework to resolve conflicts between different legal and normative layers, see Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71:2 *Modern Law Review* 183; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010). Krisch presents constitutionalism and pluralism as contrasting paradigms for the postnational legal order which transcends the divide between national and international law. Krisch observes that pluralism rejects the practical feasibility and normative desirability of the overarching legal framework, and emphasises the 'heterarchical interaction of the various layers of law': Krisch, *Beyond Constitutionalism*, *ibid.*, at 23.

national rule of law practices are, after all, part of *state practices*,⁷⁴ which create new customary international law⁷⁵ or new treaty interpretations.⁷⁶ National legal practices may also form part of the general principles of law.⁷⁷ Also, before international courts, judicial decisions, possibly including those of national courts,⁷⁸ would be invoked as subsidiary means for the determination of rules of international law.⁷⁹ In principle, national reception of the UN Security Council's decisions inevitably constitutes part of state practice and may also contribute to the creation of new customary international law or new treaty interpretation.

⁷⁴ See Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60:1 *International & Comparative Law Quarterly* 57 at 61–64 (pointing out the a dual role of domestic courts to create law as state practice, and to enforce established international law).

⁷⁵ H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Year Book of International Law* 65; Robert Jennings & Arthur Watts (eds.), *Oppenheim's International Law*, 9th ed. (Harlow, Essex: Longman, 1992) at 41; ILA, Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in ILA, Report of the Sixty-Ninth Conference (2000); Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff Publishers, 1993) at 79 ('domestic court decisions constitute one of the most important categories of custom-shaping State behaviour'). See further Nollkaemper, *supra* note 42 at 267–271.

⁷⁶ Treaty interpretation can be developed through subsequent practice which establishes the agreement of the parties regarding its interpretation: Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980), Article 31(3)(b).

⁷⁷ See ICJ Statute, *Statute of the International Court of Justice*, 26 June 1945, 39 AJIL Supp. 215 (1945) (entered into force on 24 October 1945) (1945) at Art. 38(1)(c). It has indeed been argued that judicial review or the access to information might form part of the general principles of law and could apply to the decision-making of the UN Security Council. For the analysis of judicial review and the possible implication on the judicial review of Security Council resolutions, see Erika de Wet, 'Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice' (2000) 47:2 *Netherlands International Law Review* 181. On the access to information and the principle of transparency, see Devika Hovell, 'The Deliberate Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farrall & Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, 2009) 92. Cf. Antonios Tzanakopoulos, 'Transparency in the Security Council', in Andrea Bianchi and Anne Peters, eds. *Transparency in International Law* (Cambridge University Press) (forthcoming), available at <<http://ssrn.com/abstract=2088858>>.

⁷⁸ See Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press, Originally Published in 1958, 1982) at 20.

⁷⁹ See ICJ Statute, note 77 at Art. 38(1)(d). Regarding the ICJ's reference to domestic court decisions, see André Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5:2 *Chinese Journal of International Law* 301.

Yet these classic modes of interaction apply to the present case only to a very limited extent. The standards of review applied by the courts were primarily for those applicable to the national government and European institutions and not to the international organs *per se*. The CFI's decision in *Kadi*, which in part adopted the *international rule of law regulating the UN* as the standards of review, was exceptional in this regard. The ECJ in *Kadi I* applied fundamental rights as part of the general principles of EU law; the UK Supreme Court in *Ahmed* (2010)⁸⁰ decided whether the Al-Qaida Order was *ultra vires* the powers conferred upon the government by section 1 of the United Nations Act 1946; and the Canadian Federal Court in *Abdelrazik* (2009)⁸¹ held that the Canadian government breached the applicant's right to enter Canada under Canadian constitutional jurisprudence. These judgments indirectly reviewed the UN's international decisions,⁸² but it is difficult to regard these practices based upon the national and European rule of law yardsticks as formulating 'state practice' for the international rule of law regulating the UN Security Council.

2 Normative

Beyond these state practice connections, domestic and EU court decisions may connect to the development of the international rule of law in a wider *normative* sense. Domestic courts often refer to each other's decisions,⁸³ and the inter-judicial communication may even create 'norms' which are yet to become part of formal international law but affect the way the UN Security Council and

⁸⁰ *HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury* [2010] UKSC 2 (UK Supreme Court) (Judgment of 27 January 2010).

⁸¹ *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, 4 June 2009 (Canadian Federal Court) (Canada Federal Court) (Judgment of 4 June 2009).

⁸² See Cardwell, French & White, *supra* note 66 at 234. Luis M Hinojosa Martinez, 'Bad Law for Good Reasons: The Contradictions of the Kadi Judgment' (2008) 5 *International Organizations Law Review* 339 at 342.

⁸³ For transnational judicial dialogue in general and its role in the development of international law, see further, e.g., Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191; Christopher A Whytock, 'Transnational Judicial Governance' (2012) 2:1 *St John's Journal of International and Comparative Law* 55; Eyal Benvenisti & George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20:1 *European Journal of International Law* 59 at (observing that the loose form of inter-judicial co-ordination has contributed to the mitigation of fragmentation of norms within the international legal systems).

its subsidiary organs make their decisions.

Within the context of targeted sanctions, there are limited judicial practices of cross-referencing among national and international judicial bodies. For instance, the Federal Supreme Court of Switzerland, in the case of *Nada* (2007), referred to the CFI's decision in *Kadi I* and reasoned the case in a similar line.⁸⁴ The UK Supreme Court in *Ahmed* (2010)⁸⁵ referred to the Canadian case of *Abdelrazik* (2009).⁸⁶ And *Kadi I*, *Abdelrazik*, and *Ahmed*, together with *Sayadi* (2008) before the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR),⁸⁷ were referred to by the European Court of Human Rights in the case of *Nada* (2012).⁸⁸ While the standards of review were after all primarily for those applicable to the national government and European institutions, the practice of cross-referencing may reduce the divergence across different jurisdictions in reviewing the implementing legislation in light of human rights law.

The transnational norms which could be generated by domestic and EU courts are also interconnected with international human rights law. As noted above (Section II-B), the standards of review applied by national and EU courts have international origins. International human rights law regulating states is also part of this normative interaction. UN organs themselves have played an active role in the development and promotion of international human rights law.⁸⁹

⁸⁴ The Swiss court conducted the *jus cogens* review and found that procedural deficiencies at the UN did not contradict *jus cogens*, as did the CFI in its 2005 decision. *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment, Case No. 1A.45/2007, DTF 133 II 450; ILDC 461 (CH 2007)* (Switzerland, Federal Supreme Court, First Public Law Chamber). For details, see Johannes Reich, 'Recent Developments: Due Process and Sanctions Targeted Against Individuals Pursuant to UN Resolution 1267 (1999)' (2008) 33 *Yale Journal of International Law* 505.

⁸⁵ *HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury*, *supra* note 80.

⁸⁶ *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, 4 June 2009 (Canadian Federal Court), *supra* note 81.

⁸⁷ *Nabil Sayadi and Patricia Vinck v. Belgium*, UN Doc. CCPR/C/94/D/1472/2006 (29 December 2008) (*views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the ICCPR*) (2008). The Human Rights Committee found that there was a violation of Articles 12 and 17 of the ICCPR by Belgium. In particular, the Committee found unjustified the way that Belgium initially transmitted complainants' names to the Sanction Committee: see *ibid.*, paras. 10.7-10.8.

⁸⁸ *Nada v. Switzerland* (Appl. No. 10593/08), *supra* note 45.

⁸⁹ See Louis B. Sohn, 'The Human Rights Law of the Charter' (1977) 12 *Texas International Law Journal* 129.

The UN Security Council is also part of the UN's human rights promotion.⁹⁰ International human rights law, and the political values underlying it, have brought changes to the way in which the UN itself performs its mandates including its peace and security sphere.⁹¹

3 Theoretical

Another possibility is a *theoretical* connection. National legal practices may be theoretically 'transposed' on international law by analogy.⁹² The analogical reasoning widely used in judicial practices requires both contextual similarities at a certain level of abstraction, and the presence and willingness of actors to execute the transposition. While the analogical borrowing of national law was traditionally limited to private law,⁹³ there is the growing possibility of applying a 'public law' analogy, including the national rule of law, given that the exercise of authority by international organisations has begun to share similarities with that of governmental authority.⁹⁴

Within the context of targeted sanctions, there is, in theory, the possibility for the theoretical contribution of national legal practices. The fact that the UN Security Council and its subsidiary organs designate specific individuals and entities as if they were those states' national governments seems to create a limited contextual similarity between the Council's exercise of authority and the

⁹⁰ See Sydney D Bailey, *The UN Security Council and Human Rights* (New York: St. Martin's Press, 1994).

⁹¹ See Michael Barnett and Martha Finnemore, 'Political Approaches' in Thomas G. Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (Oxford University Press, 2007) 41 at 48-50; Richard Jolly et al., *UN Ideas That Changed the World* (Bloomington: Indiana University Press, 2009) at 163-185.

⁹² For the different types of analogical reasoning and the related practices of international courts, see Robert Kolb, *Interprétation et création du droit international: Esquisses d'une herméneutique juridique moderne pour le droit international public* (Bruxelles: Bruylant, 2006) at 710-756. The analogical reasoning is used also in the process of treaty-making: e.g., Jonathan B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2000) 27 *Ecology Law Quarterly* 1295.

⁹³ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (The Lawbook Exchange, Ltd., 1927).

⁹⁴ For instance, Momirov and Fourie present the case for 'vertical comparative law' between the rule of law governing state actors and the international rule of law regulating the 'public power' exercised by international institutions. See Aleksandar Momirov & Andria Naude Fourie, 'Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law' 2:3 *Erasmus Law Review*.

national contexts. National court decisions may be contextually importable even if they themselves have *not* engaged in reviewing the UN's decisions.

What is missing in practice is rather the presence and willingness of actors to execute the transposition. Through the communications with member states' officials, including judges, the national rule of law practice is already part of the deliberation of the Monitoring Team of the Al Qaeda Sanctions Committee and the Ombudsperson referred to below in Section II-D. Yet this does not mean that the Monitoring Team or the Ombudsperson try to import domestic jurisprudence to the international level. The UN Security Council itself is apparently not willing to make a domestic analogy with regard to the procedural safeguards to be given at the international level. While, in theory, such a theoretical transposition could have been made since the introduction of targeted sanctions for Haiti in 1994, the issue of procedural safeguard for individuals did not gather international attention until the post-9/11 expansion of the Al Qaeda sanctions regime.⁹⁵

4 Political

The most likely mode of connection between the national rule of law practices and the development of the international rule of law is *political*. While the gaps between the national and international rule of law have existed from the inception of targeted sanctions, it was only after the Al Qaeda sanctions regime that the inter-order conflict surfaced. What has helped the problem to emerge was the geographical proliferation of targets, which not only exacerbated the scale of human right problems but diversified political and judicial recourses available to the targeted individuals and entities. The use of national courts with which they indirectly challenged the Council's listing decisions has been an influential apparatus for attracting international political attention to their contestation.

The fact that the targets of the Al Qaeda sanctions regime spread across states empowers domestic courts in various parts of the world to generate political impacts if they legally prejudice domestic implementation. The operational

⁹⁵ Earlier initiatives to reform targeted sanctions primarily addressed the effectiveness of sanctions through robust domestic implementation and international monitoring: the Interlaken Process (1998-2001), the Bonn-Berlin Process (1999-2001), and the Stockholm Process (2001-2002), sponsored by Switzerland, Germany and Sweden, respectively.

effectiveness of sanctions regimes would be simply undermined if states encountered legal impediments to their implementation. Yet the political impact that each national court decision may produce is by no means uniform. It varies, first, by the geopolitical location in which the courts reside. Among national and regional judicial venues, EU courts should be ranked as one of the most influential fora because their decisions bind member states. Two EU member states assume the permanent seats at the UN Security Council (i.e., UK and France), and some EU members reportedly submitted names to the sanctions committee.⁹⁶ In such venues, the finding that a European list which copied the UN's list violates fundamental rights would be a significant political challenge to the credibility of UN sanctions.⁹⁷

In addition, the mere fact that the court actions are launched by individuals may mobilise political initiatives at the international level, whether or not EU courts eventually find in favour of the individual applicants. In fact, many key normative and procedural developments (which will be described below, and also listed in Annex II) had started before the critical decisions such as *Kadi I* in the ECJ were rendered.⁹⁸ It was therefore the fact that court proceedings were instigated in major political constituencies in the eyes of the UN Security Council that facilitated the international reform.

In addition to the effect of decisions themselves, judges' specific reasoning and narratives also determine the extent to which domestic and EU court decisions foster political momentum at the international level. As noted above (in Section II-B), the CFI's *jus cogens* review was the European application of the

⁹⁶ Italy, France, Spain, Belgium, Germany, and the UK have reportedly submitted names to the Committee: see E.A. Wayne, 'Internationalizing the Fight' (2004) 9(3) *eJournal USA: Economic Perspectives* 6 at 6-7, available at <<http://usinfo.state.gov/journals/ites/0904/ijee/ijee0904.htm>>; US Department of State, Money Laundering and Terrorist Financing in the Middle East and South Asia, Testimony by E.A. Wayne, Assistant Secretary for Economic and Business Affairs, before the Senate Committee on Banking, Housing, and Urban Affairs, 13 July 2005, available at <<http://www.state.gov/e/eeb/rls/rm/2005/49564.htm>>.

⁹⁷ Eckes, *supra* note 66 at 301.

⁹⁸ The UN Security Council's meeting held two months *after Kadi I* (ECJ) is noteworthy. While some states expressed concern about *Kadi I* (ECJ), the attention was paid rather to the implementation of Resolution 1822, which introduced the procedural development (narrative summaries of reasons, notice to the targets, and comprehensive review) *before* the ECJ's decision. This meeting suggests that the ECJ's decision was not to change the overall direction of the procedural development which had started before. See UN Doc. S/PV.6015 (12 November 2008).

international rule of law regulating the UN Security Council. The CFI's *jus cogens* review added the material through which the European decision facilitated the international regulatory reform at that time—despite the ECJ's subsequent rejection of *jus cogens* review.

In the aforementioned *Abdelrazik*,⁹⁹ Justice Zinn of the Canadian Federal Court criticised the 1267 Committee regime against Al Qaeda as 'a denial of basic legal remedies and as untenable under the principles of international human rights',¹⁰⁰ despite the fact that it was not strictly necessary to refer to the sanctions committee's procedure. In *A and Others* (2008) before the UK Court of Appeal, an English judge has chosen the powerful term 'prisoners of the state' to characterise the state of those targeted, which was also reiterated by the Supreme Court, and also by the EGC in *Kadi II*.¹⁰¹ The EGC also described targeted sanctions as 'particularly draconian'¹⁰² for the targeted individuals. These expressions and terms are reproduced by scholars and possibly by judges, and contribute to the gathering of political momentum to call for procedural improvement on the international stage.

D INTERNATIONAL RECEPTION OF NATIONAL DECISIONS: THE PRINCIPLES OF FAIRNESS AND TRANSPARENCY

All these points of connection thus conveyed the national rule of law practices to the international legal arena. The fact that court proceedings are instigated, the finding that national measures infringed upon fundamental rights, and the substantive reasoning referring to the international rule of law standards have created *political* force at the international level to develop the international rule of law governing the targeted sanctions, accompanied by the limited *normative* and *theoretical* presence that national practices have for the regulatory development at the UN.

The political momentum has culminated into the formulation of the principles

⁹⁹ *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, 4 June 2009 (Canadian Federal Court), *supra* note 81.

¹⁰⁰ *Ibid.*, para. 51.

¹⁰¹ *A and Others v. HM Treasury* [2008] EWCA Civ 1187 (UK Court of Appeal), para. 125 (Sedley LJ); *HM Treasury v. Mohammed Jabar Ahmed and Others*; *HM Treasury v. Mohammed al-Ghabra*; *R (Hari El Sayed Sabaei Youssef) v. HM Treasury*, *supra* note 80, paras. 4, 60; *Kadi II* (EGC), *supra* note 67, para. 149.

¹⁰² *Kadi II* (EGC), *ibid.*, para. 149.

of 'fair and clear' procedures, and more broadly, the principles of fairness and transparency as the UN's institutional regulatory standards. A general regulatory formula is found in the World Summit Outcome adopted in 2005, in which the General Assembly stated the following:¹⁰³

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that *fair and clear procedures* exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.

The statements encapsulate not merely the need for monitoring and development of the sanctions' designing, but also the call for procedural fairness and clarity in listing and delisting.¹⁰⁴ The principles of fairness and transparency have been endorsed by the UN Secretary-General,¹⁰⁵ repeated by the General Assembly,¹⁰⁶ and incorporated into Security Council resolutions themselves.¹⁰⁷ The Chairman of the Al Qaeda Sanctions Committee stressed in September 2006 the Committee's awareness of 'the numerous calls urging it [to] adopt fair and clear listing and de-listing procedures'. In Resolution 1904 adopted in December 2009, the Security Council also '[took] note of challenges, both legal and otherwise' to the sanctions measures, and 'express[ed] its intent to continue efforts to ensure that procedures are fair and clear'.¹⁰⁸ These statements in part evidence the connections between the national contestations and the realisation of fair and clear procedures at the international level.

¹⁰³ 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), para. 108 (emphasis added).

¹⁰⁴ For more detailed background and procedural implications, see Machiko Kanetake, 'Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee' (2008) 12 *Max Planck Yearbook of United Nations Law* 113.

¹⁰⁵ Report of the Secretary-General, 'Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy', UN Doc. A/60/825 (27 April 2006), para. 42 ('[m]ore must be done...to improve the *accountability and transparency* of sanctions regimes' (emphasis added)).

¹⁰⁶ The United Nations Global Counter-Terrorism Strategy, UN Doc. A/RES/60/288 (20 September 2006), para. 15 ('to ensure, *as a matter of priority*, that *fair and transparent procedures* exist' (emphasis added)).

¹⁰⁷ UN Doc. S/RES/1730 (19 December 2006), pre. para. 5; UN Doc. S/RES/1822 (30 June 2008), pre. para. 12, and op. para. 28; UN Doc. S/RES/1904 (17 December 2009), pre. para. 9; UN Doc. S/RES/1989 (17 June 2011), pre. paras. 11, 13, and op. para. 42.

¹⁰⁸ UN Doc. S/RES/1904 (17 December 2009), pre. para. 9 (original emphasis omitted). Similarly, UN Doc. S/RES/1989 (17 June 2011), pre. para. 11.

At the UN, the principles of fairness and transparency have been considered as part of the rule of law issues, as noted in the introduction. In 2006, the UN Security Council convened the meeting entitled ‘Strengthening international law: rule of law and maintenance of international peace and security’, in which one of the main agendas concerned the listing decisions of the targeted sanctions.¹⁰⁹ Also in 2008, Austria presented before the General Assembly an outcome report of a four-year project on ‘the UN Security Council and the Rule of Law’, in which the report recommended the Council to be proactive in improving ‘fair and clear’ procedures to protect the rights of individuals affected by its decisions.¹¹⁰ The Declaration of the High-Level Meeting in 2012 referred to above also situates the fair and clear procedures as one facet of the rule of law.¹¹¹

While the fairness and transparency can be understood in a range of different ways,¹¹² the principles are broadly understood to realise not only the general improvement of the listing, but also the following four procedural safeguards: (i) *periodical review* by the Council, (ii) the respect for the individuals’ *right to be informed* of the measures, (iii) the *right to be heard* directly by the decision-making body, and (iv) the *right to review* by an effective review mechanism.¹¹³ The main procedural improvements are chronologically listed in

¹⁰⁹ UN Doc. Doc. S/PV. 5474 (22 June 2006); UN Doc. S/PV. 5474 (Resumption 1) (22 June 2006).

¹¹⁰ The UN Security Council and the Rule of Law, UN Doc. A/63/69-S/2008/270 (7 May 2008), Chapter VI (The Security Council and Individual Rights). For details, see Konrad G. Bühler, ‘The Austrian Rule of Law Initiative 2004-2008: The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law’ (2008) 12 *Max Planck Yearbook of United Nations Law* 410.

¹¹¹ See *supra* notes 8-9.

¹¹² The Council’s aforementioned meeting on ‘rule of law and maintenance of international peace and security’ in 2006 illustrates the differences. While states commonly upheld the need for fairness and transparency, some states emphasized the due process, effective remedy, and the right to be heard (e.g., Denmark, Peru, Qatar, Greece, Liechtenstein, Venezuela, Switzerland), while the permanent members avoided the use of these human rights language. See UN Doc. S/PV. 5474 (22 June 2006); UN Doc. S/PV. 5474 (Res. 1) (22 June 2006).

¹¹³ Bardo Fassbender, ‘Targeted Sanctions and Due Process’, Study Commissioned by the UN Office of Legal Affairs (20 March 2006), available at <http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf>; UN Doc. S/PV. 5474 (22 June 2006) at 5 (statement by Mr. Michael, Legal Council of the UN, presenting the Secretary-General’s view in the non-paper, presumably based on Fassbender’s aforementioned paper); Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc.

Annex II of this paper.

The specific procedural improvements made by the Security Council and its sanctions committees, especially Al-Qaeda Sanctions Committee, can be considered as part of incremental realisation of these four requirements. Here I briefly summarise the key points regarding the *right to be heard* and the *right to review*.

The first incremental step for the element of the *right to be heard* was taken in December 2006 in response to governmental and non-governmental initiatives, when the Security Council unanimously adopted Resolution 1730 based on a French proposal, requesting the Secretary-General to establish a 'focal point' to receive delisting requests as a mechanism to be applied to all Council sanctions involving designated individuals.¹¹⁴ Yet this focal point has soon invited contestation by national judges on the grounds that it was 'obvious that this procedure does not begin to achieve fairness for the person who is listed'.¹¹⁵

The national contestations have then encouraged the Council and its sanctions committees to incorporate the element of the *right to review* into the listing procedures. In December 2009, with respect to the Al Qaeda sanctions regime alone, the Focal Point was replaced by the Office of the Ombudsperson established under Resolution 1904, who not only receives delisting requests from individuals and entities,¹¹⁶ but also assists the Committee's consideration to such requests 'in an independent and impartial manner'.¹¹⁷ The

A/61/267 (16 August 2006), paras. 38-41.

¹¹⁴ UN Doc. S/RES/1730 (19 December 2006).

¹¹⁵ *A, K, M, Q & G v. HM Treasury [2008] EWHC 869 (Admin) (Justice Collins) (High Court of Justice, UK)* (UK High Court) part 18.

¹¹⁶ UN Doc. S/RES/1904 (17 December 2009), para. 21. On the establishment and function of the Ombudsperson under Resolution 1904, see Christopher Michaelsen, 'The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts?' (2010) 33 *Studies in Conflict & Terrorism* 448 at 456-459.

¹¹⁷ UN Doc. S/RES/1904 (17 December 2009), para. 20. The delisting process under Resolution 1904 follows the three steps: information gathering by the Ombudsperson (two months), 'dialogue' between the Ombudsperson and the petitioner (two months), and Committee discussion and decision (two months): see *ibid.*, Annex II. For the function of the Ombudsperson under Resolution 1904, see Christopher Michaelsen, 'The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts?' (2010) 33:5 *Studies in Conflict & Terrorism* 448 at 456-459; Laurence Boisson de Chazournes & Pieter Jan Kuijper, 'Mr Kadi and Mrs Prost: Is the UN Ombudsperson Going to Find Herself between a Rock and a Hard Place?' in Henri Waele &

Ombudsperson was established to better guarantee both the right to be heard and the right to review. The Council's effort to establish the Ombudsperson however soon invited criticisms, including those from national judges as lacking any effective judicial remedy.¹¹⁸ The judicial contestations have led some member states to propose further improvement in the listing procedures in April 2011,¹¹⁹ leading to the adoption of Council Resolution 1989 in June 2011 concerning sanctions against Al Qaeda, which noted the Ombudsperson's important role in improving fairness and transparency',¹²⁰ and awarded it the power to make recommendations on delisting.¹²¹ Under the resolution, if the Ombudsperson recommends the Committee to consider 'delisting', and if no decisions are rendered either by the Committee or the Council within the period of 60 days, the restrictive measures against the targeted individuals and entities would come to an end.¹²²

Eva Rieter (eds.), *Evolving Principles of International Law* (Martinus Nijhoff Publishers) 71 at 81–90.

¹¹⁸ HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury, *supra* note 80, para. 78 (Lord Hope, with whom Lord Walker and Lady Hale agree). Lord Phillips observed that the Guidelines revised according to Resolution 1822 'fall far short' of providing the access to a court as well as the reasons for the listing to enable him to make an effective challenge: *ibid.*, para. 149 (Lord Phillips). Lord Mance also denounced the procedure of the 1267 committee, despite various modifications up to Resolution 1904, in that they do not provide judicial procedure for review, nor do they guarantee that individuals affected will know sufficiently about the case against them in order to be able to respond to it: *ibid.*, para. 239 (Lord Mance). See also Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/65/258 (6 August 2010), paras. 55–58 (the Special Rapporteur, Martin Scheinin, remains concerned that the revised delisting procedures do not meet the fundamental principles of the right to fair trial); Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/67/396 (26 September 2012), paras. 27–59 (Special Rapporteur, Ben Emmerson, recommended that the Ombudsperson should be renamed the Office of the Independent Designations Adjudicator (IDA), and that states should be obligated to disclose information to the IDA on conditions of confidentiality. The Rapporteur also suggested that the information obtained through torture should be excluded from consideration by the IDA.)

¹¹⁹ 'Improving Fair and Clear Procedures for a More Effective UN Sanctions System' (Document submitted to the Security Council by Switzerland and the Like-Minded States in April 2011) (a proposal submitted by Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland).

¹²⁰ UN Doc. S/RES/1989 (17 June 2011), pre. para. 13

¹²¹ UN Doc. S/RES/1989 (17 June 2011), para. 21. See also *ibid.*, Annex II, para. 7(c).

¹²² See UN Doc. S/RES/1989 (17 June 2011), Annex II, para. 12. In cases where the

The principles of fairness and transparency, which have guided at least some of these incremental procedural reforms, are the UN's institutional standards and do not have any formal binding force upon the Security Council. They are nevertheless widely accepted as standards to restrict the manner in which the Council exercises its authority against individuals and entities, and are embedded in the discourse of the UN Security Council and its sanctions committees themselves. The principles have brought about concrete reforms in the listing procedures, leading to the delisting of some of those targeted individuals and entities which brought court proceedings.¹²³

Despite these normative and procedural developments, the principles of fairness and transparency (and their concrete realisation) still distance themselves from the strict observance of human rights, and may still be significantly underdeveloped compared to the national rule of law standards. The still existing gap between the national and international rule of law seems to suggest at least three things for the purpose of this paper.

It first reminds us of the fundamental subject-matter *disconnection*, to which I referred in Section I-A above. Namely, the UN Security Council is constituted by an international agreement between states, and the international rule of law for the organ's exercise of authority is constructed primarily in relation to the rights and interests of member states. The distinct feature of targeted sanctions mitigates this *disconnection* by assimilating the Council's decisions with member states' exercise of authority (and vice versa) *at least with respect to the designation of targets*. Nevertheless, this resemblance does not alter the presence of traditional constituencies which, through their original agreement and

Ombudsperson recommends *retaining the listing*, the restrictive measures on the petitioner remain in place 'unless a Committee member submits a delisting request' which will be considered under its normal consensus procedures: *ibid.*, Annex II, para. 11.

¹²³ See Annex I of this paper. The delisted individuals and targets include: Aaran Money Wide Service (26 August 2002), Global Services International (26 August 2002), Aden (26 August 2002), Abdulaziz Ali (26 August 2003), Yusuf (24 August 2006), Nasco (14 November 2007), Sayadi (20 July 2009), Vinck (20 July 2009), Nada (23 September 2009), Barakaat International Foundation (22 October 2009), Nada Management Organization (22 October 2009), Hassan (9 September 2010), Abdulrahim (22 December 2010), Elostia (22 December 2010), Al-Faqih (T-135/06) (22 June 2011), Sanabel Relief Agency (22 June 2011), Abdrabbah (22 June 2011), Ayadi (17 October 2011, after Ombudsperson review), Abdelrazik (30 November 2011, after Ombudsperson's review), Maftah Mohamed Elmabruk (22 December 2010), MIRA (2 July 2012, after Ombudsperson's review), Al-Faqih (2 July 2012, after Ombudsperson's review), and Kadi (Delisted on 5 October 2012 after Ombudsperson's review).

subsequent practice, have favoured the formalistic and thin international rule of law for the guardian of the international peace and security.

Second, the difference also tells about the political connection between the two branches of the rule of law. EU and domestic court decisions mentioned above (such as *Kadi*, *Abdelrazik*, and *Ahmed*) reviewed the European and governmental decisions based upon protection of individuals' rights. The points of connection then added to the EU and national practices the international political dynamics, which accommodate disagreements between the permanent members of the Security Council and major designating states—which often favour the adherence to the formalistic and thin international rule of law—and many European states which, from their own internal political and legal constraints, advocate the more substantive rule of law at the international level.¹²⁴

Finally, the existing gap between the national and international rule of law also promises the continuation of national contestations. From the perspective of the national rule of law yardsticks, the listing procedure at the Council is far from satisfactory. In the future, more international attention would likely be paid to the issue of standards of listing and delisting, which is perhaps one of the sacred areas in which no noteworthy changes have been made at the international level. These three points thus suggest both the limits and possibilities in the development of the international rule of law through the interactions with the national rule of law practices.

CONCLUSION

The subject-matter overlap between national and international law has created the space in which both spheres of law not only mutually enrich but also collide with one another. These friendly and confrontational interactions between national and international law take place not only at the level of national

¹²⁴ For the differences in the views of member states, see *supra* note 112 (regarding the Council's meeting held in 2006), and *supra* note 119 (a proposal by the like-minded states). Switzerland, Germany, and Sweden also commissioned the widely-known Watson Institute's paper on the fair and clear procedures, presented to the Security Council and the General Assembly in June 2006: Paper by the Watson Institute, *supra* note 56; Report of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, UN Doc. S/2007/59 (7 February 2007), para. 10.

reception of international law, but also with respect to the international reception of national law.

The inter-order interactions with respect to the rule of law existed traditionally with respect to the regulation of governmental authority. Both national and international law regulates the manner in which the national government exercises its authority vis-à-vis individuals under its jurisdictions. As the exercise of authority by international organisations resembles that of the national government, there is now a greater possibility for national rule of law practices concerning state authority to interact with the international rule of law which restricts the authority exercised by international organisations. The UN Security Council's listing decisions in targeted sanctions is one such instance, where the Council and its subsidiary organs replace the governmental decisions to designate targets at the international level.

The gap between the substantive rule of law built against governmental entities and the formalistic international rule of law governing the UN Security Council has led to a series of court proceedings brought against member states, thereby indirectly challenging the UN's decisions. A symbolic case is *Kadi*, followed by a series of national court decisions regarding the UN's targeted sanctions. While national and EU court decisions do not bind UN organs, they could become an influential political apparatus for generating regulatory reforms at the UN. The court proceedings and decisions have succeeded in establishing the principles of fairness and transparency according to which incremental procedural improvements have been made with respect to the listing process.

The assessment of inter-order interactions in the context of targeted sanctions illustrates that the classic 'state practice' roles attributed to domestic legal practices do not capture their presence in the development of the international rule of law. The case of targeted sanctions bespeaks other normative, theoretical and political points, through which the national rule of law practices connect and bring about changes to the international rule of law.

As illustrated by the case of targeted sanctions, these modes of connection involve *different actors* and their *differing roles*. In a classic 'state practice' mode of connection, the participants are limited to those actors whose conduct is attributable to a state. Domestic courts' decisions regarding targeted sanctions are merely part of a collection of the possibly contradictory acts of state. At the *normative* point of connection, on the other hand, the role of judicial branches may carry greater weight than that of non-judicial branches of the government.

Also, at the *normative* point, non-governmental entities, by contesting international decisions, can also participate in the development of transnational norms. The *theoretical* point of connection generally requires international adjudicative bodies in executing the theoretical interaction. Finally, at the *political* point of connection, the international political significance of national courts varies depending upon their geographical location. Suppose that *Kadi* decisions were rendered by a court of a small state, that the state is not a well-known advocate of the rule of law, and that the decisions were not readily available in English. The national rule of law practices might have brought far more moderate progress in the regulation of the UN Security Council's listing decisions.

Targeted sanctions are only some of the instances in which the subject-matter overlap between the national and international rule of law arises due to the replacement of governmental authority by international organisations. For instance, in territorial administration, the UN Security Council's subsidiary organs exercise their authority against local populations just as the territorial government would. The case of UN territorial administration bears much stronger resemblance to the exercise of authority by national government than the case of targeted sanctions; the Council's subsidiary organs directly execute their decisions vis-à-vis individuals and entities under the UN's administration, instead of asking the national government to implement international decisions as in the case of sanctions.

The paradox in the development of the international rule of law, however, is that the deeper the replacement of governmental authority by the UN becomes, the higher the hurdles would be for individuals to contest the decisions taken by the UN, especially before judicial venues. In the context of the UN's territorial administration, the claims instituted directly against the UN would be often hindered by jurisdictional immunities. The claims instituted against member state authorities may likewise be rejected on the ground of the attribution of the impugned conduct to the UN. Therefore, in the context of territorial administration, the interfaces between the national and international rule of law would likely be different from the case of targeted sanctions.

The development of the international rule of law with regard to the UN's targeted sanctions is the product of interfaces with different layers of law. The national rule of law practices themselves had already substantively connected with international human rights law. The continued absorption of governmental

authority by international organisations would likely augment the points of connection through which the national rule of law practices—which also continue to develop through their own interaction with international law—develop the international rule of law by way of normative, theoretical, and political inter-order interfaces.

Annex I The List of National, European and International Cases regarding UN Targeted Sanctions

[as of 1 November 2012]

Sources: (i) 2nd to 12th reports of the Monitoring Team for the 1267 Sanctions Committee; (ii) Thomas Biersteker et al. (eds.), 'Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"' (October 2009), at 49-57; (iii) Oxford Reports on International Law in Domestic Courts (ILDC); and (iv) own research.

Year	Sanctions	Applicant	UN List	Court	Date	Citation	Summary
11/2001	Al-Qaida SCR 1267	Othman (Abu Qatada)	QI.M.31.01	UK, Queen's Bench Division (Administrative Court) 28 November 2001	28 November 2001	R (on the application of Othman) v Secretary of State for Work and Pensions [2001] EWHC Admin 1022	The payment of income support to the designated person is suspended under Council Regulation 437/2001. The law of humanity allows necessary minimum payment.
05/2002	Al-Qaida SCR 1267	Benevolence International Foundation	QE.B.93.02	USA, District Court, N.D. Illinois, Eastern Division	14 May 2002	Benevolence International Foundation, Int. v. Ashcroft (200 F.Supp. 2d 935)	Decided to stay the civil case until the conclusion of the parallel criminal case.
--/2002	Al-Qaida SCR 1267	Global Relief Foundation	QE.G.91.02	USA, federal district court; appellate court	In 2002	Global Relief Foundation Inc v. O'Neil, 315 F.3d 748 (7th Cir. 2002); Global Relief Foundation Inc. v. O'Neil, 207 F. Supp. 2d 779 (N.D. Ill. 2002) See the second report of the Monitoring Team, UN Doc. S/2005/83, Annex II, para. 12	In 2002, a federal district court and an appellate court dismissed the emergency petition and constitutional claims of Global Relief Foundation.

02/2003	Al-Qaida SCR 1267	Benevolence International Foundation	QE.B.93.02	(US first instance)	25 February 2003	Benevolence International Foundation Inc. v. Ashcroft, No. 02-CV-763 (N.D. I11. 25 February 2003) See also United States v. Arnaout, No. 02-CR-892 (N.D. I11. 10 February 2003)	The case was dismissed after Arnaout pled guilty, pursuant to a written plea agreement.
06/2003	Al-Qaida SCR 1267	Nasco	Delisted on 14 November 2007	Turkey, Council of State	11 June 2003 (Council of State) 18 September 2003 (Administrative Law Decision of the Council of State) Appealed to the Administrative Cases Bureau	Nasco Nasreddin Holding AS See the second report of the Monitoring Team, UN Doc. S/2005/83, Annex II, para. 10; Eighth report of the Monitoring Team, UN Doc. S/2008/324, Annex I, para. 6	The Council of State in Ankara rejected the request for a stay of execution of the decision to freeze the assets. The Administrative Law Decision of the Council of State approved the rejection.
08/2003	Al-Qaida SCR 1267	Aaran Money Wide Service	Delisted on 26 August 2002	US, District Court, D. Minnesota	21 August 2003 (Order)	Aaran Money Wire Service Inc. and Garad Nor v United States; Global Services International Inc. and Abdullahi Farah v. US, Nos. 02CV789JMR/FLN, 02CV790MJD/JGL (2003 WL 22143735 (D.Minn.))	The court dismissed the cases after the government delisted the plaintiffs.

08/2003	Al-Qaida SCR 1267	Global Services International	Delisted on 26 August 2002	US, District Court, D. Minnesota	21 August 2003 (Order)	Aaran Money Wire Service Inc. and Garad Nor v. United States; Global Services International Inc. and Abdullahi Farah v. US, Nos. 02CV789JMR/FLN, 02CV790MJD/JGL (2003 WL 22143735 (D.Minn.))	The court dismissed the cases after the government delisted the plaintiffs.
--/2003	Al-Qaida SCR 1267	Al-Rashid Trust	QE.A.5.01	Pakistan, High Court of Sindh	2003	See the fifth report of the Monitoring Team, UN Doc. S/2006/750, Annex III, para.6	The lower court ruled in favour of Al-Rashid Trust, based on the Pakistani government's failure to issue a statutory notification to the Trust under the 1948 United Nations (Security Council) Act.
--/2003	Al-Qaida SCR 1267	Nasco	Delisted on 14 November 2007	Italy, Tribunal of Milan	2003 Filed in January 2003	Nasco Business Residence Center SAS See the second report of the Monitoring Team: UN Doc. S/2005/83, Annex II, para.7	The Tribunal rejected the suit based on a lack of jurisdiction. The EU regulations do not foresee that national courts can adopt provisions contrary to sanctions imposed by the EU.
02/2005	Al-Qaida SCR 1267	Sayadi and Vinck	Both delisted on 20 July 2009	Belgium, Brussels Court of First Instance	11 February 2005	Nabil Sayadi and Patricia Vinck v. Belgian State	The Brussels court ordered the Belgium government to make a delisting request to the UN because Sayadi and Vinck were not indicted after investigation.
03/2005	Al-Qaida SCR 1267	Al Haramain	QE.A.114.04	Netherlands, Amsterdam District Court	31 March 2005	Stichting Al Haramain Humanitarian Aid, LJN: AT2894	The Court could not conclude that Al Haramain Foundation directly or indirectly supported terrorist organizations. The Court rejected an application

							by the Public Prosecution Service to ban and dissolve Stichting Al-Haramain Humanitarian Aid.
04/2005	Al-Qaida SCR 1267	Nada Management Organization	Delisted on 22 October 2009	Switzerland, Federal Criminal Court in Bellinzona	27 April 2005	See the third report of the Monitoring Team: UN Doc. S/2005/572, Annex II, paras. 9-10	The federal criminal court held against the Swiss federal prosecutor's office. It held that the prosecutor either had to bring criminal charges or drop the case.
09/2005	Al-Qaida SCR 1267	Kadi	Delisted on 5 October 2012 after Ombudsperson review	EU, General Court (then Court of First Instance)	21 September 2005	Case T-315/01, Kadi v. Council of the European Union and Commission of the European Communities, Judgment of 21 September 2005	The UN Charter's primacy structurally limited the review of UN Security Council resolutions, even indirectly. While indirect review is still possible with respect to <i>jus cogens</i> , the restrictive measures did not contravene <i>jus cogens</i> in this case.
09/2005	Al-Qaida SCR 1267	Yusuf Barakaat International Foundation Aden Abdulaziz Ali	Yusuf: Delisted on 24 August 2006 Barakaat: Delisted on 22 October 2009 Aden: Delisted on 26 August 2002 Abdulaziz Ali: Delisted on 26 August 2003	EU, General Court (then the Court of First Instance)	21 September 2005	Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities	The UN Charter's primacy structurally limited the review of UN Security Council resolutions, even indirectly. While indirect review is still possible with respect to <i>jus cogens</i> , the restrictive measures did not contravene <i>jus cogens</i> in this case.

01/2006	Al-Qaida SCR 1267	Al Haramain	QE.A.114.04	Netherlands, appeals court	5 January 2006	Stichting Al Haramain Humanitarian Aid, NJF 2006/281 See the fourth report of the Monitoring Team: UN Doc. S/2006/154, Annex, paras. 8-9	Upheld the decision of the District Court.
07/2006	Al-Qaida SCR 1267	Ayadi	Delisted on 17 October 2011 after Ombudsperson review	EU, General Court (then the Court of First Instance)	12 July 2006	Case T-253/02, Chafiq Ayadi v. Council of the European Union	As the General Court held in <i>Kadi</i> (2005), the contested EC regulation did not infringe fundamental rights. States must ensure that delisting requests are presented without delay and fairly and impartially to the UN Sanctions Committee.
07/2006	Al-Qaida SCR 1267	Hassan	Delisted on 9 September 2010	EU, General Court (then the Court of First Instance)	12 July 2006	Case T-49/04, Faraj Hassan v. Council of the European Union and Commission of the European Communities	As the CFI held in <i>Kadi</i> (2005), the contested EC regulation did not infringe fundamental rights. States must ensure that delisting requests are presented without delay and fairly and impartially to the UN Sanctions Committee.

07/2006	Al-Qaida SCR 1267	Kadi	Delisted on 5 October 2012 after Ombudsperson review	Turkey, Council of State, 10th Division	4 July 2006	Judgment E. 2002/984, K. 2006/4795 See ILDC 311 (TR 2007), paras. F6-7; Fifth report of the Monitoring Team, UN Doc. S/2006/750, Annex III, para. 11; Sixth report of the Monitoring Team, UN Doc. S/2007/132, Annex I, para. 8	The decree which froze Kadi's assets was annulled. Under the Constitution, fundamental rights may be restricted only by law. This would mean that Kadi's funds and assets could only be frozen by a court decision, and not by an administrative decree.
01/2007	Liberia SCR 1521	Minin	Delisted on 20 June 2012	EU, General Court (then the Court of First Instance)	21 January 2007	Case T-362/04, Leonid Minin v. Commission of the European Communities	As the CFI held in <i>Kadi</i> (2005), the contested EC regulation did not infringe fundamental rights.
02/2007	Al-Qaida SCR 1267	Kadi	Delisted on 5 October 2012 after Ombudsperson review	Turkey, Council of State, Board of Administrative Cases	22 February 2007	Kadi v. Prime Ministry and Ministry of Foreign Affairs of Turkey, Appeal judgment, E 2006/2824, K 2007/115; ILDC 311 (TR 2007)	The decision of the 10th Division is quashed. The Court could give direct effect to Security Council resolutions by enacting an administrative decree.
05/2007	Al-Qaida SCR 1267	Global Relief Foundation	QE.G.91.02	USA, Federal District Court	31 May 2007	See the seventh report of the Monitoring Team: UN Doc. S/2007/677, Annex I, para. 8	Dismissed the claims and concluded that the government had an adequate factual basis to support its decision to impose sanctions on the Global Relief Foundation.
05/2007	Al-Qaida SCR 1267	Nada	Delisted on 23 September 2009	Switzerland, Federal Criminal Tribunal in Bellinzona	31 May 2007	See the seventh report of the Monitoring Team: UN Doc. S/2007/677, Annex I, para. 5	Awarded Mr. Nada 5,951 Swiss francs, far less than the 27 million he sought.

06/2007	Al-Qaida SCR 1267	Ali Ghaleb Himmat	Delisted on 10 August 2009	Switzerland, Federal Criminal Tribunal in Bellinzona	19 June 2007	See the seventh report of the Monitoring Team: UN Doc. S/2007/677, Annex I, para. 5	
11/2007	Al-Qaida SCR 1267	Nada	Delisted on 23 September 2009	Switzerland, Federal Supreme Court, First Public Law Chamber	14 November 2007	Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment, Case No. 1A.45/2007, DTF 133 II 450; ILDC 461 (CH 2007)	By Articles 25 and 103 of the UN Charter, the decisions of the UN Security Council bind member states and prevail over their other obligations. Member states cannot evade their Charter obligations on the basis of the Council's non-conformity to the Charter. An exception is the Council's non-conformity to <i>jus cogens</i> . Yet in this case, the procedural deficiencies at the UN did not contradict <i>jus cogens</i> .
01/2008	Iraq SCR 1483	A	Added to the list on 26 April 2004	Switzerland, Federal Supreme Court, Second Public Law Chamber	23 January 2008	A v. Federal Department of Economic Affairs, Administrative first instance judgment, Case No. 2A.783/2006; ILDC 1200 (CH 2008)	As the Federal Tribunal ruled in <i>Nada</i> (2007), the obligations under the UN Charter prevail over those under ECHR and ICCPR. Arts. 6 and 13 of ECHR were not part of <i>jus cogens</i> . While the listing procedure is not satisfactory, the delisting is an exclusive competence of the UN sanctions committee.
04/2008	Al-Qaida SCR 1267	A, K, M, Q and G	QI.A.228.06	UK, High Court of Justice, Queen's Bench Division	24 April 2008	A, K, M, Q & G v. HM Treasury [2008] EWHC 869 (Admin)	The 2006 Al-Qaida and Taliban (United Nations Measures) Order concerning 'G' was <i>ultra vires</i> and unlawful.

04/2008	Al-Qaida SCR 1267	Ali Ghaleb Himmat	Delisted on 10 August 2009	Switzerland, Federal Supreme Court, First Public Law Chamber	22 April 2008	A v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative first instance judgment, No 1A48/2007; ILDC 1201 (CH 2008)	As the Federal Tribunal decided in <i>Nada</i> (Case 1A.45/2007, on 14 November 2007), the fundamental rights and procedural guarantees invoked by 'A' were not part of <i>jus cognes</i> . Switzerland is bound by Council resolutions, and does not enjoy a margin of appreciation with respect to the designation.
04/2008	Al-Qaida SCR 1267	al-Aqeel	QI.A.171.04	USA, District Court of the District of Columbia	4 August 2008	Aqeel Abdulaziz Al-Aqeel v. Paulson, 568 F.Supp.2d 64 (Civil Action No. 05-943 (GK)).	The notification of terrorist designation via press release did not violate due process. The government did not violate Al-Aqeel's rights by failing to provide privileged portions of administrative records in connection with his challenge to the designation. The Saudi Arabian citizen was not entitled to obtain those privileged materials.
04/2008	Al-Qaida SCR 1267	M and Others		UK, House of Lords	30 April 2008 (Report)	R (on the application of M) v. Her Majesty's Treasury and two other actions [2008] UKHL 26; ILDC 1539 (UK 2008).	The question on the interpretation of Council Regulation (EC) 881/2002 was referred to the European Court of Justice. It is difficult to see how household expenses could fund terrorism.
04/2008	Al-Qaida SCR 1267	Othman (Abu Qatada)	QI.M.31.01	UK, Court of Appeal	9 April 2008	OO (Jordan) v. Secretary of State for the Home Department [2008] EWCA Civ 290.	ECHR Arts. 3 should be assessed separately from Art. 6 in determining the human rights compatibility of extradition.

09/2008	Al-Qaida SCR 1267	Kadi Al Barakaat International Foundation	Delisted on 5 October 2012 after Ombudsperson review Barakaat was delisted on 22 October 2009	EU, Court of Justice	3 September 2008	Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, Judgment of 3 September 2008	In the autonomous European Community legal system based on the rule of law, the court must ensure in principle the full review of Community measures in the light of fundamental rights as the expression of a constitutional guarantee. The contested regulation infringed upon the right to be heard, the right to an effective legal remedy, and the right to property.
10/2008	Al-Qaida SCR 1267	A, K, M, Q and G	QI.A.228.06	UK, Court of Appeal	30 October 2008	A and Others v. HM Treasury [2008] EWCA Civ 1187	The Al-Qaida Order was lawful. 'G' was entitled to seek judicial review of the merits of his designation.
11/2008	Al-Qaida SCR 1267	Al Haramain Foundation	QE.A.117.04	USA, District Court for Oregon	6 November 2008	Al Haramain Islamic Foundation, Inc. and Multicultural Association of Southern Oregon v. United States, Civil No. 07-1155-KI	The terrorist designation of the charity is supported by substantial evidence. The notice was, however, insufficient, and the term was vague.
12/2008	Al-Qaida SCR 1267	Sayadi and Vinck	Both delisted on 20 July 2009	Human Rights Committee, ICCPR	29 December 2008	Nabil Sayadi and Patricia Vinck v. Belgium, UN Doc. CCPR/C/94/D/1472/2006	There has been a violation of Articles 12 and 17 of the ICCPR by Belgium. The Committee found unjustified the way that Belgium initially transmitted complainants' names to the Sanction Committee.

02/2009	Al-Qaida SCR 1267	Othman (Abu Qatada)	QI.M.31.01	UK, House of Lords	18 February 2009	RB (Algeria) v. Secretary of State for the Home Department; OO (Jordan) v. Secretary of State for the Home Department [2009] UKHL 10	Special Immigration Appeals Commission (SIAC) did not err in law. The case of Othman did not meet the test regarding Article 6 of the ECHR, which requires a real risk of a fundamental breach of fair trial and of a flagrant violation of his fundamental rights.
06/2009	Al-Qaida SCR 1267	Abdelrazik	Delisted on 30 November 2011 after Ombudsperson review	Canada, Federal Court	4 June 2009	Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada, 2009 FC 580; ILDC 1332 (CA 2009)	The rejection of the applicant's travelling documents breached his right to enter Canada.
06/2009	Al-Qaida SCR 1267	Othman (Abu Qatada)	QI.M.31.01	EU, General Court (then the Court of First Instance)	11 June 2009 (Action brought on 17 December 2001, <i>OJ</i> C68/13)	Case T-318/01, Omar Mohammed Othman v. Council of the European Union and Commission of the European Communities, Judgment of 11 June 2009	Following <i>Kadi</i> (ECJ 2008), Council Regulation (EC) 881/2002 is annulled. It infringes upon the rights of defence, the right to effective judicial review, and the right to property.
07/2009	Al-Qaida SCR 1267	Hay	QI.A.198.05	UK, High Court of Justice, Queen's Bench Division, Administrative Court	10 July 2009	Hay and HM Treasury and Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 1677 (Admin); ILDC 1367 (UK 2009)	The Al-Qaida Order was <i>ultra vires</i> . The Order effectively precludes the right of access to a court. The United Nations Act 1946 neither expressly nor by necessary implication permits the removal of the right of access to the courts.

07/2009	Iran SCR 1737	Melli Bank	Bank Melli and its branches and subsidiaries Based on SCR 1803 (2008), para. 10, which <i>calls upon</i> states to exercise vigilance.	EU, General Court (then the Court of First Instance)	9 July 2009	Joined Cases T-246/08 and T-332/08, Melli Bank plc v. Council of the European Union	The restrictive measures are consistent with the principle of proportionality. The applicant is classified as an entity “owned or controlled” under Article 7(2)(d) of Regulation No. 423/2007.
08/2009	Al-Qaida SCR 1267	Al-Faqih MIRA	Both delisted on 2 July 2012 after Ombudsperson review		Action brought on 14 August 2009	Case T-322/09, Action brought on 14 August 2009 — Al-Faqih and MIRA v. Council and Commission	(Filing)
10/2009	Iran SCR 1737	Melli Bank Iran	Bank Melli and its branches and subsidiaries Based on SCR 1803 (2008), para. 10, which <i>calls upon</i> states to exercise vigilance	EU, General Court (then the Court of First Instance)	14 October 2009	Case T-390/08, Bank Melli Iran v Council	Regulation 423/2007 has a sufficient legal basis. The duty to state reasons was satisfied.
11/2009	Al-Qaida SCR 1267	Al Haramain Foundation	QE.A.117.04	USA, District Court for Oregon	5 November 2009	Al Haramain Islamic Foundation Inc. and Multicultural Association of Southern Oregon v. United States, Civil No. 07–1155–KI, 2009 WL 3756363	Due process violation was harmless and therefore judicial relief is not granted.

12/2009	Al-Qaida SCR 1267	Hassan Ayadi	Hassan: Delisted on 9 September 2010 Ayadi: Delisted on 17 October 2011 after Ombudsperson review	EU, Court of Justice	3 December 2009	Cases C-399/06 P and C-403/06 P, Faraj Hassan and Chafiq Ayadi v. Council of the European Union and European Commission	As the ECJ held in <i>Kadi</i> (2008), the contested EC regulation infringes upon fundamental rights.
01/2010	Al-Qaida SCR 1267	Ahmed & Others (A, K, M and G and HAY)	QI.A.198.05 QI.A.228.06	UK, Supreme Court	27 January 2010	HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury [2010] UKSC 2; ILDC 1534 (UK 2010)	Article 3(1)(b) of the Al-Qaida Order is <i>ultra vires</i> . The Order gives effect to the sanctions regime which had no provision for basic procedural fairness, and deprived those designated of access to an effective remedy.
02/2010	Al-Qaida SCR 1267	Ahmed & Others (A, K, M and G and HAY)	QI.A.198.05 QI.A.228.06	UK, Supreme Court	4 February 2010	HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury (No.2) [2010] UKSC 5	The order rendered in the 27 January 2010 judgment will not be suspended.
04/2010	Al-Qaida SCR 1267	M and Others		EU, Court of Justice	29 April 2010	Case C-340/08, M and Others v. Her Majesty's Treasury, Judgment of 29 April 2010	Article 2(2) of Council Regulation (EC) 881/2002 does not apply to the provision of social security or social assistance benefits to the spouse of a designated person.

06/2010	Al-Qaida SCR 1267	Abdelrazik	Delisted on 30 November 2011 after Ombudsperson review	Canada, Federal Court	7 June 2010 (Filing)	Abdelrazik et al v. Attorney-General of Canada (T-889-10)	Abdelrazik challenged the implementation of the sanctions against him as <i>ultra vires</i> , in violation of the rights of association and of liberty and security. After delisting, Abdelrazik dropped his constitutional claims.
09/2010	Al-Qaida SCR 1267	Al-Faqih Sanabel Relief Agency Abdrabbah Nasuf	QE.S.124.06 Al-Faqih, Abdrabbah, and Nasuf: Delisted on 22 June 2011	EU, General Court	29 September 2010	Joined Cases T-135/06 to T-138/06, Al-Faqih v Council (Case T-136/06, Sanabel Relief Agency v. Council; Case T-137/06, Abdrabbah v Council; Case T-138/06, Nasuf v Council)	The rights of the defence, the right to judicial review and the right to property had not been respected. Regulation (EC) No 881/2002 is annulled in part.
09/2010	Al-Qaida SCR 1267	Kadi	Delisted on 5 October 2012 after Ombudsperson review	EU, General Court	30 September 2010	Case T-85/09, Kadi v. European Commission and Council of the European Union, Judgment of 30 September 2010	Following <i>Kadi</i> (ECJ 2008), the court must ensure in principle the full review of EU measures in the light of fundamental rights. The contested regulation infringed upon the rights of defence, the right to effective judicial review, and the right to property.
01/2011	Al-Qaida SCR 1267	Hassan	Hassan: Delisted on 9 September 2010	EU, General Court	30 January 2011 (Order)	Case T-4/10, Order of the General Court of 30 June 2011 — Al Saadi v. Commission	The applicant is deceased. No further adjudication is necessary.

09/2011	Al-Qaida SCR 1267	Al Haramain Foundation	QE.A.117.04	USA, Court of Appeals for the Ninth Circuit	23 September 2011 (Amended 27 February 2012)	Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury, No. 10-35032	While the Treasury violated due process rights of the designated corporation, procedural due process were harmless and therefore judicial relief is not granted. The Treasury's failure to obtain a judicial warrant violated the Fourth Amendment
09/2011	Al-Qaida SCR 1267	Elosta	Delisted on 22 December 2010	EU, General Court	1 September 2011 (Order)	Case T-102/09, Elosta v. Commission	The action was dismissed as being inadmissible.
09/2011	Al-Qaida SCR 1267	Maftah Mohamed Elmabruk	Delisted on 22 December 2010	EU, General Court	1 September 2011. (Order)	Case T-101/09, Elmabruk Maftah v. European Commission	The action is dismissed as inadmissible.
11/2011	Iran SCR 1737	Melli Bank Iran	Bank Melli and its branches and subsidiaries Based on SCR 1803 (2008), para. 10, which <i>calls upon</i> states to exercise vigilance	EU, Court of Justice (Grand Chamber)	16 November 2011	Case C-548/09 P, Bank Melli Iran v. Council of the European Union	As the CFI rightly decided, Regulation 423/2007 has a sufficient legal basis. The duty to state reasons was satisfied. Security Council resolutions and EU law are distinct legal orders.
--	Al-Qaida SCR 1267	Hafiz Saeed	QI.S.263.08	Pakistan	----	See the eleventh report of the Monitoring Team: UN Doc. S/2011/245, Annex, para. 8	The Supreme Court quashed the Punjab government's restrictive measures taken under the maintenance of public order act owing to 'insufficient evidence'.

01/2012	Al-Qaida SCR 1267	Ayadi	Ayadi: Delisted on 17 October 2011 after Ombudsperson review	EU, General Court	31 January 2012 (Order)	Case T-527/09, Order of the General Court of 31 January 2012 — Ayadi v. Commission	There is no longer any need to adjudicate on the action.
01/2012	Al-Qaida SCR 1267	Othman (Abu Qatada)	QI.M.31.01	ECtHR	17 January 2012	Othman v. United Kingdom (8139/09) (2012) 55 E.H.R.R. 1	The deportation of the applicant would violate Art. 6 of ECHR. He demonstrated a real risk of a flagrant denial of justice contrary to Art. 6.
02/2012	Al-Qaida SCR 1267	Abdulrahim	Delisted on 22 December 2010	EU, General Court	28 February 2012 (Order)	Case T-127/09, Abdulrahim v. Council and Commission (Appeal brought on 18 May 2012, Case C-239/12 P)	The action was dismissed. The adjudication is no longer necessary.
03/2012	Al-Qaida SCR 1267	Kadi (USA)	Delisted on 5 October 2012 after Ombudsperson review	USA, District Court, District of Columbia	19 March 2012	Yassin Abdullah Kadi v. Timothy Geithner, et al., Civil Action No. 09–108(JDB), 2012 WL 898778 (D.D.C.)	Kadi's designation is supported by substantial evidence. The decision to freeze assets did not violate Kadi's due process rights or freedom of speech.
03/2012	Iran SCR 1737	Melli Bank	Bank Melli and its branches and subsidiaries Based on SCR 1803 (2008), para. 10, which <i>calls upon</i> states to exercise vigilance	EU, Court of Justice (Grand Chamber)	13 March 2012	Case C-380/09 P, Melli Bank plc v. Council of the European Union	As the General Court rightly decided, the measures are consistent with the principle of proportionality. The applicant is owned by Bank Melli Iran and to apply the restrictive measures on that basis does not affect the presumption of innocence.

09/2012	Al-Qaida SCR 1267	Nada	Delisted on 23 September 2009	ECtHR, Grand Chamber	12 September 2012	Application no. 10593/08, Nada v. Switzerland	Switzerland violated Arts. 8 (right to privacy) and 13 (effective remedy) of the ECHR. Switzerland had the latitude to harmonise its international obligations under Security Council resolutions and its human rights obligations under the ECHR.
Pending	Al-Qaida SCR 1267	Ayadi	Ayadi: Delisted on 17 October 2011 after Ombudsperson review	EU, Court of Justice		Case C-183/12 P, Appeal brought on 18 April 2012 by Chafiq Ayadi against the order of the General Court (Second Chamber) delivered on 31 January 2012 in Case T-527/09: Chafiq Ayadi v. European Commission	
Pending	Al-Qaida SCR 1267	Al-Akhtar Trust	QE.A.121.05	Pakistan, High Court of Sindh		See the twelfth report of the Monitoring Team: UN Doc. S/2012/729, Annex, para. 3	
Pending	Al-Qaida SCR 1267	Al-Rashid Trust	QE.A.5.01	Pakistan, Supreme Court		See the twelfth report of the Monitoring Team: UN Doc. S/2012/729, Annex, para. 3	An appeal from a 2003 decision.

Date	General quality of the List	Communication with Member States	Humanitarian exemptions	Procedural Safeguards for the Targets (i) Periodical review / (ii) Right to be informed (iii) Right to be heard / (iv) Right to review
02/2000	Introduced the first Guidelines (Press Release SC/6802)		Approved exemptions on flight ban for the Hajj (Press Release SC/6802)	
12/2000	SCR 1333 (para.15(a)) introduced the Committee of Experts		SCR 1333 (para.12) introduced further humanitarian aid exemptions for flight ban SCR 1333 (para.15(b)) requested SG to review the humanitarian implications of the measures (UN Doc. S/2001/241, S/2001/695, S/2001/1215)	
01/2001			Approved the list of humanitarian relief providers (Press Release SC/6994)	
02/2001			Approved procedures to add humanitarian relief providers (Press Release SC/7012)	
03/2001			SG reported on humanitarian implications (S/2001/241)	
06/2001	SCR 1363 introduced the Monitoring Group	SCR 1363 introduced the Monitoring Group	SG reported on humanitarian implications (S/2001/695)	
12/2001			SG reported on humanitarian implications (S/2001/1215)	

01/2002	SCR 1390 (para.5(d)) requested the Committee to promulgate guidelines to facilitate the implementation			
08/2002				(iii) Announced delisting procedures (Press Release AFG/203-SC/7487) Removed Aden and five other individuals and entities (Press Release SC/7490)
11/2002	Approved new Guidelines, listing up the basic identifying information to be included, to the extent possible, in the proposed listing (para.5(c)) (Press Release SC/7571)			(iii) Approved new Guidelines, adopting delisting procedures (para.6) (Press Release SC/7571)
12/2002			SCR 1452 developed mechanisms for exemptions for freezing assets	
01/2003		SCR 1455 (para.4) requested the Committee to communicate to states the list at least every three months		
02/2003		Convened open briefing by the Chairman of the Committee (S/2004/281, para.21)		
04/2003	Revised Guidelines, adding new section on reviewing information (Press Release SC/7731)			(i) Revised Guidelines, adding new section on reviewing information (Press Release SC/7731)

12/2003		Invited member states to comment on report of Monitoring Group (Press Release SC/7948)		
01/2004	<p>SCR 1526 (para.6) introduced the Monitoring Team</p> <p>SCR 1526 (para.17) 'calls upon' states to include identifying information and background information to the greatest extent possible</p>	<p>SCR 1526 (para.6) introduced the Monitoring Team</p> <p>SCR 1526 (para.11) provided states with discussion opportunities with Committee (followed by Press Release SC/8208 (October 2004))</p>		(ii) SCR 1526 (para.18) 'strongly encourages' states to inform individuals of the measures, guidelines and exemptions
07/2005	<p>SCR 1617 (para.2) defined those 'associated with'</p> <p>SCR 1617 (para.4) 'decides' states shall act in accordance with para.17 of SCR 1526, and shall provide a statement of case</p>	SCR 1617 (para.6) decided that the statement of case 'may be used by the Committee in responding to queries from Member States whose nationals, residents or entities have been included'		(ii) SCR 1617 (para.5) 'requests' states to inform individuals of the measures, listing/delisting procedures and exemptions
12/2005	Revised Guidelines, extending the time for considering listing submissions from two business days to five (Press Release SC/8602)			
04/2006	Introduced the procedures for the removal of deceased individuals (Note Verbale SCA/2/06(8))			

07/2006	Introduction of a standard 'cover sheet' for listing proposals, with more details for identifying information and statements of case	Convened open briefing by the Chairman of the Committee, attended by 50 representatives (S/200759, para.12)		
11/2006	Revised Guidelines, attaching the 'cover sheet'	Revised Guidelines, introducing the provision of feedback to the designating state (para.6(f))		<p>(i) Revised Guidelines, introducing annual review of listings left un-updated for more than four years upon request of a Committee member (para.6(i))</p> <p>(ii) Revised Guidelines, introducing the procedure to remind states of residence/citizenship to inform individuals (para.6(h))</p>
12/2006		SCR 1735 (para.29) 'strongly encourages' to 'send representatives to meet the Committee' (c.f., SCR 1526, para.11 and SCR 1617, para.14)	SCR 1735 (para.15) extended the period for consideration of notifications of humanitarian exemptions from 48 hours to 3 working days	<p>(ii) SCR 1735 (para.11) 'calls upon' states of location/nationality to notify individuals of 'the publicly releasable portion of statement of case, a description of the effects of designation' delisting procedures and exemptions</p> <p>(iii) SCR 1730 introduced focal point of delisting</p>
02/2007	Updated Guidelines following SCR 1730 and 1735			
06/2008	SCR 1822 (para.12) reaffirms that states shall provide a 'detailed' statement of case (cf., SCR 1617, para.4, and SCR 1735, para.5)			<p>(i) SCR 1822 (para.25) initiated a comprehensive review of the List. SCR 1822 (para. 26) revised annual review to be applicable to listings left un-reviewed more than three years</p> <p>(ii) SCR 1822 (para. 17) 'demands' states to inform individuals. SCR 1822 (para. 12) decides states to identify publicly releasable information when they propose names, and (para. 13) directed the Committee to make a narrative summary of reasons for listing accessible on the website</p>
12/2008	Updated Guidelines following SCR 1822			

12/2009	SCR 1904 (para. 13) introduced a new standard form for listing		SCR 1904 (para.7) directs the Committee to review the procedures for humanitarian exemptions	<p>(i) SCR 1904 introduced the review every six months of those reportedly deceased (para.26), the annual review of listings which lack necessary identifiers (para.31), and the annual review of all names which have not been reviewed in three or more years (para.32)</p> <p>(ii) SCR 1904 (para.11) treats statement of case as releasable unless otherwise indicated</p> <p>(iii) & (iv) SCR 1904 (para. 20) established the Office of Ombudsperson</p>
07/2010	<p>Updated Guidelines following SCR 1904</p> <p>The listing requests will be considered within 10 days (Sect.6.(h))</p>			<p>(ii) Listed the items included in the narrative summary (Sect.9(d))</p>
01/2011				<p>(i) The Committee considers any official communication from a state on the deceased individuals (Sect.7(i))</p> <p>(iii) & (iv) Attached the annex II of SCR 1904 regarding the Ombudsperson procedure</p>
06/2011				<p>(i) SCR 1989 (para.37) introduced the review every six months of listings which lack necessary identifiers (cf. SCR 1904, para.31)</p> <p>(ii) SCR 1989 (para.14) strongly encourages designating states to make their identity known, and (para.29) strongly urges designating states to allow the Ombudsperson to reveal their designating states' status to petitioners</p> <p>SCR 1989 (para. 16(b) of Annex II) also mandated the Ombudsperson to notify individuals or entities about their listing</p>

				<p>(iii) & (iv) SCR 1989 (para.21) instructed the Ombudsperson to make a recommendation on the delisting</p> <p>The Committee is required to set out the 'reasons' for the delisting decision (Annex II, para. 13; cf. SCR 1904, Annex II, para. 12 ('as appropriate, explanatory comments'))</p>
08/2011				<p>(iii) & (iv) The Ombudsperson posted the standard for its analysis: 'whether there is sufficient information to provide a reasonable and credible basis for the listing' ('Approach to and Standard for Analysis, Observations, Principal Arguments and Recommendation')</p>
11/2011	Updated Guidelines following SCR 1989			