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### Challenges and opportunities for judicial protection of human rights against decisions of the United Nations Security Council

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## **3. The International Human Rights Involved**

### **3.1. Introduction**

The aim of the research is to explore whether and how domestic and regional courts provide judicial protection of international human rights when these are interfered with by the implementation of UNSC measures. The previous chapter elaborated on different kinds of UNSC measures that could cause such interference. The present chapter will introduce the international human rights that could be interfered with by the implementation of such measures, and under what circumstances these rights could be lawfully limited. The purpose of this chapter is not to discuss international human rights protection in general or the particular provisions at length; rather, it will focus on those aspects that proved to be relevant in the cases analysed in the present research. The aim of the chapter is to provide the necessary information to guide and elucidate the discussion on the analysis of the case law, which will start from the subsequent chapter.

First, sections 3.2 to 3.4 will be concerned with some preliminary issues. After that, the discussion in section 3.5 will start by specifying which human rights are affected by the implementation of the relevant UNSC measures. The focus will be on the rights guaranteed by the ICCPR and the ECHR. First, this section will briefly discuss the rights of a more substantive character. After that, it will deal more elaborately with the rights to an effective remedy and access to court. As the normative foundation of judicial protection, these rights are central to the present research. Subsequently, section 3.6 will explain under what conditions states may place lawful limitations on the exercise of human rights, and against what standard courts should review states' interferences. Finally, section 3.7 will explore the current level of the remedies available to individuals at the UN level against UNSC targeted sanctions. The finding on the quality of these remedies is

relevant, inter alia, in the analysis of courts' findings on the lawfulness of limitations on individuals' human rights; certain limitations could be regarded as lawful when there are alternative mechanisms for their protection available.

### **3.2. Sources of the International Human Rights Obligations**

The present chapter will consider certain obligations following from the relevant human rights provisions under the ICCPR and the ECHR. In this regard, it will also take account of the interpretations of those provisions by the instruments' supervisory bodies, the HRC<sup>1</sup> and the ECtHR.<sup>2</sup> Similar norms can be found in the African Charter on Human and Peoples' Rights (ACHPR)<sup>3</sup> and the American Convention on Human Rights (ACHR).<sup>4</sup> This chapter's focus on the ICCPR and the ECHR is informed by the fact that the case law in the present research is almost without exception concerned with the application of these two international instruments only. The same rationale accounts for the choice not to deal with human rights under customary international law.

In a few cases contained in the present research, courts have classified the rights invoked by the applicants as norms of *ius cogens*.<sup>5</sup> However, these courts' understanding of *ius cogens* significantly deviated from the general understanding of that concept, which is thought to include only a very limited

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<sup>1</sup> The Committee's views and general comments do not create binding obligations upon states. However, in practice they are a relevant interpretative source for many domestic and regional courts. See chapter 1.3.4, and M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* 2nd edn (N.P. Engel Kehl 2005) 749, and I Boerefijn *The Reporting Procedure under the Convention on Civil and Political Rights* (Intersentia Antwerpen 1999) 294. See also H Keller and L Grover 'General Comments of the Human Rights Committee and Their Legitimacy' in H Keller and G Ulfstein (eds.) *UN Human Rights Treaty Bodies* (Cambridge University Press Cambridge 2012) 116-198, 128-133.

<sup>2</sup> See G Ress 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) 40 *Texas International Law Journal* 359, 373 et seqq.

<sup>3</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 363 (ACHPR).

<sup>4</sup> American Convention on Human Rights (adopted 22 November, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR).

<sup>5</sup> See chapter 4.3.4.

number of norms.<sup>6</sup> Under no circumstances may states deviate from these superior norms, which are most fundamental to the international community as a whole. In none of the instances discussed in the research could an individual's enjoyment of rights protected under *ius cogens* have genuinely been found to be interfered with.<sup>7</sup> However, the concept has some relevance for the research in so far as it is referred to by certain courts that consider themselves competent to engage in an indirect review of UNSC resolutions only in regard to norms with a *ius cogens* character.<sup>8</sup> Similarly, other courts have been found to conclude that UNSC resolutions cannot prevail over norms of *ius cogens*, without however specifying their content.<sup>9</sup>

To be certain, the research is not concerned with any alleged obligations under international human rights law upon the UN, the UNSC, or its subsidiary bodies. Rather, it deals only with states' obligations under international human rights law. In particular instances these obligations might conflict with their obligations under the UN Charter.

### **3.3. Distinction from Fundamental Rights**

Many domestic constitutions guarantee rights to individuals which are very similar to those guaranteed in international human rights treaties. The present research is primarily concerned with human rights emanating from international

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<sup>6</sup> The exact content of *ius cogens* remains subject to debate. Most probably it would include the right to self-determination of peoples, and the prohibition of aggression, genocide, slave trading, racial discrimination, apartheid, and torture. See A Cassese *International Law* (Oxford University Press 2001) 139, and M Shaw *International Law* 5th edn (Cambridge University Press Cambridge 2003) 117-118. The concept originally stems from treaty law. See Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) article 53.

<sup>7</sup> The High Court in the *Othman* case stopped short of engaging in a review of the applicant's rights under (European) Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 (ECHR) article 3. See *The Queen (on the Application of Othman) v Secretary of State for Work and Pensions* [2001] EWHC 1022 (Admin) 2001 WL 1422967 [64]. This is the closest a court might have been to engaging in a review of a right that could possibly be qualified as *ius cogens*.

<sup>8</sup> See chapter 4.3.4.

<sup>9</sup> See *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, ILDC 832 (UK 2007) (*Al-Jedda*) [35].

law. Still, rights stemming from domestic law play an important role in Chapters 6 and 7. Those chapters will consider the opportunities for judicial protection emerging from courts entertaining a dualist perspective. These courts engage in a review of UNSC resolutions' implementation against domestic constitutional rights. For the purpose of those chapters, these domestically guaranteed rights will be referred to as fundamental rights. The different label is indicative only of the different normative source of these rights, not necessarily of their content. Chapter 6 will elaborate further on the reasons for including domestic courts' review against fundamental rights in the research.

### **3.4. Human Rights of Private Entities**

In addition to individuals, private companies can also be adversely affected by the implementation of UNSC sanctions. Their interests, for example, can be impinged upon by a general ban on trade against a particular country, and they can also be targeted directly by UNSC sanctions. The applicants in some of the cases considered in the subsequent part of the research are indeed private entities.<sup>10</sup> In this regard there is an important difference between the ICCPR and the ECHR. The ICCPR is more tailored towards individuals than the ECHR.<sup>11</sup> There is also a distinction between the two instruments as regards the enforcement of human rights. While the ECHR includes a right for individual communications both for individuals and non-governmental organizations,<sup>12</sup> the ICCPR under the optional protocol grants such a right to individuals only.<sup>13</sup> The

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<sup>10</sup> See, for example, Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, and Case C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] ECR I-06351.

<sup>11</sup> D Moeckli, S Shah and S Sivakumaran (eds.) *International Human Rights Law* (Oxford University Press Oxford 2010) 153; Nowak 2005 (n 1) 15. See also P De Hert 'Artikel 8 - Recht op privacy' in J Vande Lanotte and Y Haeck (eds.) *Handboek EVRM* vol. 2 (I) (Intersentia Antwerpen 2004) 705-788, 726.

<sup>12</sup> ECHR (n 7) article 34. The ECtHR has always regarded private entities, such as companies, to fall within the term non-governmental organizations. M Emberland *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press New York 2006) 4.

<sup>13</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (First Protocol) article 2.

HRC is inclined to interpret this provision literally.<sup>14</sup> This narrow application of the scope of the right to bring a complaint, however, may not be decisive for the scope of application of the ICCPR.<sup>15</sup> There is not necessarily a relationship between the two.<sup>16</sup> In any case, the HRC does not seem to exclude the possibility that certain provisions in the ICCPR could support for-profit interests.<sup>17</sup> Moreover, it acknowledges in relation to small businesses that certain measures concerning the company could indirectly affect a shareholder in the enjoyment of his own human rights.<sup>18</sup>

Whatever could be said of that, there are, in principle, no fundamental reasons why some human rights could not be enjoyed (to a certain extent) by private entities as well,<sup>19</sup> and indeed this is clearly the case under the ECHR. It depends largely on the nature of the human right concerned whether private entities can actually enjoy the (full) protection of that right.<sup>20</sup> The prohibition on torture or the right to freedom from arbitrary detention, for example, are very much intertwined with being human. These rights are not very likely to be equally applicable to private entities.<sup>21</sup> On the other hand, the right to respect for property<sup>22</sup> and the right of access to court are very much amenable to protecting

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<sup>14</sup> Nowak 2005 (n 1) 830.

<sup>15</sup> M Emberland 'Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights' (2004) 4 Human Rights Law Review 257, 274.

<sup>16</sup> A Van Strien 'Rechtspersonen en mensenrechten' (1996) RM Themis 3, 8. See also Nowak 2005 (n 1) 15.

<sup>17</sup> Emberland 2006 (n 12) 55.

<sup>18</sup> Moeckli et al. 2010 (n 11) 153.

<sup>19</sup> See De Hert 2004 (n 11) 705-788, 726. See also Nowak 2005 (n 1) 15; and discussion in Van Strien 1996 (n 16) 3-6 and 9.

<sup>20</sup> Van Strien *ibid.* 9 et seq. Another relevant aspect could be the nature of the private entity concerned. See *ibid.* 17 et seq. See also Emberland 2006 (n 12) 53-54.

<sup>21</sup> Emberland *ibid.* 53-54 and 110.

<sup>22</sup> Article 1 of the Protocol to the ECHR even explicitly includes the application of this right to legal persons. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 20 March 1952, entered into force 18 May 1954) 213 UNTS 221; CETS 9 (First Protocol to the ECHR) article 1. Cameron seems to consider that there is a difference in the level of protection by this right between individuals and companies. See I Cameron 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 Nordic Journal of International Law 159, 191.

the interests of these entities as well.<sup>23</sup> The right to private life is located somewhere in between, in a grey area. Some elements of this right could possibly be applicable, such as the right to defend one's reputation.<sup>24</sup> Other elements of this right are clearly unsuitable, or at least their application is subject to debate: for example, the right to a family life, and the right to privacy.<sup>25</sup> In conclusion, the discussion in the present chapter will focus primarily on the relevant characteristics of the application of certain human rights norms in regard to individuals, but many of the rights discussed below are equally applicable to private entities.

### **3.5. The Human Rights Norms Concerned**

The present section will expound on the international human rights that are most likely to be engaged in the cases concerning individuals who are affected by UNSC resolutions. It will first describe the rights of a more substantive character. Thereafter, it will pay more elaborate attention to the rights to an effective remedy and access to court. This is because these rights are, in addition to being part of the human rights catalogue, also important guarantees for securing judicial protection of (other) human rights. Judicial protection means that interferences with individuals' human rights are subjected to an independent judicial assessment as to their lawfulness.<sup>26</sup> This requires access to a court which is competent and able to engage in an effective judicial review.<sup>27</sup> Such review is the primary means for obtaining an effective remedy.<sup>28</sup>

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<sup>23</sup> These rights, and the right to freedom of expression, are also the most often invoked rights by companies before the ECtHR. *Emberland* 2006 (n 12) 14 and 110.

<sup>24</sup> *De Hert* 2004 (n 11) 705-788, 727-728.

<sup>25</sup> See *Emberland* 2006 (n 12) 113 et seq. See also discussion in *Van Strien* 1996 (n 16) 14 et seq.

<sup>26</sup> See chapter 1.3.3.

<sup>27</sup> Judicial review for the purpose of this research is not understood in the narrow sense of judicial constitutional review. Rather, it intends to describe the act courts engage in when assessing the lawfulness of a measure against any (other) legal instrument.

<sup>28</sup> As will be explained below, the right to an effective remedy does not require the remedy to be judicial, but it has a preference for judicial remedies.

The following subsections discuss human rights that have been invoked by adversely affected individuals before courts in the cases considered in the research's analysis. This does not necessarily mean that in those cases the courts actually found these rights to be violated, or even to be applicable. Such findings depend on the rights' scope of protection, and the possibilities for lawful limitation and derogation. The present section primarily seeks to introduce the relevant aspects of the rights concerned, and section 3.6 will explain in general whether and how individuals' enjoyment of these rights could be lawfully limited.

### **3.5.1. Respect for Property**

Many UNSC sanction measures affect individuals' enjoyment of their right to respect for property. This could be the result of general economic sanctions, which may institute, for example, an obligation to impound a certain aircraft,<sup>29</sup> or the result of targeted sanctions obliging states to freeze certain individuals' assets.<sup>30</sup> The level of judicial protection of property rights is generally rather low.<sup>31</sup> The right to peaceful enjoyment of property was not included directly in the ECHR but was added later in an optional protocol,<sup>32</sup> and it has moderate status.<sup>33</sup> Moreover, the right is not even part of the human rights catalogue contained in the ICCPR.<sup>34</sup>

The right to peaceful enjoyment of property under the ECHR comprises three rules.<sup>35</sup> First, there is the general rule that 'every legal or natural person is

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<sup>29</sup> See, for example, UNSC Res 820 (17 April 1993) UN Doc S/Res/820 [24].

<sup>30</sup> See, for example, UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267 [4].

<sup>31</sup> An important element explaining the low level of judicial protection is the ideological undertone influencing the debate on the right to property and its function in society. See Emberland 2006 (n 12) 188-193.

<sup>32</sup> First Protocol to the ECHR (n 22) article 1.

<sup>33</sup> See Emberland 2006 (n 12) 156; I Cameron, Council of Europe 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions' (6 February 2006) 16; and C Gearty 'The European Court of Human Rights and the Protection of Civil Liberties: An Overview' (1993) 52 Cambridge Law Journal 89, 106.

<sup>34</sup> See also *supra* footnote 31.

<sup>35</sup> *Sporrong and Lönnroth v Sweden* [1982] 7151/75; 7152/75 [61].



entitled to the peaceful enjoyment of his possessions.<sup>36</sup> The second rule then regulates deprivation of property, and subjects that to certain conditions.<sup>37</sup> The third rule acknowledges the right of a state to enact laws necessary to control the use of property in accordance with certain legitimate aims.<sup>38</sup> Thus the provision makes a distinction between a deprivation of property and a control of its use. A slight difference between the two, which appears *prima facie* from the text of the provision, concerns the legitimate aims for the pursuance of which a limitation could lawfully be made.<sup>39</sup> Still, the distinction is primarily relevant in regard to the difference in intensity of judicial review. To a restriction constituting a control of use, a more lenient standard of judicial review is applied than to one establishing a deprivation of property.<sup>40</sup> This means that the decision-maker enjoys a wider margin of appreciation when instituting a control of use of property.<sup>41</sup>

Further, a distinction can be made between the restrictions on the peaceful enjoyment of property, as such, and the procedures by which these restrictions came about.<sup>42</sup> The latter element considers the procedural limb of the right to property. It means that an individual suffering any limitations on his right to respect for property must have a reasonable opportunity of putting his case before the competent authorities.<sup>43</sup>

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<sup>36</sup> First Protocol to the ECHR (n 22) article 1, first sentence.

<sup>37</sup> Ibid. article 1, second sentence.

<sup>38</sup> Ibid. article 1, second paragraph.

<sup>39</sup> See also M Frigo 'Peaceful Enjoyment of Possessions, Expropriation and Control of the Use of Property in the System of the European Convention on Human Rights' (2000) 10 Italian Yearbook of International Law 45, 53.

<sup>40</sup> Y Arai-Takahashi *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR* (Intersentia Antwerp 2002) 151; Frigo *ibid.* 54.

<sup>41</sup> Arai-Takahashi *ibid.* 151-152. See chapter 7.2.1 for further discussion.

<sup>42</sup> See chapters 7.2.1 and 7.2.3 for further discussion.

<sup>43</sup> This procedural requirement does not necessarily mean that there must be an opportunity for judicial review. See *Fredin v Sweden* (App no. 12033/86) 18 February 1991 [50]. Moreover, the ECtHR prefers to guarantee review of restrictions of the right to respect for property under article 6 ECHR, instead of under the right's own procedural requirements. See, for example, *Ibid.* [50]; and *Jacobsson v Sweden* 25 (App no. 10842/84) October 1989 [58]. See also Gearty 1993 (n 33) 106.

### 3.5.2. Freedom of Movement

UNSC targeted sanctions often also include, in addition to a freezing of assets, restrictions on travelling.<sup>44</sup> These restrictions make it impossible for a targeted individual to leave a country. In this respect an especially harsh situation arose in the *Nada* case.<sup>45</sup> In that case, an individual targeted by the 1267 regime lived in a 1.6 square km Italian enclave in Switzerland. In this particular situation the implementation of a travel ban, which was part of the sanction measures against him,<sup>46</sup> effectively led to a house arrest.<sup>47</sup> Under some circumstances, targeted sanctions may make it impossible not only to leave but also to enter one's own country.<sup>48</sup>

Restrictions on travel may constitute an interference with the human right to freedom of movement.<sup>49</sup> This right is laid down in the ICCPR<sup>50</sup> as well as in an additional protocol to the ECHR.<sup>51</sup> It guarantees everyone the freedom to leave any country, including one's own. This puts an obligation on both the individual's state of residence, as well as on his state of nationality, which must provide him with the necessary travel documents.<sup>52</sup> In addition, freedom of movement includes a right for an individual to enter the state of which he is a

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<sup>44</sup> See, for example, UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390 [2].

<sup>45</sup> *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007; and *Nada v Switzerland* [2012] ECHR 1691.

<sup>46</sup> See UNSC Res 1390 (2002) (n 44) [2 (b)].

<sup>47</sup> This was argued by Mr Nada. See *Nada* (CH) (n 45) [10.2].

<sup>48</sup> See *Aboufian Abdelrazik v The Minister of Foreign Affairs* [2009] 2009 FC 580, ILDC 1332 (CA 2009) [122].

<sup>49</sup> See UN Human Rights Committee 'Views of the Committee Concerning the Communication Submitted by Sayadi and Vinck' (29 December 2008) CCPR/C/94/D/1472/2006 (*Sayadi and Vinck*) [10.8].

<sup>50</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) article 12.

<sup>51</sup> Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963, entered into force 2 May 1968) CETS 46 (Fourth Protocol to the ECHR) article 2 and 3.

<sup>52</sup> See UN Human Rights Committee 'General Comment No. 27, Article 12: Freedom of Movement' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [9].

national.<sup>53</sup> Apart from the possibility of derogation,<sup>54</sup> the right for nationals to enter their own country could be regarded as an absolute right.<sup>55</sup>

### 3.5.3. Liberty and Security

The right to liberty and security does not totally prohibit deprivations of liberty. It precludes only those deprivations that are arbitrary and unlawful.<sup>56</sup> In addition, it intends to construe procedural safeguards. The restriction on movement must be more grievous than that in regard to the right to freedom of movement considered above.<sup>57</sup> It regards limitations on the freedom of bodily movement in the narrowest sense.<sup>58</sup>

Under the ECHR, the right to liberty and security recognizes six grounds on the basis of which a person may be lawfully detained.<sup>59</sup> A deprivation of liberty for any other reason constitutes, without more, a violation of the individual's rights under the Convention.<sup>60</sup> The six grounds need to be interpreted restrictively.<sup>61</sup> In

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<sup>53</sup> The scope of application of the right as laid down in the ICCPR (n 50) appears to extend beyond nationals of a state. See General Comment No. 27 *ibid.* [20].

<sup>54</sup> See *infra* subsection 3.6.1.

<sup>55</sup> See Nowak 2005 (n 1) 283 and 289, and P van Dijk, F van Hoof, A van Rijn and L Zwaak *Theory and Practice of the European Convention on Human Rights* 4th ed. (Intersentia Antwerpen 2006) 949-950.

<sup>56</sup> Nowak 2005 (n 1) 211.

<sup>57</sup> *Ibid.* 212; F Dhont 'Artikel 5 - Recht op persoonlijke vrijheid en veiligheid' in J Vande Lanotte and Y Haecck (eds.) *Handboek EVRM* vol. 2 (I) (Intersentia Antwerpen 2004) 267-370, 277.

<sup>58</sup> See Nowak 2005 (n 1) 212.

<sup>59</sup> The six grounds mentioned in article 5 (1) are: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. ECHR (n 7) article 5 (1).

<sup>60</sup> F Jacobs and R White *The European Convention on Human Rights* 4th edn (Oxford University Press Oxford 2006) 127.

<sup>61</sup> Dhont 2004 (n 57) 267-370, 275.

contrast, the provision in the ICCPR does not contain an exhaustive enumeration of grounds for lawful detention,<sup>62</sup> because the negotiating states could not agree on such a list.<sup>63</sup> Instead, they adopted a prohibition of arbitrariness of arrest or detention,<sup>64</sup> and required it to be on ‘such grounds and in accordance with such procedures as established by law.’<sup>65</sup>

Under very specific circumstances, the right to liberty and security could be affected by the implementation of a UNSC resolution. It was found to be applicable in a case concerning an individual who was interned by Multi National Forces (MNF) operating in Iraq on the basis of UNSC authorization.<sup>66</sup> The UNSC authorized these forces to intern persons where this would be necessary for imperative reasons of the security of Iraq.<sup>67</sup> This authorization, however, did not fit within one of the grounds for lawful detention mentioned in article 5(1) of the ECHR.

In addition, the right to liberty and security also seeks to guarantee the principle of *habeas corpus*.<sup>68</sup> This means that an individual who is deprived of his liberty is granted access to a court without delay, in order to determine the lawfulness of his detention. This principle could be found to be applicable in respect of individuals being interned on the basis of a UNSC authorization as well.<sup>69</sup>

#### **3.5.4. Private and Family Life**

Sanction measures such as the freezing of assets or the imposition of a travel ban may significantly affect the targeted individual’s enjoyment of his right to

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<sup>62</sup> ICCPR (n 50) article 9 (1).

<sup>63</sup> Nowak 2005 (n 1) 216.

<sup>64</sup> See *ibid.* 224-225.

<sup>65</sup> ICCPR (n 50) article 9 (1). See also Nowak 2005 (n 1) 224.

<sup>66</sup> See *Al-Jedda* (UKHL) (n 9); and *Al-Jedda v The United Kingdom* [2011] ECHR 1092.

<sup>67</sup> See UNSC Res 1546 (8 June 2004) UN Doc S/Res/1546 [10], and the annexed letter of US Secretary of State Colin Powell.

<sup>68</sup> ECHR (n 7) article 5 (4); and ICCPR (n 50) article 9 (4).

<sup>69</sup> In the *Al-Jedda* case the House of Lords was not concerned with any issue relating to this principle. *Al-Jedda* (UKHL) (n 9) [46]. The Court of First Instance in the same case did consider it, but it was not brought up again on appeal. *The Queen (On the Application of Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327 [13].

respect for private and family life.<sup>70</sup> One of the targeted individuals argued before a court that it was impossible for him to have the means for enjoying the normal aspects of a civilised existence.<sup>71</sup> He was unable to engage in any paid employment, and he was excluded from almost all aspects of social life.<sup>72</sup> This is mainly due to the fact that the property rights interfered with are also necessary for the realization of private and family life.<sup>73</sup>

In a similar vein, the travel ban imposed against the earlier mentioned Mr Nada, which confined his movement to an Italian enclave in Switzerland, made it difficult for him to consult his doctors and to visit his friends and family.<sup>74</sup> In addition, Mr Nada invoked the right to private and family life also with regard to the attack on his honour and reputation.<sup>75</sup> The names of targeted individuals are put on a publicly accessible blacklist as individuals designated by the UN Sanctions Committee. The negative association with the sanctions list could amount to defamation.<sup>76</sup>

The right to private and family life is guaranteed under the ICCPR as well as under the ECHR.<sup>77</sup> Under both instruments the right has a rather broad scope of application, which is continuously expanding.<sup>78</sup> In addition, the ICCPR contains an explicit paragraph in the provision which seeks to protect individuals from attacks on their honour and reputation.<sup>79</sup> It prohibits unlawful and intentional

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<sup>70</sup> The right was mentioned, for example, in *Othman* (UK) (n 7) [63]; *M, A, MM v HM Treasury* [2006] EWHC 2328 (Admin) [61]; and Case C-340/08 *M (FC) and Others v HM Treasury* (Opinion of Advocate General Mengozzi) [2010] ECR I-03913 [67].

<sup>71</sup> Case T-318/01 *Omar Mohammed Othman v Council and Commission* [2009] ECR II-1627 [64].

<sup>72</sup> *Ibid.* [65].

<sup>73</sup> Cameron 2003 (n 22) 188.

<sup>74</sup> *Nada* (ECtHR) (n 45) [149], [154].

<sup>75</sup> *Nada* *ibid.* [149]. However, see concurring opinion of Judge Malinverni *ibid.* [27]-[29].

<sup>76</sup> See also *Sayadi and Vinck* (n 49) [10.12].

<sup>77</sup> The right to respect for private and family life is guaranteed by the ICCPR (n 50) article 17, and the ECHR (n 7) in article 8.

<sup>78</sup> R White and C Ovey *The European Convention on Human Rights* 5th ed. (Oxford University Press Oxford 2010) 401; Van Dijk et al. 2006 (n 55) 664-666; and Nowak 2005 (n 1) 385.

<sup>79</sup> ICCPR (n 50) article 17.

impairments that are based on untrue allegations.<sup>80</sup> The ECHR does not contain a separate provision on this aspect of the right to private and family life. However, an individual's reputation could constitute a relevant and important element that states may have to take into account when determining their obligation to ensure the right to respect for private life.<sup>81</sup> Moreover, under both human rights instruments interference with a (civil) right to honour and reputation, if recognized by the relevant national law, may trigger the application of the right of access to court,<sup>82</sup> which will be discussed below.

### **3.5.5. Effective Remedy**

The implementation of targeted sanctions can have an adverse effect on targeted individuals' right to an effective remedy. This right is contained in many international human rights treaties, among which are the ICCPR and the ECHR.<sup>83</sup> It obliges states to afford an effective remedy before a competent national authority to individuals who claim to be a victim of a breach of one of the human rights laid down in these treaties. Accordingly, the right to an effective remedy under the ICCPR and the ECHR applies only with regard to the human rights guaranteed in those respective instruments.<sup>84</sup>

This does not mean that the right does not have an independent existence. The right to an effective remedy can be violated even if no violation is found of any of the other human rights.<sup>85</sup> The only requirement for the right's applicability is

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<sup>80</sup> Nowak 2005 (n 1) 404.

<sup>81</sup> Van Dijk et al. 2006 (n 55) 666. Moreover, the reputation of others constitutes a legitimate aim for limiting an individual's enjoyment of freedom of expression under ECHR (n 7) article 10 sub 2.

<sup>82</sup> Cameron 2006 (n 33) 11.

<sup>83</sup> ICCPR (n 50) article 2 (3) and ECHR (n 7) article 13. See also article 25 of the ACHR (n 4) and article 7 of the ACHPR (n 3). The right to an effective remedy is also recognized in many national constitutional systems. D Shelton *Remedies in International Human Rights Law* 2nd edn (Oxford University Press Oxford 2005) 27-30 and 114.

<sup>84</sup> Compare to article 8 of the Universal Declaration on Human Rights, which includes a right to an effective remedy also with regard to violations of other fundamental rights accorded by a constitution or other laws. See M Cromheecke and V Staelens 'Artikel 13 - Recht op daadwerkelijke rechtshulp' in J Vande Lanotte and Y Haeck (eds.) *Handboek EVRM* vol. 2 (II), (Intersentia Antwerpen 2004) 76-126, 77-78.

<sup>85</sup> *Ibid.* 80.

that the individual has an arguable claim that one of the rights of the human rights instrument has been violated.<sup>86</sup> The question then is whether that individual had an effective opportunity to bring that complaint before a competent national authority, regardless of whether the complaint was eventually sustained.

A right to an effective remedy can also be recognized as a procedural requirement inherent in other more substantive human rights in the instrument.<sup>87</sup> This evidences the right's hybrid character. On the one hand, it is a human right in itself, and on the other it is a mechanism for securing the protection of other human rights.<sup>88</sup> Without such a mechanism human rights law would become virtually meaningless in individual instances. The lack of a remedy is, in effect, similar to the lack of a right.<sup>89</sup>

The research considers both perspectives on the right to an effective remedy. Its exploration of judicial protection by domestic and regional courts must be understood primarily from the perspective of the instrumental function of the right, as a mechanism for human rights protection. In this sense, the research focuses on judicial remedies only. It will determine whether these courts are able to provide for effective judicial protection of international human rights. In addition, an effective remedy as a human right, which includes non-judicial remedies as well, is relevant for the research in the context of courts assessing the observance of the human right to an effective remedy by state authorities implementing UNSC resolutions.

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<sup>86</sup> Ibid. 94; Nowak 2005 (n 1) 67. See on that page, however, also footnote 200. There Nowak rejects as incorrect an opinion voiced by the Human Rights Committee in which it held that a right to a remedy arises only after a violation of a right under the ICCPR has been established.

<sup>87</sup> See *AGOSI v The United Kingdom* [1986] App no. 9118/80 [55]. See also *Kadi I* (appeal) (n 10) [368].

<sup>88</sup> See on the hybrid character of article 13 of the ECHR (n 7): Cromheecke and Staelens (n 84) 79-80.

<sup>89</sup> See Shelton 2005 (n 83) 29 and 100. Cf. S Gardbaum 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749, 763.

While the right does not require that the remedy must be judicial, the ICCPR obliges states to place priority on judicial remedies.<sup>90</sup> It also contains an obligation of conduct to develop the possibilities of judicial remedy.<sup>91</sup> Still, at the moment, if there is in a particular case no access to a court it does not necessarily mean that the right to an effective remedy has been violated, because other alternative (non-judicial) mechanisms of review could be available. The right to an effective remedy requires, in any case, that the competent authority is impartial and that it has a certain measure of independence from the original decision-maker.<sup>92</sup> Moreover, in determining whether a particular remedy is indeed effective, it is relevant to consider the competent authorities' powers and the procedural guarantees available.<sup>93</sup> It is important that the authority is able to consider the substance of the complaint and can provide an appropriate measure of relief.<sup>94</sup> In addition, an effective practice of following up on the relief granted by the competent authority must also exist.<sup>95</sup>

The assessment of the effectiveness of a remedy needs to be made in regard to the specific circumstances of the case.<sup>96</sup> In situations concerning national security, the required remedy should be 'as effective as can be' in that particular situation.<sup>97</sup> Under certain circumstances the aggregate of individual non-effective remedies may also, if taken together, constitute an effective remedy.<sup>98</sup>

### **3.5.6. Fair Trial and Access to Court**

States implementing targeted sanctions against individuals designated by a UNSC Sanctions Committee are almost inevitably interfering with those

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<sup>90</sup> Nowak 2005 (n 1) 64.

<sup>91</sup> 'Each State Party to the present Covenant undertakes [...] to develop the possibilities of judicial remedy.' ICCPR (n 50) article 2 (3) (b).

<sup>92</sup> Cromheecke and Staelens (n 84) 121-123. See also Nowak 2005 (n 1) 64.

<sup>93</sup> *Klass and Others v Germany* [1978] (App. No. 5029/71) [67].

<sup>94</sup> *Chahal v The United Kingdom* [1996] (App. No. 22414/93) [145]; see Cromheecke and Staelens (n 84) 102.

<sup>95</sup> Cromheecke and Staelens *ibid.* 120.

<sup>96</sup> Nowak 2005 (n 1) 65.

<sup>97</sup> *Klass* (n 93) [69]; *Chahal* (n 94) [150]; see also Cromheecke and Staelens (n 84) 107.

<sup>98</sup> *Klass* *ibid.* [72]; *Chahal* *ibid.* [145]; see also Cromheecke and Staelens *ibid.* 105.



individuals' right of access to court and right to a fair trial. They must implement these sanctions without having any scope of discretion with regard to the means and procedures by which these measures are applied to the individuals concerned. Moreover, due to the lack of access to the confidential grounds and evidence underlying an individual's designation, many domestic courts are unable to guarantee a full review of the merits of a case. In addition, other courts may themselves be reluctant to engage in a (full) review of the implementation of the sanction measures, due to the precedence of UNSC obligations over obligations under other international agreements.<sup>99</sup>

The ECHR and the ICCPR both recognize the human right of access to court, as a part of the right to a fair trial.<sup>100</sup> Individuals are entitled to access to a court in the determination of their civil rights and obligations, and of any criminal charge against them.<sup>101</sup> The notions 'civil rights and obligations' and 'criminal charge' require an autonomous interpretation.<sup>102</sup> 'Civil rights and obligations' include, but are not limited to, rights and obligations of a private law character.<sup>103</sup> National law is the starting point for determining whether an individual can invoke such a right or obligation.<sup>104</sup> However, it is for the ECtHR or the HRC to make an independent assessment of whether in a specific instance there is a 'civil right or obligation' engaged within the meaning of the right of access to court.<sup>105</sup>

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<sup>99</sup> Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)* [2005] ECR II-3649 [288].

<sup>100</sup> See *Golder v The United Kingdom* [1975] 4451/70 [36], and 'General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial' (23 August 2007) UN Doc CCPR/C/GC/32 [9].

<sup>101</sup> ECHR (n 7) article 6 (1). The (to a certain extent) comparable provision in the ICCPR uses the phrase 'rights and obligations in a suit at law' instead of the phrase 'civil rights and obligations', as is used in the ECHR. However, in the French wording both provisions are equivalent in this regard: '*des contestations sur ses droits et obligations de caractère civil*'. ICCPR (n 50) article 14 (1). Accordingly, the scope of applicability of the civil limbs of both provisions may be regarded as largely similar. See Nowak 2005 (n 1) 315. Van Dijk et al. 2006 (n 55) 515-516.

<sup>102</sup> Van Dijk et al. *ibid.* 516; White and Ovey 2010 (n 78) 248; and Nowak 2005 (n 1) 314 and 318; Cameron 2006 (n 33) 10.

<sup>103</sup> Van Dijk et al. *ibid.* 524, and White and Ovey *ibid.* 247.

<sup>104</sup> Van Dijk et al. *ibid.* 516, and G Lautenbach *The Rule of Law Concept in the Case Law of the European Court of Human Rights* (Dissertation University of Amsterdam 2012) 164.

<sup>105</sup> Van Dijk et al. *ibid.* 516; Nowak 2005 (n 1) 314-315.

The implementation of UNSC sanctions could be argued to fall within the scope of this civil limb of the right of access to court. In practice, this limb comprises many unilateral administrative decisions as well.<sup>106</sup> The case law of the ECtHR does not provide general guidelines on the delineation between civil and public law conflicts.<sup>107</sup> What is clear, however, is that the outcome of the contested procedure must have a direct and decisive effect on the determination of a civil right.<sup>108</sup> This could equally be the case with many administrative procedures.<sup>109</sup> Similarly, the HRC understands the equivalent term ‘suit at law’ also to include most of the disputes that would traditionally be regarded as public law conflicts.<sup>110</sup>

A civil right that could be directly determined by the implementation of UNSC sanctions, and thus triggering the right of access to a court, is the right to defend one’s reputation, discussed previously.<sup>111</sup> Designating an individual as a terrorist suspect or a supporter of terrorism and placing him on a blacklist could amount to defamation.<sup>112</sup> In this regard, it has to be noted that an individual can be on a blacklist for a considerable period of time, and without an eventual criminal trial in which guilt or innocence is determined.<sup>113</sup>

In addition, many UNSC sanction measures have a direct effect on the right to respect for property, which is also a human right in itself under the ECHR. However, what is relevant to the applicability of the right of access to court is

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<sup>106</sup> B De Smet, J Lathouwers and K Rimanque ‘Artikel 6 - Recht op een eerlijk proces (§ 1)’ in J Vande Lanotte and Y Haeck (eds.) *Handboek EVRM* vol. 2 (I) (Intersentia Antwerpen 2004) 386-519, 392; Nowak 2005 (n 1) 318.

<sup>107</sup> De Smet et al. *ibid.* 392-394.

<sup>108</sup> Nowak 2005 (n 1) 315; De Smet et al. *ibid.* 391-392.

<sup>109</sup> Nowak *ibid.* 318, and Van Dijk et al. 2006 (n 55) 528-535.

<sup>110</sup> Nowak *ibid.* 317-318. See also *supra* footnote 101.

<sup>111</sup> Van Dijk et al. 2006 (n 55) 527, 536-537; Cameron 2006 (n 33) 11.

<sup>112</sup> See *Sayadi and Vinck* (n 49) [10.12]-[10.13]. But see also *Segi and Others v 15 states of the European Union* [2002] (App 6422/02, 9916/02), in which the ECtHR found that it may be embarrassing to appear in a list comprised of ‘groups or entities involved in terrorist acts’, but that the link was ‘too tenuous to justify application of the Convention.’

<sup>113</sup> Cameron 2006 (n 33) 11.

whether the measures are decisive for the determination of that right.<sup>114</sup> Most of the targeted sanctions are of a preventive and temporary character only. They are interim measures that do not determine a case. But considering the open-ended nature and the duration of these measures they cannot (or at least can no longer) be qualified as interim measures.<sup>115</sup> They are not short-term measures pending a final judgment of the issue.<sup>116</sup> No judicial determination is eventually foreseen, and in many instances the measures are already in place for a considerably long period of time, without any realistic perspective on the removal of the sanctions in the near future. Moreover, in some instances frozen assets are actually forfeited.<sup>117</sup>

The nature, severity, and duration of some of the targeted sanctions might also be sufficient to justify qualifying them as constituting a ‘criminal charge’. This would not change the content of the right of access to court, but such qualification would open up a whole new panoply of guarantees under the right to a fair trial.<sup>118</sup> For example, rights such as the presumption of innocence; the right to be informed promptly and in detail of the nature and cause of the accusation; the right to be tried without undue delay; and the right to examine or to have examined witnesses will then have to be observed as well.<sup>119</sup> Moreover, the principle of legality will also then become applicable to the imposition of these sanctions.<sup>120</sup>

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<sup>114</sup> De Smet et al. 2004 (n 106). Nowak regards the same criterion to be applicable in respect of article 14 of the ICCPR (n 50): see Nowak 2005 (n 1) 315.

<sup>115</sup> Cameron 2003 (n 22) 192.

<sup>116</sup> Ibid.

<sup>117</sup> See the targeted sanctions against Iraq: UNSC Res 1483 (22 May 2003) UN Doc S/Res/1483 [23].

<sup>118</sup> These guarantees would also be applicable to disciplinary proceedings that are categorized under the civil limb. De Smet et al. 2004 (n 106) 451, and the case law mentioned there in footnote 380.

<sup>119</sup> ECHR (n 7) article 6 (2), (3) a, d; and ICCPR (n 50) article 14 (2), (3) a, c, e.

<sup>120</sup> ECHR (n 7) article 7; ICCPR (n 50) article 15.

As was mentioned, under the ECHR and the ICCPR the concept of criminal charge is autonomous.<sup>121</sup> How the measures are qualified under domestic law is a relevant factor, but not decisive.<sup>122</sup> The most important criterion is the nature and severity of the penalty.<sup>123</sup> Another relevant element is the character of the act.<sup>124</sup> Until now, no court has qualified UNSC targeted sanctions as constituting a criminal charge. The General Court in the *Kadi II* case, however, suggested that considering their duration the exact qualification of the nature of the sanctions might be subject to debate.<sup>125</sup>

Whatever the measures' characterization, the right of access to court and the right to a fair trial under both the civil and the criminal limb seek to guarantee access to a court with full competence to review the merits of a case,<sup>126</sup> which provides adequate motivation for its decisions,<sup>127</sup> and whose final decisions are effective.<sup>128</sup> Moreover, the principles of equality of arms and of adversary proceedings need to be observed.<sup>129</sup> These principles require that the parties before the court have an (equal) opportunity to present their case,<sup>130</sup> that they have (equal) access to all relevant information brought to the court,<sup>131</sup> and that they are in a position to challenge effectively that information.<sup>132</sup>

To a certain extent the right of access to court overlaps with the right to an effective remedy. Both also have, in addition to being a human right, a functional aspect in maintaining the system. As was mentioned in the previous subsection, the right to an effective remedy operates as a mechanism for ensuring the

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<sup>121</sup> Nowak 2005 (n 1) 318; Cameron 2006 (n 33) 10.

<sup>122</sup> Cameron *ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*; Nowak 2005 (n 1) 318.

<sup>125</sup> Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [150].

<sup>126</sup> De Smet et al. 2004 (n 106) 485-486, 490. Van Dijk et al. 2006 (n 55) 561.

<sup>127</sup> White and Ovey 2010 (n 78); De Smet et al. *ibid.* 461-463.

<sup>128</sup> White and Ovey *ibid.* 259-260.

<sup>129</sup> Nowak 2005 (n 1) 322; White and Ovey *ibid.* 261; Arai-Takahashi 2002 (n 40) 48; and De Smet et al. 2004 (n 106) 451 et seq.

<sup>130</sup> White and Ovey *ibid.*; Van Dijk et al. 2006 (n 55) 580.

<sup>131</sup> White and Ovey *ibid.*; De Smet et al. 2004 (n 106) 453 and 454; Van Dijk et al. *ibid.* 584.

<sup>132</sup> De Smet et al. *ibid.* 453.

observance of (other) human rights. Similarly, the right of access to court could be seen as a foundation of the rule of law.<sup>133</sup> In addition, the two human rights coincide in that domestic courts are the primary authorities for granting an effective remedy.<sup>134</sup>

In this regard, the right of access to court takes over the function of the right to an effective remedy to a considerable extent.<sup>135</sup> This is especially so since many human rights have an aspect that could be qualified as a civil right within the meaning of the right of access to court.<sup>136</sup> Relevant exceptions are, possibly, the right to liberty and security<sup>137</sup> and the right to freedom of movement. On the other hand, the above-mentioned right of individuals not to be subjected to an unlawful attack on their reputation may not, as such, be regarded as a human right under the ECHR,<sup>138</sup> but as a civil right it could trigger the application of the right of access to court.<sup>139</sup>

In addition, the requirements imposed by the right of access to court are stricter than those required by the right to an effective remedy.<sup>140</sup> The right of access to court, for example, demands the access to a court or tribunal established by law; it cannot be implemented by granting access only to other competent (non-judicial) authorities, as would be possible in regard to the right to an effective remedy. What is more, the scope of protection of the right of access to court

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<sup>133</sup> See *Golder* (n 100) [34], and *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5, ILDC 1533 (UK 2010) (*Ahmed*) [146]. Cf., Lautenbach 2012 (n 104) 157.

<sup>134</sup> The right to an effective remedy does not require the competent authority to be judicial, but see Nowak 2005 (n 1) 64; see also ICCPR (n 50) article 2 (3) (b).

<sup>135</sup> P van Dijk 'Access to Court' in R Macdonald, F Matscher and H Petzold (eds.) *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers Dordrecht 1993), 352. See also White and Ovey 2010 (n 78) 139.

<sup>136</sup> Van Dijk et al. 2006 (n 55) 535-538.

<sup>137</sup> *Golder* (n 100) [33]. But see Van Dijk et al. 2006 (n 55) 536.

<sup>138</sup> See subsection 3.5.2.

<sup>139</sup> Cameron 2006 (n 33) 11, and Van Dijk et al. 2006 (n 55) 536. For such an occurrence the ECtHR must be able to discern a right thereto under national law. Van Dijk et al. *ibid.* 537; and Lautenbach 2012 (n 104) 164.

<sup>140</sup> *Tinnelly & Sons Ltd and Others and Mc Elduff and Others v The United Kingdom* [1998] (62/1997/846/1052-1053) [77].

cannot be restricted by reasons of national security to a standard of ‘as effective as can be’ in the circumstances of the case.<sup>141</sup>

### **3.6. Derogation and Limitation**

Not all interferences with an individual’s human right constitute a violation of that right. Most of the human rights discussed in the previous subsections can be subjected to lawful restrictions. For these restrictions to be lawful they need to observe certain criteria. The present subsection will first briefly consider the option of derogation, and then it will discuss the system of limitations, and in addition it will pay special attention to the assessment of proportionality.

#### **3.6.1. Derogation**

Under certain circumstances states may derogate from their obligations under international human rights treaties. This means that the rights lawfully derogated from are inapplicable for a period of time. Both the ICCPR and the ECHR afford states a very restrictive opportunity to resort to such derogation.<sup>142</sup> The relevant conditions are that there is an emergency situation threatening the life of the nation; the measures are strictly required by the exigencies of the situation; and the measures must not be in violation of other rules of international law.<sup>143</sup> In addition, certain human rights are excluded from this possibility. They cannot be derogated from. For example, the prohibition on inhumane and cruel treatment and the principle of legality are excluded from derogation under both human rights instruments.<sup>144</sup>

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<sup>141</sup> Ibid. [77]. Compare to *Klass* (n 93) [69]; and *Chahal* (n 94) [150]. See also previous subsection.

<sup>142</sup> ICCPR (n 50) article 4 and ECHR (n 7) article 15. See F Megret 'Nature of Obligations' in D Moeckli, S Shah and S Sivakumaran (eds.) *International Human Rights Law* (Oxford University Press Oxford 2010) 124-149, 143.

<sup>143</sup> In addition, both instruments require the state to inform respectively the SG of the Council of Europe or the SG of the UN of the measures taken and the reasons thereto. The ICCPR adds that the measures may not be discriminatory. See to the same effect *A and Others v The United Kingdom* [2009] (App No. 3455/05) [190].

<sup>144</sup> ECHR (n 7) article 15 in conjunction with articles 3 and 7; and ICCPR (n 50) article 4 in conjunction with articles 7 and 15.

The relevance of the possibility of derogation from human rights obligations remains limited for the present research. In no case concerning the implementation of UNSC sanctions was the existence of an emergency situation relied upon. It could be argued that by the mere fact that the UNSC has adopted a particular measure pursuant to a determination that there was a threat to international peace and security, a de facto state of emergency would exist. However, opportunities for derogation are strictly formulated. Moreover, states relying on such derogation have to inform, respectively, the Secretaries General of the Council of Europe or the UN. The UNSC has never required states to make such an announcement. Nor have courts referred to a de facto state of emergency when assessing the lawfulness of certain interferences with international human rights law due to implementations of UNSC resolutions.<sup>145</sup>

With regard to the threats to national security posed by international terrorism, the United Kingdom appears to have been the only state to avail itself of its right to derogate from international human rights law in response to these threats.<sup>146</sup> The measures it sought to take, however, did not concern an implementation of UNSC sanctions. Rather, the United Kingdom extended its power to arrest and detain foreign nationals, for which it sought derogation from individuals' right to liberty. This derogation was challenged before the ECtHR.<sup>147</sup> The Court held that states enjoy a wide margin of appreciation in determining whether a situation constitutes a public emergency threatening the life of the nation.<sup>148</sup> The margin is, however, not unlimited; it is for the Court to exercise supervision.<sup>149</sup> It accepted the United Kingdom's submission that there was a public emergency.<sup>150</sup>

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<sup>145</sup> See also A Peters 'Article 25' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. I (Oxford University Press Oxford 2012) 791-854, 825.

<sup>146</sup> With regard to the ECHR see *A v United Kingdom* (n 143) [11] and [180]. With regard to the ICCPR see 'Report of the Human Rights Committee' UN Doc A/57/40 (Vol. I) [33]. Subsequent annual reports by the Human Rights Committee also do not refer to other states seeking to derogate from their obligations under the ICCPR in relation to the threats posed by international terrorism.

<sup>147</sup> *A v United Kingdom* (n 143).

<sup>148</sup> *Ibid.* [173].

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.* [181].

However, it found the measures taken by the United Kingdom to be disproportionate because they were discriminatory.<sup>151</sup>

### 3.6.2. The System of Limitations

Besides the very restrictive option of derogation, states may lawfully limit individuals' enjoyment of most of the human rights considered in the above subsections. This does not mean that these rights could then be held inapplicable, but that they could be subject to certain restrictions allowed for by the particular human rights norm. Courts, when assessing an individual's complaint of an interference with a human right, will have to determine, first, whether the conduct complained of indeed falls within the scope of protection of the human right concerned. If the answer is in the affirmative, they will have to evaluate whether the state's interference with the individual's human right is lawful. The possibility to limit a certain right is either made explicit in a limitation clause in the provision of that human right, or it is implicit in its nature.<sup>152</sup> Explicit limitation clauses can be found, for example, in provisions on the right to freedom of movement<sup>153</sup> and the right to private life.<sup>154</sup>

Generally, limitations must observe three criteria. They need to be prescribed by law; to pursue a legitimate aim; and to be necessary and proportional.<sup>155</sup> Essentially, the same criteria for lawfulness apply in regard to implicit limitations.<sup>156</sup> The first criterion, that a limitation needs to be prescribed by law,

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<sup>151</sup> *Ibid.* [190].

<sup>152</sup> See *Golder* (n 100) [38]. Alternatively, the Universal Declaration of Human Rights contains a general limitation clause, in article 29.

<sup>153</sup> ICCPR (n 50) article 12. See in the same instrument also articles 18, 19, 21, and 22.

<sup>154</sup> ECHR (n 7) article 8. See in the same instrument also articles 9-11. The right to privacy as enshrined in the ICCPR does not contain a limitation clause as such, but prohibits arbitrary or unlawful interferences. Opinions differ on whether this provision provides a higher or lower level of protection than article 8 ECHR. See Nowak 2005 (n 1) 381, but see also 383.

<sup>155</sup> White and Ovey 2010 (n 78) 312; see also Megret (n 142) 140-143; General Comment No. 27 (n 52) [11]; and R Hanski and M Scheinin *Leading Cases of the Human Rights Committee* 2nd edn (Institute for Human Rights Turku 2007) 4.

<sup>156</sup> J vande Lanotte and Y Haeck *Handboek EVRM* (Intersentia Antwerpen 2004) 150; see also Arai-Takahashi 2002 (n 40) 36, 41 and 47.



is an emanation of the principle of legal certainty.<sup>157</sup> It does not only mean that there needs to be a law which was applicable at the time of the events complained of, but also that that law must have been accessible and foreseeable to the individual concerned. The ECtHR assesses this criterion only very marginally.<sup>158</sup> It leaves wide discretion to the national courts. Limitations are not often found to be unlawful on the basis of this criterion. Also, in the present context of implementation of UNSC resolutions, no difficulties arise in respect of this requirement. However, since UNSC resolutions are generally not considered to be self-executing,<sup>159</sup> it is usually not the UNSC resolution itself that constitutes the legal basis, but a domestic implementation of that resolution.<sup>160</sup>

The second criterion, that the measures must pursue a legitimate aim, also does not normally pose any serious impediment to a limitation's lawfulness.<sup>161</sup> States have wide discretion with regard to this criterion as well.<sup>162</sup> What is more, the ECtHR uses a broad understanding of the exhaustively enumerated legitimate aims.<sup>163</sup> Nearly all potential limitations justified by a state's pursuit of a common interest could be brought within one of the legitimate aims.<sup>164</sup> Moreover, sanction measures taken by the UNSC – which has the primary task of restoring and maintaining international peace and security<sup>165</sup> – fall squarely within the interests

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<sup>157</sup> This principle is inherent in the ECHR (n 7) as a whole. Vande Lanotte and Haecck *ibid.* 125-126.

<sup>158</sup> *Ibid.* 127.

<sup>159</sup> In most legal systems UNSC resolutions have to be implemented in order to gain effect. This can be done on the basis of prior general implementing legislation or on the basis of ad hoc legislation. See chapter 2.4.

<sup>160</sup> See, for example, the *Bosphorus* case before the ECtHR. The Court considered that the UNSC resolution itself 'did not form part of Irish domestic law and could not therefore have constituted a legal basis' for the execution of the sanctions. In that case a legal basis was found in European implementing legislation. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [145].

<sup>161</sup> Arai-Takahashi 2002 (n 40) 11.

<sup>162</sup> O De Schutter *International Human Rights Law* (Cambridge University Press Cambridge 2010) 307. But see A Conte and R Burchill *Defining Civil and Political Rights* 2nd edn (Ashgate Publishing Farnham 2009) 56.

<sup>163</sup> Vande Lanotte and Haecck 2002 (n 156) 135.

<sup>164</sup> *Ibid.*

<sup>165</sup> See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119 (UN Charter), articles 24 and 39.

of national security, public safety, and public order. These aims are generally considered legitimate aims for the lawful limitation of human rights that are not absolute.<sup>166</sup> Accordingly, measures necessary to implement UNSC resolutions *prima facie* serve a legitimate aim.

The third requirement for lawful limitation of an individual's human rights is that the measure must be necessary and proportional.<sup>167</sup> Of all three requirements, the evaluation of whether this requirement is observed is most likely to be subject to controversy and intense discussion.<sup>168</sup> The ECtHR makes such assessment in the context of the criterion that the impugned interference must be 'necessary in a democratic society'.<sup>169</sup> In its case law this criterion is understood to mean that the impugned measure must be taken in response to a pressing social need, and must be proportional to the legitimate aim pursued.<sup>170</sup> Moreover, the reasons justifying the measure must be relevant and sufficient.<sup>171</sup> The different elements are scrutinized in a broader proportionality analysis. Due to the central importance of proportionality analysis in the assessment of lawfulness of limitations,<sup>172</sup> and also in the system of human rights protection in general,<sup>173</sup> it will be further elaborated in the subsequent subsection.

The right of access to court, which is part of the right to a fair trial, does not contain a limitation clause. This does not mean that the right is absolute.<sup>174</sup>

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<sup>166</sup> Any or all of these aims are, for example, mentioned in the limitation clauses to articles 8-11 of the ECHR (n 7); and with regard to the ICCPR (n 50) see Conte and Burchill 2009 (n 162) 55-56.

<sup>167</sup> The explicit limitation clauses in the ECHR require an interference to be 'necessary in a democratic society', as do the provisions in articles 21 and 22 ICCPR (n 50). In contrast, articles 12, 18 and 19 ICCPR only require an interference to be 'necessary'. This different standard was intended to put a more objective limitation upon the national authorities. Nowak 2005 (n 1) 274-275. See also Conte and Burchill *ibid.* 47-50, 55.

<sup>168</sup> See Van Dijk et al. 2006 (n 55) 335.

<sup>169</sup> See *supra* footnote 167.

<sup>170</sup> White and Ovey 2010 (n 78) 325; Van Dijk et al. 2006 (n 55) 340.

<sup>171</sup> Arai-Takahashi 2002 (n 40) 63; Van Dijk et al. *ibid.* 341.

<sup>172</sup> See Chapter 7 on the application of the proportionality analysis in relevant case law.

<sup>173</sup> See *infra* footnote 190.

<sup>174</sup> Also to some other guarantees under the right to a fair trial limitations could be allowed. See, for example, *A v United Kingdom* (n 143) [205]-[206]. For an insightful enumeration of

Limitations are permitted by implication.<sup>175</sup> For such limitations to be lawful they must be proportionate and have a legitimate aim.<sup>176</sup> Moreover, they may not impair the very essence of the right.<sup>177</sup> In the case law of the ECtHR, the latter element, however, does not mean that there is an inviolable core to the right.<sup>178</sup> Rather, it means that the essence cannot be outbalanced easily in a proportionality analysis.<sup>179</sup> The ECtHR has accepted exceptions to the very essence of the right of access to court in cases concerning sovereign and parliamentary immunity.<sup>180</sup> In cases concerning the immunity of IOs, the ECtHR has held that a material factor in determining whether a limitation on an individual's right of access to court is lawful is whether that individual has available to him a reasonable alternative means for protecting his human rights.<sup>181</sup> Instead of regarding this as a requirement prompted by the need for maintaining the very essence of the right,<sup>182</sup> it is probably better to understand this as the result of the fair balance drawn in those specific cases.<sup>183</sup>

The right to an effective remedy also contains no provision on limitations. Still, under certain circumstances the right guarantees only a remedy 'as effective as

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other guarantees under article 6 that may be subject to limitations see the opinion of Lord Bingham in *Procurator Fiscal v Brown* (Scotland) [2000] UKPC D3 (5 December 2000).

<sup>175</sup> That is, at least in regard to the civil limb. See *Golder* (n 100) [37]-[38]; *Waite and Kennedy v Germany* [1999] 30 EHHR 261 [59]; and General Comment No. 32 (n 100) [18]. See also J Christoffersen *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers Leiden 2009) 78.

<sup>176</sup> *Waite and Kennedy* *ibid.* [59]; White and Ovey 2010 (n 78) 255; see also General Comment No. 32 *ibid.* [18].

<sup>177</sup> *Waite and Kennedy* *ibid.* [59]; White and Ovey *ibid.*; see also General Comment No. 32 *ibid.* [18].

<sup>178</sup> See for a distinction between relative and absolute theories on the essence of rights: Christoffersen 2009 (n 175) 135 et seq. For an analysis of the right of access to court see *ibid.* 149 et seq. For further consideration see also *infra* chapter 7.2.3.

<sup>179</sup> This follows from the law of balancing. See R Alexy *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002) 102 and 195.

<sup>180</sup> Lautenbach 2012 (n 104) 176 and 178.

<sup>181</sup> *Waite and Kennedy* (n 175) [68]. The ECtHR recognized the same standard also outside the context of immunity: see *WOS v Poland* [2006] App. No. 22860/02 [103] and [108]. See also Van Dijk et al. 2006 (n 55) 571-572. See also chapter 7.3.

<sup>182</sup> Lautenbach 2012 (n 104) 175.

<sup>183</sup> Christoffersen 2009 (n 175) 150.

can be'.<sup>184</sup> Such restrictive application is not the result of an implied limitation. Rather, it follows from a narrower interpretation of the scope of protection of that right. In such circumstances, the impugned action does not interfere with what is guaranteed by the right. In practice, however, the outcome may not be very different from the situation if it were understood as an implied limitation.<sup>185</sup>

### 3.6.3. Proportionality Analysis

Proportionality analysis in different shapes and forms has a broad and general application in many fields of international and national law.<sup>186</sup> It is applied in regard to many domestic constitutional reviews,<sup>187</sup> and it constitutes a general principle underpinning the EU's constitutional legal order.<sup>188</sup> Proportionality analysis is implicitly incorporated in limitation and derogation clauses to international human rights guaranteed by the ICCPR and the ECHR.<sup>189</sup> Moreover, the search for a fair balance is inherent in human right protection.<sup>190</sup> There is, however, no single coherent principle of proportionality; courts from

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<sup>184</sup> See *supra* subsection 3.5.5.

<sup>185</sup> See also T Barkhuysen *Artikel 13 EVRM: effectieve nationale bescherming bij schending van mensenrechten* (Uitgeverij Koninklijke Vermande Leiden 1998) 158.

<sup>186</sup> See T Franck 'On Proportionality of Countermeasures in International Law' (2008) 102 *American Journal of International Law* 715, 719; and A Stone Sweet and J Mathews 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 74 and 111 et seqq; see R Mazzeschi 'Book Review "Cannizzaro, Enzo: Il Principio Della Proporzionalità Nell'Ordinamento Internazionale"' (2002) 13 *European Journal of International Law* 1031. See also B Goold, L Lazarus and G Swiney 'Public Protection, Proportionality, and the Search for Balance' *Ministry of Justice Research Series* 10/07 September 2007, 20.

<sup>187</sup> A notable exception to this is the human rights adjudication in the United States. See S Tsakyrakis 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468. However, for a more nuanced perspective see M Cohen-Eliya and I Porat 'The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law' (2009) 46 *San Diego Law Review* 367 and G Kleijkamp 'Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights' (2002) 12 *Transnational Law and Contemporary Problems* 307.

<sup>188</sup> T Tridimas *The General Principles of EU Law* 2nd edn (Oxford University Press Oxford 2006) 138.

<sup>189</sup> Arai-Takahashi 2002 (n 40) 190; Conte and Burchill 2009 (n 162) 47. Yet, 'the application of the proportionality yardstick remains rudimentary in the jurisprudence of the Human Rights Committee'. Arai-Takahashi *ibid.* 191. See, similarly, Franck 2008 (n 186) 760. However, since the 1990s the principle of proportionality has gained an increasing importance in the General Comments of the Human Rights Committee. Christoffersen 2009 (n 175) 41-42.

<sup>190</sup> With regard to the ECHR (n 7) see, for example, *Sporrong and Lönnroth* (n 35) [69]. See also Christoffersen *ibid.* 40, 69, and 198 et seq.

different jurisdictions apply different manifestations of such analysis.<sup>191</sup> Yet all configurations of the proportionality analysis essentially concern a balancing of the conflicting interests at stake, and an assessment of the means employed against the aims sought to be achieved.

The focus of the present subsection will primarily be on the practice of the ECtHR, due to the still rudimentary nature of the application of proportionality analysis by the HRC.<sup>192</sup> However, in contrast to the case law of some other courts, it is not easy to discern any clear, pre-set two, three or four stages test in ECtHR case law.<sup>193</sup> The CJEU, for example, applies a three-step test which includes the following questions: first, is the measure suitable or appropriate for actually reaching the aim pursued; second, is the measure necessary to reach that aim, or are less restrictive alternatives available; and, finally, even when the measure is determined to be the least restrictive measure possible, is it proportional (*stricto sensu*) to the aim sought to be realized?<sup>194</sup> Other configurations may consist of two- or four-step analyses.<sup>195</sup> Often courts do not specify the individual steps they take when they engage in a proportionality analysis. Accordingly, most classifications are the result of *ex post facto* interpretation of case law.

The proportionality analysis employed by the ECtHR instead has to be conceived of as a flexible standard taking account of several requirements as factors in an

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<sup>191</sup> See M Andenas and S Zleptnig 'Proportionality: WTO Law: in Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 387; W van Gerven 'The Effect of Proportionality on the Actions of Member States' in E Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing Oxford 1999), 60; and Goold et al. (n 186) 2007, ii; Franck 2008 (n 186) 717.

<sup>192</sup> See footnote 189. However, see also Conte and Burchill 2009 (n 162) 47-50.

<sup>193</sup> See also Christoffersen 2009 (n 175) 71.

<sup>194</sup> Tridimas 2006 (n 88) 139; and G De Búrca 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105, 113. See also Christoffersen *ibid.* 69-70.

<sup>195</sup> A four-step analysis would add the question of whether the impugned measure pursues a legitimate aim. See Stone Sweet and Mathews 2008 (186) 75 (see also footnote 8 on that page). For an argument for two steps, see J Rivers in the translator's introduction to Alexy 2002 (n 179), xxxii.

intricate overall assessment.<sup>196</sup> Moreover, it is closely intertwined with the margin of appreciation, which will be discussed below. Any general explanation of the ECtHR's use of the principle of proportionality in the few pages available here is necessarily bound to oversimplify the matter.<sup>197</sup> However, some relevant and continuously recurring elements should be mentioned.

The Court discerns from the requirement that interferences must be 'necessary in a democratic society' that there must be a 'pressing social need',<sup>198</sup> and that the measures taken must be 'proportionate to the legitimate aim pursued'.<sup>199</sup> Moreover, it requires the reasons for the impugned measure to be 'relevant and sufficient'.<sup>200</sup> As was mentioned, these elements are intricately interlinked and difficult to separate as to their independent qualities.

What is clear is that one of the relevant aspects in the Court's determination is whether the measure can be rationally related to the legitimate aim pursued.<sup>201</sup> This bears similarity to a suitability test,<sup>202</sup> which requires a causal relationship between the measure and its object.<sup>203</sup> Often this test can be met readily.<sup>204</sup> Another relevant aspect is whether it could reasonably be argued that the measures are necessary to accommodate a pressing social need. In this regard, the Court could assess whether the same objective could be reached by other equally effective measures that are less intrusive of the human rights of the individual concerned.<sup>205</sup> How closely the Court scrutinizes such argument depends on the margin of appreciation. The same is true in regard to the

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<sup>196</sup> Ibid. 71 et seq.

<sup>197</sup> See for an elaborative study: Ibid.

<sup>198</sup> *Sunday Times v The United Kingdom* [1979] 6538/74 [59]. See also Van Dijk et al. 2006 (n 55) 340.

<sup>199</sup> Van Dijk et al. *ibid.* 340. Arai-Takahashi 2002 (n 40) 63.

<sup>200</sup> Van Dijk et al. *ibid.* 341.

<sup>201</sup> See also Stone Sweet and Mathews 2008 (186) 75.

<sup>202</sup> See also Arai-Takahashi 2002 (n 40) 41.

<sup>203</sup> Andenas and Zleptnig 2007 (n 191) 387.

<sup>204</sup> Van Dijk et al. 2006 (n 55) 341; Arai-Takahashi 2002 (n 40) 63.

<sup>205</sup> Opinions differ however on whether the Court actually applies a less restrictive alternative means test. Compare Van Dijk et al. *ibid.* 340, to Christoffersen 2009 (n 175) 114-129.

assessment of whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim pursued.<sup>206</sup> That assessment requires the scope of the impact caused by the measure to be commensurate to the importance of the objective that is pursued. In the cases included in the present research, the impact of the measures has an adverse effect on individuals' enjoyment of their human rights, and the aim pursued is an objective the UNSC seeks to secure in the general interest. Hence, essentially, a fair balance must be drawn between the general and the individual interests at issue.<sup>207</sup>

Although the interests involved may differ per case, the balancing act remains the same.<sup>208</sup> A difference in the kind of interests at stake may, however, influence the intensity with which the Court undertakes a proportionality review. This, in turn, has a decisive impact on the outcome of such review.

#### **3.6.4. The Margin of Appreciation**

In the context of the ECHR, the assessment of whether certain limitations on an individual's human rights are 'necessary in a democratic society' is closely intertwined with the concept of the 'margin of appreciation'.<sup>209</sup> This margin provides member states of the Council of Europe certain latitude in the assessment of whether a measure results in a lawful restriction on an individual's Convention rights.<sup>210</sup> It is a manifestation of the subsidiary nature of the Court. State authorities are in principle in a better position than the ECtHR to assess the

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<sup>206</sup> Van Dijk et al. *ibid.* 341.

<sup>207</sup> Instead of balancing individual interests against general interests, according to Christoffersen, 'it is more appropriate to think of the ECHR as comprising multiple countervailing interests that must be reconciled in the circumstances of a particular cases.' Christoffersen 2009 (n 175) 75. The present author shares the view that the boundaries between different interests often cannot be drawn clearly, in the sense that public interests may eventually also serve an individual interest, and *vice versa*. Still, for the purpose of analysis it might be useful to maintain the general dichotomy between individual and public interests, although it necessarily simplifies reality.

<sup>208</sup> See also Case C-402/05 P *Opinion of Advocate General Poiares Maduro* [2008] ECR I-06351 [46].

<sup>209</sup> Andenas and Zleptnig 2007 (n 191) 391; Franck 2008 (n 186) 760.

<sup>210</sup> McBride 1999 (n 210) 23-35, 29.

specific requirements of a particular situation.<sup>211</sup> The scope of the margin with which the Court engages in an assessment of the lawfulness of the limitations is often of decisive importance for the outcome of the case. Views differ, however, as to the exact relationship between the Court's assessment of whether a limitation is necessary in a democratic society and the margin of appreciation.<sup>212</sup> Yet what is clear is that the margin depends on the subject area concerned,<sup>213</sup> the nature of the human right interfered with,<sup>214</sup> the epistemological advantage state authorities may have over the Court,<sup>215</sup> and whether there is a generally accepted common standard.<sup>216</sup> It is important to note with regard to the analysis in the present research that in the area of national security, states parties are generally allowed a rather wide margin of appreciation.<sup>217</sup>

In contrast to the ECtHR, the HRC has explicitly rejected the concept of 'margin of appreciation'.<sup>218</sup> However, there is evidence that the Committee has declined the margin of appreciation in terminology only.<sup>219</sup> Numerous cases can be discerned in which it has in effect applied the idea underlying this concept.<sup>220</sup> The HRC appears to relate its determination of the margin largely to the same grounds as the ECtHR.<sup>221</sup> However, due to its still limited and inconstant

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<sup>211</sup> *Handyside v The United Kingdom* Series A No 24 (1976) 1 EHRR 737 [48]; and *ibid* 29. See also A Legg *The Margin of Appreciation in International Human Rights Law: deference and proportionality* (Oxford University Press Oxford 2012) 58 et seqq.

<sup>212</sup> Compare Jacobs and White 2006 (n 60) 240 to McBride 1999 (n 210) 23-35, 29; and Franck 2008 (n 186) 761; and Arai-Takahashi 2002 (n 40) 14-15.

<sup>213</sup> Legg 2012 (n 211) 153 et seq.

<sup>214</sup> McBride 1999 (n 210) 23-35, 30; and, more generally, Arai-Takahashi 2002 (n 40).

<sup>215</sup> Legg 2012 (n 211) 145.

<sup>216</sup> White and Ovey 2010 (n 78) 329. Legg *ibid.* 116. See also Arai-Takahashi 2002 (n 40) 15.

<sup>217</sup> White and Ovey *ibid.* 330.

<sup>218</sup> See, for example, UN Human Rights Committee 'General Comment No. 34, Article 19: Freedoms of opinion and expression' (12 September 2011) UN Doc CCPR/C/GC/34 [36]; see also D McGoldrick 'The United Kingdom's Human Rights Act 1998 in Theory and Practice' (2001) 50 *International and Comparative Law Quarterly* 901, 942.

<sup>219</sup> D Moeckli 'The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination' (2006) 31 *Brooklyn Journal of International Law* 495 (at footnote 134). See also Conte and Burchill 2009 (n 162) 43-44; and McGoldrick *ibid.* 942 (at footnote 257), who considers that it may be a matter of semantics.

<sup>220</sup> Legg 2012 (n 211) 6.

<sup>221</sup> See generally Legg 2012 (n 211).



practice, its particular use of the concept remains somewhat underdeveloped.<sup>222</sup> Therefore it is uncertain whether the discretion the HRC occasionally leaves to states can be fully equated to the ECtHR's developed practice in applying the margin of appreciation doctrine.<sup>223</sup>

The breadth of the margin of appreciation left by the Court to state authorities is often decisive for the outcome of a case. It can apply, for example, a very strict proportionality standard while at the same time largely defer to the findings of the decision-maker. In this sense, the intensity of review determines whether the proportionality analysis is 'a very sharp or rather blunt weapon in the hands of the judiciary.'<sup>224</sup>

### **3.7. Remedy before the UNSC Sanctions Committee**

The present research focuses on decisions by regional and domestic courts. These courts' determinations of whether an individual's human rights have been lawfully limited could be influenced by the level of protection of these rights provided at the UN level.<sup>225</sup> This subsection will consider whether there is an alternative remedy available at the UN level for individuals affected by UNSC targeted sanctions which sufficiently guarantees their due process rights. With regard to these targeted sanctions, it are the limitations on the rights of access to court and effective remedy that are especially far-reaching and difficult to justify. Whether the individuals concerned have an alternative remedy at the UN level could be a relevant consideration for courts in the assessment of the lawfulness of the implementation of the targeted sanctions.

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<sup>222</sup> Legg *ibid.* 5-6.

<sup>223</sup> See also Conte and Burchill 2009 (n 162) 43-44.

<sup>224</sup> Andenas and Zleptnig 2007 (n 191) 391.

<sup>225</sup> The ECtHR employs two different but related tests in which such assessment could play a role: the equivalent protection test, which will be discussed in chapter 4.3.2, and the reasonable alternative means test. The ECtHR engages in the latter test in the context of reviewing the lawfulness of a limitation on an individual's right of access to a court due to an IO's immunity. See *Waite and Kennedy* (n 175) [68]. See also Van Dijk et al. 2006 (n 55) 571-572. In addition, other (domestic) courts have been found to apply a test that bears similarities to both the equivalent protection test and the reasonable alternative means test. This assessment will be elaborately discussed in chapter 7.3.1.

The present discussion will focus on (the development of) the remedies at the UN level for individuals targeted by the original 1267 regime.<sup>226</sup> A largely similar discussion can be held with regard to the other targeted sanction regimes that have been instituted by the UNSC.<sup>227</sup> However, the 1267 regime has been subject to fierce debate and has been the most judicially assessed sanctions regime in case law.<sup>228</sup> As a result, the remedial procedures with regard to this regime have been subject to many changes.<sup>229</sup> In this sense, it could be seen as a precursor in the development of the targeted sanction regimes.<sup>230</sup>

Another difference with many other targeted sanction regimes is that, from the perspective of having an opportunity to challenge a listing, there may be a relevant difference between, on the one hand, measures directed against members of government and heads of state, and, on the other hand, measures directed in entirely general terms at anyone associated with non-state actors, such as Al-Qaida.<sup>231</sup> In respect of the former targeted individuals there is a clear link between them and a state. As an international legal person this state is able to represent the interests of those individuals within the international legal order. This is not the case with regard to the individuals allegedly associated with Al Qaida. Moreover, in contrast to individuals suspected of supporting terrorism, the identities of the leaders of a state are usually public knowledge. Accordingly, there are fewer problems with identification, and there seems to be less opportunity for challenging the UNSC's findings. Still, many of the sanction

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<sup>226</sup> As will be explained in this section this regime is now divided into two separate regimes.

<sup>227</sup> See chapter 2.3.1.

<sup>228</sup> See, for example, *Othman* (UK) (n 7); Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3353; *Nada* (CH) (n 45); *Kadi I* (appeal) (n 10); and *Ahmed* (n 133).

<sup>229</sup> For example, in the preamble to UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904 the UNSC took 'note of challenges, both legal and otherwise, to the measures implemented by Member States'.

<sup>230</sup> See 'Thirteenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1989 (2011) concerning Al-Qaida and associated individuals and entities' (31 December 2012) UN Doc S/2012/968 [9].

<sup>231</sup> See the opinion of Lord Mance in *Ahmed* (n 133) [247] - [248].

regimes against state officials include measures against lower-ranking individuals associated with a targeted government as well.<sup>232</sup> This may constitute a connection that is just as disputable as the connection an individual designated under the 1267 regime may have with Al-Qaida. In this regard, the examination of the potential remedies against designations under the 1267 regime, discussed below, could apply equally to other UNSC targeted sanction regimes.

### **3.7.1. From Diplomatic Protection to the Ombudsperson**

In the early days, targeted individuals were dependent on a form of diplomatic protection by their state.<sup>233</sup> Designated individuals could only address a request for delisting to the Sanctions Committee through their national authorities. Moreover, while the first targeted sanctions under the 1267 regime were instituted in 1999, the first reference by the UNSC to the possibility of delisting was only in 2005.<sup>234</sup>

Over the course of time, the UNSC has made several consecutive improvements to the Sanctions Committee's procedures. It made it possible to grant certain exemptions for humanitarian purposes;<sup>235</sup> it required states transmitting names to provide a statement of reasons;<sup>236</sup> it introduced a triennial re-examination procedure;<sup>237</sup> and it established a Focal Point to which the designated individuals could address their complaints directly.<sup>238</sup>

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<sup>232</sup> See, for example, 'Non-Paper on the Implementation of Paragraph 23 of Resolution 1483 (2003)' available at the website of the 1518 Sanctions Committee, <http://www.un.org/sc/committees/1518/pdf/Non-paper.pdf>.

<sup>233</sup> N Krisch 'Article 41' in B Simma et al. (eds.) *The Charter of the United Nations: A Commentary* 3rd ed. vol. II (Oxford University Press Oxford 2012) 1305-1329, 1317. See Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities (Kadi I)* [2005] ECR II-3649 [267] and Case T-253/02 *Chafiq Ayadi v Council of the European Union* [2006] ECR II-2139 [149]-[150]. See similarly *Nada (CH)* (n 45) [9.2], and *A, K, M, Q, & G v HM Treasury* [2008] EWCA Civ 1187 [119].

<sup>234</sup> See annex to UNSC Res 1617 (29 July 2005) UN Doc S/Res/1617.

<sup>235</sup> UNSC Res 1452 (20 December 2002) UN Doc S/Res/1452 and UNSC Res 1735 (22 December 2006) UN Doc S/Res/1735.

<sup>236</sup> UNSC Res 1617 (2005) (n 234) [4].

<sup>237</sup> UNSC Res 1822 (30 June 2008) UN Doc S/Res/1822 [25] and [26].

<sup>238</sup> UNSC Res 1730 (19 December 2006) UN Doc S/Res/1730.

However, this Focal Point functioned only as an intermediary between individuals requesting delisting and the Committee. In addition, it facilitated the communication between the different Committee members involved. It did not have any powers of review. It forwarded an individual's request to members of the Committee upon which any member could recommend delisting.<sup>239</sup> If no state made such a recommendation the request was rejected.<sup>240</sup> If a recommendation for delisting was made, the normal decision-making procedure of the Committee would be followed, which meant that a decision on the request had to be made by consensus.<sup>241</sup>

After fierce criticism of this procedure by several courts,<sup>242</sup> the UNSC decided in 2009 to institute the Office of the Ombudsperson.<sup>243</sup> The tasks initially assigned to this person were to a large extent similar in nature to those assigned to the Focal Point, which remained the only venue for individuals designated under other sanction regimes.<sup>244</sup> Both bodies facilitated the discussion and the exchange of information, but there were also some relevant differences. For example, the Ombudsperson was ascribed a somewhat more independent role in the gathering of information. Moreover, she would have the possibility of engaging in a dialogue with the individuals concerned.<sup>245</sup> After having gathered all relevant information, and possibly having engaged in such dialogue, the Ombudsperson was meant to draw up a report which she would present to the Sanctions Committee.<sup>246</sup> The Ombudsperson would then also answer any questions Committee members may have had.<sup>247</sup> Subsequently, the Committee was to

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<sup>239</sup> Ibid. [6].

<sup>240</sup> Ibid. [6 c].

<sup>241</sup> Guidelines of the Committee for the Conduct of its Work (adopted on 7 November 2002 as amended on 26 January 2006) [4].

<sup>242</sup> See *Kadi I* (appeal) (n 10) [321]-[325]; *Abdelrazik* (n 48) [51]; *A, K, M, Q, & G v HM Treasury* [2008] EWHC 869 (Admin) [18]; and *A, K, M, Q, & G* (appeal) (n 233) [114].

<sup>243</sup> UNSC Res 1904 (n 229) [20]. In the preamble to this resolution the UNSC took 'note of challenges, both legal and otherwise, to the measures implemented by Member States'.

<sup>244</sup> Ibid. [21].

<sup>245</sup> Ibid. [6]. Currently the position of the Ombudsperson is taken by a woman therefore the thesis uses the female pronoun in this regard. See also *supra* footnote 24 in Chapter 1.

<sup>246</sup> Ibid. [7].

<sup>247</sup> Ibid. [9].

consider the report and make a decision on the request for delisting through its normal decision-making procedures.<sup>248</sup> Hence, the whole procedure still culminated in a decision by the Committee members, which would have to decide by consensus.<sup>249</sup>

### **3.7.2. The Latest Reforms**

In June 2011 the UNSC again made several important amendments to the listing and delisting procedures. It divided the original 1267 list into two separate lists: one concerning Al-Qaida,<sup>250</sup> and another concerning the Taliban.<sup>251</sup> Remarkably, the system of the Ombudsperson continues to apply only in regard to the individuals and entities on the Al-Qaida list.<sup>252</sup> Hence, under the Taliban list, the old Focal Point system is back in place,<sup>253</sup> and this also remains the sole institution available for individuals affected by other targeted sanction regimes. This might be informed by the desire of some states to be able to put political pressure on certain Taliban leaders in order to convince them to cooperate with the current Afghan government.<sup>254</sup> With no system of independent review in place, the measures could more easily be tailored to advance political aims.

With regard to the Al-Qaida list, the Ombudsperson remains in place and, importantly, her competences have been extended. The Ombudsperson's report is now officially regarded as a recommendation. Moreover, if she recommends an individual's delisting, that individual will be delisted unless the Committee decides by consensus within 60 days after it has completed its consideration of the Ombudsperson's report to reject the recommendation.<sup>255</sup> If consensus is not

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<sup>248</sup> Ibid. [9] and [10].

<sup>249</sup> Committee Guidelines 2002 (n 241) [4].

<sup>250</sup> UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989.

<sup>251</sup> UNSC Res 1988 (17 June 2011) UN Doc S/Res/1988.

<sup>252</sup> UNSC Res 1989 (2011) (n 250) [21].

<sup>253</sup> UNSC Res 1988 (2011) (n 251) [20].

<sup>254</sup> See also D Tladi and G Taylor 'On the Al Qaida / Taliban Sanctions Regime: Due Process and Sunsetting' (2011) 10 Chinese Journal of International Law 771, 783-784, 786.

<sup>255</sup> UNSC Res 1989 (2011) (n 250) [23].

reached, the case will be submitted to the UNSC.<sup>256</sup> A similar system operates in regard to designating states requesting individuals' delisting.<sup>257</sup>

At first sight, this sounds very promising, in the sense that the onus is on the states objecting to delisting. However, if there is no consensus within the Committee, only one single state objecting to the delisting can obtain a referral of the case to the UNSC. The UNSC will then decide by its normal qualified majority procedure. The effectiveness of this procedure largely depends on how the reference to the UNSC is formulated: that is to say, whether the UNSC has to vote by the normal qualified majority in favour of delisting, or in favour of keeping the individual concerned on the list. The specific formulation of the question will influence the outcome hugely. If the UNSC were to vote in favour of keeping somebody on the list, then the new procedure would be quite effective. The other option, however, would largely maintain the status quo as it existed before the last amendments, at least with regard to the influence of the member states of the UNSC with a veto-power.

The sanctions regime's Monitoring Team is of the view that the UNSC would have to vote in favour of keeping somebody on the list.<sup>258</sup> However, the text of the relevant paragraph of the resolution states that if the Committee cannot decide 'the question of whether to delist' an individual by consensus, that question will be submitted to the UNSC.<sup>259</sup> This suggests that the UNSC would have to vote in favour of delisting in order for that to be the case.<sup>260</sup> From that perspective, six states together, or one state with a veto-power, can block a decision to delist.<sup>261</sup> This would be an improvement compared to the earlier

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<sup>256</sup> Ibid. [23].

<sup>257</sup> Ibid. [27].

<sup>258</sup> Thirteenth report of Monitoring Team 2012 (n 230) [12].

<sup>259</sup> UNSC Res 1989 (2011) (n 250) [23].

<sup>260</sup> This appears to be the perspective also of the Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism. See Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc A/67/396 [40].

<sup>261</sup> Tladi and Taylor 2011 (n 254) 788.

decision-making procedure of the Sanctions Committee, in which delisting required consensus. Under that model, every single member state could effectively oppose delisting. But the ultimate decision on an individual's delisting remains inter-governmental, and can presumably still be blocked by a single state with veto-power in the UNSC. At present, no case has been forwarded to the UNSC.<sup>262</sup>

Also problematic is that the Ombudsperson's reports on individual cases are not disclosed.<sup>263</sup> Thus the independent assessment of an individual's case is not made available to him. On a positive note, the Committee generally follows the Ombudsperson's recommendations for delisting.<sup>264</sup> Moreover, it has provided reasons for the decision it has taken in each case.<sup>265</sup> Its efforts in this regard even go beyond what is mandated.<sup>266</sup> However, there may be a considerable period of time between its decision and the provision of its reasons for that decision.<sup>267</sup> Through the Ombudsperson these reasons are also communicated to the individuals concerned, to the extent allowed by the Committee.<sup>268</sup> For the moment it is unknown whether the Committee also follows the UNSC's call upon it to share the reasons for rejecting a request for delisting with national and regional courts, where appropriate.<sup>269</sup>

Progress seems to have been made with regard to the disclosure of the identity of the designating states. In principle they are still not bound to reveal their identity.

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<sup>262</sup> 'Letter dated 20 January 2012 from the Ombudsperson addressed to the President of the Security Council' (20 January 2012) UN Doc S/2012/49 [44]. This might be due also to the fact that there is a large disincentive to do so. It would expose a lack of consensus within the Committee and would force states in favour of the listing to convince others of the correctness thereof, possibly requiring them to reveal previously undisclosed information. Thirteenth report of Monitoring Team 2012 (n 230) [12].

<sup>263</sup> 'Letter dated 30 July 2012 from the Ombudsperson addressed to the President of the Security Council' (30 July 2012) UN Doc S/2012/590 [39]-[40].

<sup>264</sup> Letter from the Ombudsperson (20 January 2012) (n 262) [5] and [42].

<sup>265</sup> *Ibid.* [46].

<sup>266</sup> *Ibid.* [47].

<sup>267</sup> Letter from the Ombudsperson (30 July 2012) (n 263) [45].

<sup>268</sup> Letter from the Ombudsperson (20 January 2012) (n 262) [46].

<sup>269</sup> UNSC Res 1989 (2011) (n 250) [33].

The UNSC urges, but does not oblige, these states to do so.<sup>270</sup> This could potentially constitute a significant disadvantage for individuals in their attempt to answer the case against them.<sup>271</sup> However, the Ombudsperson has reported that she received consent to disclose a designating state's identity in each case in which she sought such disclosure,<sup>272</sup> although she experiences this as a very difficult and time-consuming process.<sup>273</sup>

This difficulty illustrates the more general drawback – that a large part of the Committee's and designating states' cooperation depends on their willingness to do so, and is not directly based on any obligation thereto. As a consequence, they can refuse such cooperation at any time. Moreover, their willingness to cooperate and the effectiveness of the Ombudsperson, in general, appear to rest substantially on the ability of the specific individual holding that office.<sup>274</sup> These grounds do not constitute a firm and lasting basis for a fair procedure.

An encouraging development in the procedure is that the Ombudsperson engages in a dialogue with the individual concerned.<sup>275</sup> If possible, the former will meet the latter in person.<sup>276</sup> In this dialogue the Ombudsperson will mediate between the targeted individual, the relevant states, and the Sanctions Committee, by relaying questions and responses between them.<sup>277</sup> Under the most favourable circumstances this interaction might operate in a similar way to the special advocates procedure that is applied in certain states in cases involving the use of confidential information.<sup>278</sup> The Ombudsperson considers these elements to

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<sup>270</sup> UNSC Res 1989 *ibid.* [29].

<sup>271</sup> See 'Letter dated 21 January 2011 from the Ombudsperson addressed to the President of the Security Council' (21 January 2011) UN Doc S/2011/29 [52].

<sup>272</sup> Letter from the Ombudsperson (20 January 2012) (n 262) [48].

<sup>273</sup> Letter from the Ombudsperson (30 July 2012) (n 263) [45].

<sup>274</sup> See in this regard also Thirteenth report of Monitoring Team 2012 (n 230) [15].

<sup>275</sup> UNSC Res 1989 (2011) (n 250) Annex II [5].

<sup>276</sup> *Ibid.* [6].

<sup>277</sup> 'Letter dated 21 July 2011 from the Ombudsperson addressed to the President of the Security Council' (22 July 2011) UN Doc S/2011/447 Annex I [8].

<sup>278</sup> This procedure will be discussed extensively in chapter 8.3.1.



ensure the observance of the key components of a fair process, such as the right to be heard.<sup>279</sup>

However, whether this is the case depends on what information is made available to the targeted individuals in such dialogue. Do they have access to sufficient relevant facts and evidence, in order for them to organize a proper defence? Or do they remain largely dependent on the information given in the publicly-available narrative summaries, which the Sanctions Committee puts on its website?<sup>280</sup> What is clear is that there is no access to an independent court that is able to assess whether sufficient information has been made available to the individuals concerned, and can maintain the overall fairness of the procedure.<sup>281</sup>

Even after these procedural improvements, the fundamental problem of how to deal with a lack of access to confidential information persists.<sup>282</sup> Presently, the Ombudsperson is in the process of concluding agreements and arrangements with states on sharing such information. Until now she has concluded a publicly-accessible agreement with one state.<sup>283</sup> This agreement concerns certain procedural issues regarding the transmission of confidential information only. It does not contain any commitments on the part of the state to share such information. In addition arrangements have been made with eleven other states,<sup>284</sup> and the United States ‘has expressed willingness, and demonstrated an ability, to share confidential information on an ad hoc basis.’<sup>285</sup>

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<sup>279</sup> Letter from the Ombudsperson (22 July 2011) (n 277) [42], and Annex I [9].

<sup>280</sup> There is a significant divergence in opinion on this issue between the Ombudsperson and targeted individuals’ lawyers. See Special Rapporteur 2012 (n 260) [43].

<sup>281</sup> See in this regard chapter 8.3.2.2, which highlights the importance attached by the ECtHR to the role of independent courts in situations concerning the use of confidential material.

<sup>282</sup> Letter from the Ombudsperson (22 July 2011) (n 277) [26]. For an elaborative discussion see Chapter 8.

<sup>283</sup> ‘Agreement between the Austrian Federal Government and the United Nations on the Exchange and Mutual Protection of Classified Information with the Office of the Ombudsperson Established Pursuant to Security Council Resolution 1904 (2009)’ (concluded 26 July 2012). See <http://www.un.org/en/sc/ombudsperson/accessinfo.shtml> (last visited 3 December 2012).

<sup>284</sup> Arrangements have been concluded with Belgium; Switzerland; the United Kingdom; Costa Rica; New Zealand; Germany; Australia; Portugal; Liechtenstein; France; and the

The Ombudsperson regards the new procedure as creating a strong incentive for states to provide as much information as possible, as not providing such information will increase the chances of her recommending delisting, which will ultimately be the outcome if no state objects to that recommendation.<sup>286</sup> She also considers the strong encouragement the UNSC has given to states to provide her with all relevant information to be a useful tool to ensure their cooperation.<sup>287</sup> These are, however, soft instruments only; no obligation is created for states to share such information.

States may, for example, withhold exculpatory evidence.<sup>288</sup> Moreover, even if certain information is shared, not all of it has the sufficient level of detail and specificity necessary to carry out a meaningful analysis and to engage in a fruitful dialogue with the individual concerned.<sup>289</sup> What is more, states do not always provide information in a timely manner, which constitutes a significant problem in the attempt to secure the fairness of the process.<sup>290</sup> Another serious problem is that some of the relevant information provided by states may have been obtained through torture. It is very difficult for the Ombudsperson to ascertain in a particular instance whether that is the case. Moreover, the Ombudsperson does not necessarily eliminate such information from her assessment.<sup>291</sup>

A major improvement is that the Ombudsperson has made transparent the standard on the basis of which she assesses the available information concerning the allegations against an individual. The standard the Ombudsperson uses in her

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Netherlands. The content of these arrangements is not made public. See: <http://www.un.org/en/sc/ombudsperson/accessinfo.shtml> (last visited 3 December 2012).

<sup>285</sup> *Ibid.*

<sup>286</sup> Letter from the Ombudsperson (20 January 2012) (n 262) [41].

<sup>287</sup> *Ibid.* See UNSC Res 1989 (2011) (n 250) [25].

<sup>288</sup> Special Rapporteur 2012 (n 260) [45].

<sup>289</sup> Letter from the Ombudsperson (20 January 2012) (n 262) [39]. See also Letter from the Ombudsperson (30 July 2012) (n 263) [34].

<sup>290</sup> Letter from the Ombudsperson (30 July 2012) *ibid.* [35]-[36].

<sup>291</sup> Special Rapporteur 2012 (n 260) [46]-[47].

analysis and observations is ‘whether there is sufficient information to provide a reasonable and credible basis for the listing.’<sup>292</sup> She arrived at this standard after carefully balancing several relevant opposing interests.<sup>293</sup> According to the Ombudsperson this standard ‘recognizes a lower threshold appropriate to preventative measures while setting a level of protection that is sufficient for safeguarding the rights of individuals and entities in this context.’<sup>294</sup> However, considering the sanctions’ severe consequences, this standard might be criticised for not resulting in a sufficiently scrupulous review.<sup>295</sup>

In conclusion, over the course of time some important progress has been made in the proceedings at the UN level, at least in respect of the 1267 / Al Qaida regime. However, significant flaws in the procedure remain. The final decision on delisting continues to be, essentially, a political one. Moreover, states with a veto-power in the UNSC can, presumably, still solely block an individual’s delisting. Furthermore, the dialogue with the Ombudsperson is still not enough to guarantee the individual concerned a right to a fair hearing, especially if he has no access to the information necessary for him to organize an effective defence.<sup>296</sup> Finally, states are still largely at liberty to refuse to cooperate with the Ombudsperson, or to do so only indolently. No court has yet pronounced on the most recent amendments to the procedure. However, if regard is had to the requirements posed by several courts in their earlier assessments,<sup>297</sup> it is unlikely that the present procedure will be qualified as sufficiently guaranteeing the targeted individuals’ due process rights.

### **3.8. Conclusion**

The present chapter has discussed certain aspects of several human rights norms which are relevant to the cases concerning individuals who were adversely

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<sup>292</sup> Letter from the Ombudsperson (22 July 2011) (n 277) Annex III [16], see also [17].

<sup>293</sup> Ibid. [11]-[15].

<sup>294</sup> Ibid. [17].

<sup>295</sup> Special Rapporteur 2012 (n 260) [57].

<sup>296</sup> See for an elaborative discussion on the level of information required chapter 8.3.

<sup>297</sup> See chapter 7.3.2.

affected by the implementation of UNSC resolutions. It has paid special attention to the right to an effective remedy and the right of access to court, because guaranteeing these rights is indispensable for maintaining the human rights system as a whole. Some of the obligations upon states following from the human rights norms concerned may conflict with obligations created by the UNSC.

This chapter has explained that most human rights norms are not absolute and that they can be lawfully limited under certain circumstances. For a measure to constitute a lawful limitation it needs to be prescribed by law; it needs to have a legitimate aim; and it needs to be necessary in a democratic society. It is unlikely that domestic implementations of UNSC measures will not meet the first two criteria. In contrast, the assessment of whether a measure is necessary and proportional could be subject to debate. In the context of that assessment, the measure is set against the aim it seeks to achieve. An evaluation is then made as to whether the measure is suitable for achieving its objective, and whether that measure is necessary, or whether the same objective could be achieved as effectively by measures that are less restrictive of the individuals' human rights. In addition, the balance struck between the interests of the individual adversely affected and the aim that the impugned measure seeks to achieve is scrutinized. An important aspect in this analysis is the margin of appreciation. This margin leaves state authorities certain discretion in assessing a measure's proportionality. The margin depends on several aspects, such as the subject area concerned; the nature of the human right interfered with; the epistemological advantage of state authorities; and the existence of a generally accepted common standard. The margin's exact scope is often decisive for a court's assessment of whether a limitation of an individual's human rights is justified.

Finally, this chapter has investigated whether there is an alternative remedy available at the UN level for individuals affected by UNSC targeted sanctions to effectively protect their human rights. Courts may take the availability of such

alternative remedy into account when assessing the lawfulness of the limitation placed on the adversely affected individuals' human rights. The investigation concluded that despite several amendments to the procedure before the Sanctions Committee, it cannot, as it presently stands, be regarded as sufficiently securing the targeted individuals' due process rights.