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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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7. Proportionality and Alternative Remedy Review

7.1. Introduction

The previous chapter considered situations of courts indirectly reviewing a UNSC resolution against international human rights law. An especially interesting manifestation of an indirect review is the application of a proportionality analysis. Different guises of proportionality analyses are employed throughout many international law regimes, as well as domestic legal orders. Within international human rights law it is part of the system of lawful limitations, which was discussed earlier.¹ This widespread application in many legal systems in national and international law makes a discussion of the indirect application of proportionality analysis by domestic courts to UNSC resolutions particularly relevant for the present research. Moreover, the balancing of interests, which such analysis entails, does not directly depend on the normative source of the norms involved. In this sense it belongs to a separate category which could be classified beyond the framework of indirect review, as set out in the previous chapter. It is a general standard which leaves domestic courts sufficient latitude to apply it in relation to the particular circumstances of a specific case. Section 7.2 will discuss domestic courts' application of this standard in relation to implementations of UNSC resolutions.

In addition, section 7.3 will examine the potential of the equivalent protection doctrine and its application by domestic courts in relation to the remedies created by the UNSC for individuals subject to its targeted sanctions. Whether these individuals have an alternative remedy available for effectively protecting their human rights constitutes a relevant element in drawing a fair balance in the context of their right of access to court. In this assessment, courts might engage in a direct evaluation of the remedies available at the UN level. Indeed, courts reviewing the remedy for individuals targeted directly by the UNSC have

¹ See chapter 3.6.3.

appeared to suggest that if that remedy were to meet the required standard, they would allow for a limitation on the individuals' right of access to court. In this way they have sent a message to the UNSC on what is expected of a remedy at the UN level, and under what circumstances they might be willing to take a deferential approach.

7.2. Indirect Assessment of a UNSC Resolution's Proportionality

When courts assess the proportionality of an implementation of a UNSC resolution, they are effectively applying to that resolution a standard of judicial review which has a counterpart in international law and many domestic legal systems. It could be argued that when the relevant resolution leaves states no scope of discretion, courts effectively assess that resolution's lawfulness against this widely recognized standard, which is also applicable in international law. Accordingly, assessing the proportionality of a resolution's domestic implementation might compensate for the gap in judicial protection of international human rights. Moreover, courts' assessments in individual cases may have exemplary value beyond their own domestic legal order, especially since the proportionality standard is so widely recognized. Domestic courts, by assessing indirectly a UNSC resolution's proportionality, may contribute to an emerging general understanding of how a balance between public and individual interests will have to be drawn in these instances.

The present discussion will verify its potential for protecting individuals' domestic fundamental rights,² which have a counterpart in international human rights law. An important element in this regard is the intensity with which courts engage in a proportionality review. This is often decisive for its outcome. Accordingly, this section will examine how scrupulously domestic courts engage in such an assessment. For the purpose of the analysis, it will make a distinction between courts employing proportionality tests to assess the lawfulness of limitations placed on the right to property (subsection 7.2.1) and the use of such

² See chapter 6.1.

tests in order to assess the lawfulness of limitations placed on the rights to a fair trial and to an effective remedy (subsection 7.2.2). After that, subsection 7.2.3 will provide an appraisal.

7.2.1. The Right to Property

Very often, the implementation of UNSC sanctions affects individuals in the enjoyment of their right to property. They can either be ‘innocent’ third parties indirectly affected by the implementation of general economic sanctions against a particular state, or individuals directly targeted by UNSC sanctions, obliging states to freeze those individuals’ assets. The provision on the right to property, as laid down in the ECHR, does not categorically follow the established lines of the system of limitations.³ Still, the ECtHR has held that the structure of this article reflects the search for a fair balance.⁴ Accordingly, limitations on an individual’s exercise of this right will need to be assessed as to their proportionality.

The provision in the ECHR makes a distinction between a deprivation of property and a control of its use. This distinction is 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.⁵ This means that the decision-maker enjoys a wider margin of appreciation when instituting a control of the use of property.⁶ But

³ See chapter 3.5.1.

⁴ *Sporrong and Lönnroth v Sweden* [1982] 7151/75; 7152/75 [69].

⁵ In cases concerning a control of use the ECtHR defers to the decision-makers assessment ‘unless it is devoid of reasonable foundation’. 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, 54. According to Arai-Takahashi the Court occasionally even considers to respect such decisions unless they are ‘manifestly without reasonable foundation’. Y Arai-Takahashi *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR* (Intersentia Antwerp 2002) 151, 153. On a different note see Jacobs and White, who hold that ‘the more modern case law takes a very similar approach to all forms of interferences with property rights.’ F Jacobs and R White *The European Convention on Human Rights* 4th edn (Oxford University Press Oxford 2006), 375.

⁶ Arai-Takahashi *ibid.* 151-152. See *infra* subsection 7.2.1.2 for further discussion.

even if a limitation were to be found to constitute a deprivation of property, the intensity of review remains rather low.⁷

The present subsection will make a distinction between domestic courts' assessment of necessity, in the shape of a less restrictive alternative argument, and courts' assessment of the balance struck between the interests at stake. These two elements concur with the last two steps in the CJEU's application of the proportionality analysis. The rationale for this structure of the discussion is that most cases considered below stem from the CJEU. In contrast to the ECtHR's more diffuse assessment of proportionality, which was elaborated on in chapter 3.6.3, the CJEU applies a readily discernible, pre-set three-step test. This test includes the following questions: first, is the measure suitable or appropriate to actually reach 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 in the narrow sense (*stricto sensu*) to the aim sought to be realized?⁸

Despite the ECtHR's more dispersed approach towards proportionality,⁹ certain similarities with the CJEU's three-step test can be noted.¹⁰ An important element

⁷ The level of judicial protection of property rights in international law is generally rather low. Under the (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) the protection of property has a moderate status, and the right is not even part of the human rights catalogue laid down in the ICCPR. See M Emberland *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press New York 2006) 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.

⁸ T Tridimas *The General Principles of EU Law* 2nd edn (Oxford University Press Oxford 2006) 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 J Christoffersen *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff Publishers Leiden 2009) 69-70.

⁹ The ECtHR applies a flexible standard, taking account of several requirements as relevant factors in an intricate overall assessment. Christoffersen *ibid.* 71 et seq. See chapter 3.6.3.

¹⁰ See also De Búrca 1993 (n 8) 113 and 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), 44.

in the ECtHR's assessment is that the measure must be rationally linked to the legitimate aim it seeks to pursue. In this sense it is quite similar to a suitability test.¹¹ This test can be met readily,¹² and it was not an issue in any of the relevant case law. Therefore the present discussion will not pay special attention to this element. Another relevant element that can be discerned from the ECtHR's analysis is the assessment of whether the same objective could be achieved by measures less intrusive of the individual's human rights. It is, however, disputed that the Court applies such a test in relation to the limitations placed on the right to property.¹³ Accordingly, in this regard it seems to leave states a larger measure of discretion. Subsection 7.2.1.1 will discuss how some domestic courts, and especially the CJEU, have dealt with adversely affected individuals' arguments that less restrictive alternatives were available.

Another element in the ECtHR's assessment of whether a measure is 'necessary in a democratic society' is that there must be a reasonable relationship of proportionality between the means applied and the legitimate aim sought to be achieved.¹⁴ This entails that the scope of the impact caused by the measure must be commensurate to the importance of the aim pursued. By making such an assessment, the means are set against the ends. This results in a conflict of interests, which have to be balanced against each other. In essence, this is similar to the third step of the CJEU's broader proportionality analysis, the assessment of proportionality (*stricto sensu*).¹⁵ Subsection 7.2.1.2 will deal with courts' review of the balance drawn between the interests at stake.

¹¹ See also Arai-Takahashi 2002 (n 5) 41, and M Andenas and S Zleptnig 'Proportionality: WTO Law: in Comparative Perspective' (2007) 42 *Texas International Law Journal* 371, 387.

¹² P van Dijk, F van Hoof, A van Rijn and L Zwaak *Theory and Practice of the European Convention on Human Rights* 4th edn (Intersentia Antwerpen 2006) 341; Arai-Takahashi *ibid.* 63.

¹³ See A Çoban *Protection of Property Rights within the European Convention on Human Rights* (Ashgate Publishing Limited Aldershot 2004) 207. See for an argument that the Court generally rejects the less restrictive alternative means approach: Christoffersen 2009 (n 8) 129.

¹⁴ Arai-Takahashi 2002 (n 5) 63.

¹⁵ See also Çoban 2004 (n 13) 206-207.

In addition, the ECtHR's application of the proportionality analysis is intricately intertwined with the concept of the margin of appreciation.¹⁶ It is not appropriate for domestic courts to employ this concept, since they are not in a relationship of subsidiarity to the national authorities. However, the role attributed to them in the context of the separation of powers may result in a form of deference to decision-makers' findings as well. When courts assess the lawfulness of certain limitations on an individual's human rights, they engage in a review of the merits of a case, especially when they employ a proportionality analysis. They do not merely test whether a reasonable decision-maker could have come to the measure complained of.¹⁷ Rather, they actually assess whether the public interest in which pursuance of the measures that are taken justifies a limitation on the individual's human rights. This, however, is not to say that these courts can second-guess the decision-maker's finding. It is generally accepted that it is not for a court to replace the executive's or the legislature's finding with its own.¹⁸ The judiciary, for example, is, in determining the facts of a case, not in a better position than the political branches of government.¹⁹ Moreover, general decisions on policy, or evaluations of a measure's cost effectiveness, efficacy, or relative importance of the aims it seeks to achieve, do not fit well with the judiciary.²⁰ The judiciary needs to stay within its province demarcated by the separation of powers. Accordingly, the decision-maker usually enjoys a certain discretion.

The extent of this discretion depends on different factors. Among others, the type and nature of the interests involved in a particular case are relevant.²¹ The scope,

¹⁶ See chapter 3.6.4.

¹⁷ Compare to the *Wednesbury* test as developed in UK law. J Jowell 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) Public Law 671, 678 et seq; and P Craig 'Unreasonableness and Proportionality in UK Law' in E Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing Oxford 1999) 85-106, 94 et seq.

¹⁸ Craig *ibid.* 87. See, for example, Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council of the European Union (OMPI)* [2006] ECR II-4665 [159].

¹⁹ R Alexy *A Theory of Constitutional Rights* (Oxford University Press Oxford 2002) 399.

²⁰ De Búrca 1993 (n 8) 107.

²¹ It may also depend on other factors, such as a court's expertise in a particular field, the institutions involved, or the justiciability of a certain issue. See, for example, with regard to review of EU measures: Tridimas 2006 (n 8) 138; see for a non-exhaustive list of factors determining the level of scrutiny in a Court of Justice's review *ibid.* 173-174. See also De

for example, may be larger in respect of decisions involving national security interests and smaller in issues affecting individual human rights.²² Similar to the margin of appreciation, the discretion a domestic court leaves to a decision-maker is also often decisive for the outcome of a case. A court can apply, for example, a very strict proportionality standard while at the same time largely defer to the findings of the decision-maker.²³

7.2.1.1. Less Restrictive Alternative Means

The present subsection will consider domestic courts' responses to apparently reasonable suggestions made by adversely affected individuals of equally effective alternative measures that were less restrictive of their property rights. What discretion do these courts leave domestic authorities in implementing UNSC measures as regards the assessment of the necessity of these measures?

As was mentioned, with regard to interferences with individuals' right to property, the ECtHR does not review whether the same objective could be reached by other equally effective measures that are less intrusive of the human rights of the individual concerned.²⁴ Accordingly, in this respect decision-makers enjoy significant latitude. In order to illustrate the scope of this discretion it is insightful to consider other courts' responses to reasonable suggestions made by adversely affected individuals that less restrictive, equally effective measures were available. The response by the Court of Justice is especially interesting, since that court has clearly adopted the practice of applying a less restrictive alternative test under certain circumstances.²⁵

Búrca *ibid.* 111; N Emiliou *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International London 1996) 32-33; Andenas and Zleptnig 2007 (n 11) 391; and Craig 1999 (n 17) 102-103.

²² De Búrca *ibid.* 111; Andenas and Zleptnig *ibid.* 392-393.

²³ See also Andenas and Zleptnig *ibid.* 391.

²⁴ See *supra* footnote 13.

²⁵ De Búrca 1993 (n 8) 136; Van Gerven 1999 (n 10) 42. See also Emiliou 1996 (n 21) 192.

An apparently reasonable suggestion for an alternative measure was made before the Court of Justice in the *Bosphorus* case.²⁶ That case concerned the implementation of sanctions against the FRY, which the UNSC decided to impose in response to the atrocities committed in that country.²⁷ The EU implemented these sanctions in order to ensure a uniform application throughout the EU.²⁸ Part of these sanctions was that aircraft owned or controlled by Yugoslavian companies had to be impounded when present in another state's territory.²⁹ In accordance with this obligation, Irish authorities impounded an aircraft owned by Yugoslav Airlines (JAT), which was leased and operated by the Turkish company Bosphorus. The impoundment caused that company to bear drastic financial losses.³⁰

Bosphorus argued before the Court of Justice that the impoundment of the aircraft was unnecessary and disproportionate, since the rent for the lease was already being paid on blocked accounts.³¹ Accordingly, there was no possibility that the Yugoslavian company JAT or the Yugoslavian economy would gain any financial benefits from the lease. Therefore, not impounding the aircraft would, according to Bosphorus, not undermine the object of the Yugoslavia sanctions regime. The Court of Justice, in its considerations on the proportionality of the limitations of the affected party's fundamental rights, acknowledged this argument, but did not respond to it at all.³² It just considered that regarding the fundamental objective of the measures, impounding the aircraft could not be seen

²⁶ Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953.

²⁷ For example, UNSC Res 820 (17 April 1993) UN Doc S/Res/820.

²⁸ EC Regulation 990/1993.

²⁹ UNSC Res 820 (1993) (n 27) [24]; and EC Regulation 990/1993, article 8.

³⁰ It would, according to Bosphorus, even destroy and obliterate the company. See *Opinion of Advocate General Jacobs on the Bosphorus case* [1996] ECR I-3956 [54].

³¹ *Bosphorus* (CJEU) (n 26) [20].

³² It only mentions Bosphorus' argument at *ibid.* [20]. This discussion is closely linked to the discussion in chapter 5.3 regarding the determination of effectiveness in the context of a teleological interpretation method. In that context the Court of Justice considered that excluding leased aircraft from the sanction measure's scope 'would allow [the FRY] or its nationals to evade the application of those sanctions.' *Ibid.* [18]. This could be read as an endorsement of the AG's findings on necessity. See *infra* footnote 35.

as inappropriate or disproportionate.³³ At first sight, the Court seemed to ignore a reasonable suggestion made by Bosphorus of there being an equally effective alternative means. Does this mean that the Court of Justice was highly deferential to the findings of the decision-maker or, on a closer look, was the less restrictive alternative not equally effective?

Some indications as to the considerations the Court might have taken into account in the assessment of the measure's necessity can be found in the Advocate General's Opinion.³⁴ The AG considered that as long as the aircraft remains in operation there is always the possibility of it unexpectedly changing course back towards the FRY.³⁵ Moreover, he saw the risk of a termination of the lease contract before its expiry, and the subsequent return of the aircraft to its owner.³⁶ In addition, the aircraft will continue to operate and continue to be maintained and insured, which indirectly benefits the Yugoslav undertaking.³⁷ Hence an argument could be made that the mere payment of the rent on blocked accounts, as a less restrictive alternative, would not be as effective as the measure of impoundment currently applied.³⁸

This argument, however, is not generally accepted. Canor, for example, criticized the Court's deferential approach.³⁹ She argued that, in contrast to cases concerning fundamental rights, the Court of Justice does apply a less restrictive

³³ *Bosphorus* (CJEU) (n 26) [26]. On this finding see further *infra* subsection 7.2.1.2.

³⁴ *AG Jacobs in Bosphorus* (n 30).

³⁵ *Ibid.* [42]. The AG made these considerations in the context of his teleological construction of the meaning of the sanctions regime. See chapter 5.3. The question of what would constitute an effective interpretation needs to be distinguished, however, from the question whether alternative measures could be equally effective. The present paragraph attempts to infer from the former an indication on the latter.

³⁶ *Ibid.*

³⁷ *Ibid.* [39].

³⁸ But see footnote 35. Another explanation could be that the Court possibly relied on a more lenient standard than less restrictive alternative means. See footnote 54.

³⁹ I Canor "Can Two Walk Together, Except They Be Agreed?" *The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia Into European Community Law Through the Perspective of the European Court of Justice* (1998) 35 *Common Market Law Review* 137, 176-181.

alternative test in cases concerning the freedom of export.⁴⁰ This led her to the conclusion that the Court provides a higher level of protection to individual freedoms guaranteed by EU law, like the freedom to export, than to fundamental rights.⁴¹ Eight years after her critical remarks, Tridimas noted that the Court of Justice has amended its approach and is providing an equal level of protection to both the EU's fundamental freedoms and fundamental rights.⁴²

Even so, also in the more recently decided *Möllendorf* case, the Court of Justice did not address the applicant's suggestion of there being an equally effective alternative measure available.⁴³ The case concerned innocent individuals adversely affected by the implementation of targeted sanctions against others. The facts of the case were that a family had sold immovable property to a group of people which included a man who was targeted by the UNSC 1267 sanction regime, which was implemented by the EU.⁴⁴ This meant that that individual's assets had to be frozen and that it was prohibited to make available to him any economic resources. The blacklisting happened after the sale agreement was concluded, but before that agreement was registered in the Land Register. This latter formal act is necessary under German law to officially effectuate the transfer of ownership.⁴⁵

The Court of Justice found that the prohibition to make available to the targeted individual any economic resources precluded the final registration of the sale

⁴⁰ She compared the *Bosphorus* decision to Case C-367/89 *Criminal proceedings against Aimé Richardt and Les Accessoires Scientifiques SNC*. [1991] ECR I-4621, and Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR-00081. Canor *ibid.* 176-181.

⁴¹ Canor *ibid.* 181.

⁴² Tridimas 2006 (n 8) 299.

⁴³ Case C-177/06 *Möllendorf and Möllendorf-Niehuus* [2007] ECR I-08361.

⁴⁴ UNSC Res 1267 (15 October 1999) UN Doc S/Res/1267, UNSC Res 1333 (19 December 2000) UN Doc S/Res/1333 and UNSC Res 1390 (28 January 2002) UN Doc S/Res/1390. The last one is implemented in the EU by Common Position 2002/402/CFSP and Regulation No 881/2002.

⁴⁵ *Möllendorf* (n 43) [34].

agreement.⁴⁶ It did not, however, explicitly consider the appellants' argument that the measures were unnecessary to reach the objective.⁴⁷ The affected party argued that since the payment of the purchase price had already been made, the buyers were effectively in possession of the immovable property. Accordingly, they had been able to use it in the economic sense for years, for example by renting it out. The only things they could not do with the property were reselling or mortgaging it. This situation would not change, the argument went, if registration were to be allowed.⁴⁸ The power to mortgage or sell property would in any event be suspended by the sanction measure of freezing economic resources.⁴⁹ Hence, according to the affected party, by allowing the final registration the same objective would be achieved by a measure less restrictive of her own legal position.⁵⁰

The AG, who did address this argument, agreed that the present situation, in which the affected party might come under an obligation to make repayment, could indeed result in an unnecessary restriction of Möllendorf's right to property.⁵¹ However, because the Court (and the AG) was not informed of all the specificities regarding this situation, he argued that it is for the national court to clarify the matters of fact and law, and in the light thereof to decide on the proportionality of the regulation's application.⁵²

Eventually the Court solved the matter in accordance with the criteria of proportionality, not by endorsing a less restrictive alternative, but by instructing

⁴⁶ Lack of such registration would result, as a consequence under national law, in an obligation upon the sellers to repay to the buyers the sale price. *Ibid.* [68]. See also *ibid.* [79].

⁴⁷ It did however in the context of what constituted an effective interpretation consider that the objective pursued by the measures could not be achieved 'as effectively' if individuals were allowed to complete their transactions. *Möllendorf* (n 43) [63]. See chapter 5.3.

⁴⁸ See discussion in Case C-117/06 *Möllendorf* (*Opinion of Advocate General Mengozzi*) [2007] ECR I-8364 [97]-[106].

⁴⁹ *Ibid.* [104].

⁵⁰ It would, according to the notary involved, constitute an even lesser risk to security and public order, but the AG considered that contention unacceptable. See *ibid.* [97] and [105]

⁵¹ *Ibid.* [105].

⁵² *Ibid.* [107].

the national court to somehow balance out the adverse consequences for the Möllendorf family, following from the application of national law.⁵³ The Court itself did not assess, and nor did it ask the national court to assess, the proportionality of the implementation of the UNSC sanction measure. It required only a proportionality assessment of the adverse consequences of the application of purely national regulations. The Court of Justice thus avoided an indirect assessment of the proportionality of the impugned UNSC measure, which left no scope of discretion.

The reason why the Court in this case, despite its raised level of protection of fundamental rights, retained a low level of scrutiny in the present instance could be that the Court applies a ‘less restrictive alternative test’ only when it is required to balance a European vis-à-vis a national interest.⁵⁴ Conversely, when the Court is called upon to balance a private vis-à-vis a public interest, it merely applies a ‘manifestly inappropriate’ test.⁵⁵ This test results in a significantly lower intensity of the review, leaving a larger discretion to the decision-maker.

Before national courts, adversely affected individuals might find a hard time, too, convincing these courts of there being available less restrictive, equally effective means. For example, in the *Crna Gora* case before the Dutch District Courts, affected third parties were unsuccessful in their claim that there was a less restrictive alternative available. The case concerned a vessel that was affected by the sanctions regime against the FRY.⁵⁶ The regime provided that it was not

⁵³ See *Möllendorf* (n 43) [79].

⁵⁴ *Tridimas* 2006 (n 8) 138, 193, and see also 230.

⁵⁵ *Ibid.* This may indeed have also demarcated the difference in intensity of review between the cases considered by Canor. See *supra* footnote 40. Moreover, it may also explain her remark that the Court of Justice uses ‘the principle of proportionality instrumentally, so as to promote Community interests and rules and not so much to protect [fundamental] rights.’ Canor 1998 (n 39) 180. A different perspective is taken by De Búrca. She holds that the level of scrutiny by the Court of Justice depends not on the kind, but on the nature and importance, of the interests involved, whether it concerns the interests either of individuals, member-states, or the EU. De Búrca 1993 (n 8) 146-147.

⁵⁶ UNSC resolution 757 (1992), which was implemented in the EU by Regulation 1432/92. See also for a useful explanation of the case *A Soons 'The Netherlands'* in V Gowlland-

allowed to provide any non-financial services ‘whose object or effect it is, directly or indirectly, to promote the economy of the Republics of Serbia and Montenegro’.⁵⁷ After it was established that the Crna Gora indeed fell under the sanctions regime, the Netherlands was prohibited from providing services to the vessel, including piloting it into the port of Rotterdam. Necessarily, the ship anchored off the Dutch coast.

As a consequence of the prohibition to berth the ship, the owner of the cargo could not comply with its obligation to deliver that cargo. In an application for a temporary injunction, he argued for alternative measures that were equally effective but less damaging to the position of third parties. The cargo owner’s suggestion was to allow the ship to berth so that the cargo could be unloaded and, subsequently, impound the ship so that the effectiveness of the sanctions would remain unimpaired.⁵⁸ The Court did not specifically address this argument, but it came more generally to the conclusion that an exception on the basis of damage to third parties had no basis in the EU regulation that sought to implement the UNSC sanctions, and that it was not compatible with the purpose and aim of the sanction measures.⁵⁹

In conclusion, courts’ great deference to the decision-maker’s finding in the determination of a measure’s necessity limits the evaluative power of this part of the proportionality review. The intensity with which courts engage in a review has a decisive effect on its outcome. It makes a significant difference whether a court determines the necessity of a measure on the basis of the question whether ‘less restrictive alternative means’ were available, or whether it merely examines

Debbas (ed.) *National Implementation of United Nations Sanctions* (Martinus Nijhoff Publishers Leiden 2004) 341-380, 365-366.

⁵⁷ In particular those non-financial services provided to ‘any natural person in the Republics of Serbia and Montenegro, any legal person so constituted or incorporated under the law of the Republics of Serbia and Montenegro, or any organization exercising an economic activity controlled by persons resident in the Republics of Serbia and Montenegro or by organizations constituted or incorporated under the law of these Republics.’ EC Regulation 1432/92 art 1 (d).

⁵⁸ This was suggested by Enerco in KG 1992/318 (*Crna Gora I*) [3].

⁵⁹ *Ibid.* [5].

if the means chosen were ‘manifestly inappropriate’.⁶⁰ Moreover, a decision-maker usually enjoys broad latitude in policy areas such as (international) peace and security.⁶¹ In the presently discussed cases, this discretion did not seem to be subjected to any meaningful limitations on account of the fact that the measures caused interferences with individuals’ fundamental rights. However, this seems to be in line with the ECtHR’s rejection of the principle of strict necessity in regard to interferences with individuals’ right to property.⁶²

7.2.1.2. Review of the Balance Drawn between the Interests at Stake

In assessing the lawfulness of limitations on individuals’ enjoyment of their right to property, the ECtHR does not review the necessity of the measure, but does assess whether there is a fair balance between the private and public interests at stake.⁶³ In the cases considered in the present discussion, a balance needed to be struck between, on the one hand, achieving the aim of the UNSC resolution, and on the other, an individual’s enjoyment of his property rights. Striking such a balance is essentially similar to applying a proportionality test in the narrow sense (*stricto sensu*).⁶⁴ As was explained earlier, this coincides with the third step in the Court of Justice’s broader proportionality analysis.⁶⁵

When engaging in its assessment of the fairness of the balance struck in the *Bosphorus* case, the Court of Justice emphasized the importance of the aim of the sanctions regime,⁶⁶ which was ending the war in the FRY. It accepted that a sanctions regime, by definition, has adverse consequences for innocent third parties.⁶⁷ According to the Court, the aim pursued by the measures justified even substantial negative consequences for some operators.⁶⁸ It concluded that, if

⁶⁰ Tridimas 2006 (n 8) 138, 193 and see also 230.

⁶¹ See *supra* subsection 7.2.1. See also De Búrca 1993 (n 8) 146-147.

⁶² See *supra* subsection 7.2.1.

⁶³ Çoban 2004 (n 13) 215.

⁶⁴ *Ibid.* 206-207.

⁶⁵ See *supra* subsection 7.2.1. As was mentioned earlier, the wider analysis also includes assessments of the measure’s suitability and necessity.

⁶⁶ *Bosphorus* (CJEU) (n 26) [22].

⁶⁷ *Ibid.* [22].

⁶⁸ *Ibid.* [23].

measured against the fundamental importance of ending the war in the FRY, the impoundment of the aircraft leased by Bosphorus could not be regarded as disproportionate.⁶⁹

In addition, the Court of Justice did not find it necessary to compensate Bosphorus for the loss caused by the impoundment. In general, in cases concerning an interference with the right to peaceful enjoyment of property, a proportional balance between the individual's or company's interest and the general interest may be attained by paying the aggrieved party compensation for such interference.⁷⁰ The possibility of paying compensation for the interference with its right to peaceful enjoyment of property was also put forward by Bosphorus. It argued that the aim of the regime could also be achieved while paying it compensation.⁷¹ However, it was implicit in the Court's ruling that the European regulation did not allow an award of compensation.⁷²

The Court's finding might have been the consequence of it possibly qualifying, as the ECtHR would later explicitly do,⁷³ the infringement with Bosphorus' right to property as a 'control of use' rather than a 'deprivation' of property.⁷⁴ In addition to the effect such qualification may have on the intensity of the review, it may also have an effect on the issue of compensation.⁷⁵ Another possible argument as to why the Court of Justice might have considered it unnecessary to

⁶⁹ Ibid. [21]-[23], [26]. On the objective of the resolution see also *AG Jacobs in Bosphorus* (n 30) [41].

⁷⁰ *Jacobs and White* 2006 (n 5) 363. See *Holy Monasteries v Greece* [1994] Series A, No 301-A (1995) 20 EHHR 1 [71]. See also *Çoban* 2004 (n 13) 210-211.

⁷¹ See *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* [2005] 42 EHRR 1 [121].

⁷² See *ibid.* [147].

⁷³ *Ibid.* [142]. The Court of Justice itself did not explicitly pronounce on this distinction.

⁷⁴ Yet, it could be argued that the qualification 'control of use' was applicable only with regard to the interference with the property rights of JAT, which was the actual owner of the aircraft. With regard to Bosphorus, the situation was not that of a temporary suspension of their enjoyment of the right to property. The rent paid for the three lost years can hardly be qualified as a control of the use of property. Instead, it constituted a *de facto* deprivation of property. The ECtHR, however, considered that this loss was a constituent element of the control of the use of property. *Ibid.* See for similar critique of ECtHR's classifications of types of interference with property rights, in general: *Çoban* 2004 (n 13) 190.

⁷⁵ See *Çoban* *ibid.*

grant compensation to Bosphorus, in order to draw a fair balance between the interests concerned, is that it might have regarded Bosphorus as not suffering an ‘unusual’ and ‘special’ damage. This means, respectively, that the damage must affect ‘a particular circle of economic operators in a disproportionate manner by comparison with others’,⁷⁶ and it must exceed ‘the limits of economic risks inherent in operating in the sector concerned’.⁷⁷

This concept of ‘unequal discharge of public burdens’ stems from EU case law concerning claims for damages. In principle, compensation in the context of restrictions on the right to property needs to be distinguished from paying damages for a violation of an individual’s right.⁷⁸ Still, they bear some similarities.⁷⁹ It is argued that the amount of ‘just satisfaction’ in relation to a breach of the Convention must correspond to the compensation that might be due under the right to property.⁸⁰ From this perspective an analogy can be made with the *Dorsch Consult* case before the General Court, which is to some extent similar.⁸¹ This case concerned a claim for liability of the EU for the implementation of sanctions against Iraq.⁸²

For both Bosphorus and Dorsch Consult, it counts with regard to the ‘unusual’ nature of the damage that they were not the only operators to suffer from the sanction regimes. With regard to the ‘special’ nature of the damage suffered by

⁷⁶ Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council and Commission* [1998] ECR II-00667 [80].

⁷⁷ *Ibid.*

⁷⁸ Çoban 2004 (n 13) 210.

⁷⁹ See also *infra* footnote 84.

⁸⁰ G Ress 'Reflections on the Protection of Property under the European Convention on Human Rights' in S Breitenmoser and others (eds.) *Human Rights, Democracy and the Rule of Law* (Dike Verlag Zürich 2007) 625-645, 633.

⁸¹ *Dorsch Consult* (n 76).

⁸² The situation was that the Iraqi government, when confronted with the imposition of UNSC sanctions, responded by issuing a law which ordered the freezing of all assets of undertakings established in states whose governments had adopted sanctions against Iraq. One of the victims of that law was the German company Dorsch Consult. It sought compensation for its losses from the EU, which had implemented the UNSC sanctions against Iraq. The General Court, however, held that the alleged damage could not be attributed to the EU but must be attributed to the UNSC. *Ibid.* [73].

Dorsch Consult, the General Court held that it was common ground that when the company concluded the contracts, Iraq was already regarded as a ‘high-risk country’.⁸³ Accordingly, the Court concluded that the risks run by Dorsch Consult in providing services in Iraq were part of the risks inherent in operating in the sector concerned.⁸⁴

By analogy, the same would have been true with regard to situation in the FRY at the time Bosphorus concluded the lease agreement with JAT.⁸⁵ Therefore, the argument can be made that the FRY, like Iraq, could probably also have been qualified as a ‘high-risk country’ at the time the agreement was concluded. Hence the damage incurred by Bosphorus could be qualified as neither ‘unusual’ nor ‘special’ if measured against the *Dorsch Consult* test. In addition, the same rationale might be used to argue that Bosphorus did not bear ‘an individual and excessive burden’.⁸⁶ This criterion is part of the ECtHR’s assessment of whether a fair balance is drawn in the context of its determination of the lawfulness of limitations on an individual’s right to property.⁸⁷

Also, in the *Kadi I* case the Court of Justice assessed the fairness of the balance drawn between the objective of UNSC sanction measures and an individual’s enjoyment of his right to property.⁸⁸ Despite the considerable restriction on Mr

⁸³ Ibid. [83].

⁸⁴ Ibid. [85]. In addition, the General Court also found reason to reject EU liability on the basis of the familiar *Bosphorus* formula. It held that the importance of the aims pursued is such as to justify negative consequences, even of a substantial nature, for some operators. Therefore, it found that could not be held liable in this case. Ibid. [88]. This again shows the close relationship between the issue of compensation and the assessment of proportionality of a limitation put on the right to property.

⁸⁵ That agreement was concluded on the 17th of April 1992. Notwithstanding the fact that UNSC Res 820 (1993) (n 27) – which instituted the sanction measures that formed the basis of the impoundment of the aircraft – was not adopted until exactly one year after the conclusion of that agreement, the FRY had already experienced the war with Slovenia (1991), and was still at war with Croatia (1991-1995) and Bosnia-Herzegovina (March 1992-1995).

⁸⁶ Ress 2007 (n 80) 629.

⁸⁷ Ibid.

⁸⁸ In this case the Court explicitly made a connection with the right to property as guaranteed under the ECHR (n 7). See 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 [356] and [358]. See chapter 6.3.2.

Kadi's right to property, the Court considered it to amount to a mere control of the use, instead of a deprivation of property.⁸⁹ As was mentioned earlier, such a classification leads to a more lenient standard of review than when a restriction would be found to constitute a deprivation of property.⁹⁰ This means that the decision-maker enjoys an even wider discretion.⁹¹ The Court of Justice repeated, after the ECtHR,⁹² that this discretion applies to choosing the means of enforcement as well as to determining whether the public interest justifies the measure for the purpose it seeks to attain.⁹³

In assessing the fairness of the balance drawn, the Court of Justice reiterated from its decision in the *Bosphorus* case that the importance of the measure's aim justifies even substantial adverse consequences for some operators.⁹⁴ From this it followed, according to the Court, that freezing Mr Kadi's funds could not per se be regarded as inappropriate or disproportionate, if measured against an objective of general interest as fundamental to the international community as the fight by all means of the threats to international peace and security posed by acts of terrorism.⁹⁵ The Court concluded, therefore, that the measures could, in principle, constitute a justified limitation of the individual's right to peaceful enjoyment of property.⁹⁶ In this respect the Court, as it had done in the *Bosphorus* case, followed quite a deferential approach towards the decision-maker's finding. Accordingly, the level of judicial protection of the right to

⁸⁹ Ibid. [358]. The General Court in the subsequent *Kadi II* case called into question the assessment that the measures did not amount to a confiscation of property. It found further discussion on this matter, however, to be outside the scope of the proceedings. Case T-85/09 *Kadi v European Commission (Kadi II)* [2010] ECR II-05177 [149]-[150].

⁹⁰ *Arai-Takahashi* 2002 (n 5) 151; *Frigo* 2000 (n 5) 54. Another consequence is that the Court does not have to review whether the restriction is in accordance with 'general principles of international law'. See *Bosphorus* (ECtHR) (n 71) [142].

⁹¹ *Arai-Takahashi* *ibid.* 151-152. Yet, even when the measures would be qualified as confiscation of property, instead of mere control of use, the decision-maker would still enjoy a considerably wide margin of appreciation. See *supra* footnote 7.

⁹² See *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford Land) Ltd. v United Kingdom* [2007] 2007-0000 [55], [75].

⁹³ *Kadi I* (appeal) (n 88) [360].

⁹⁴ *Ibid.* [361].

⁹⁵ *Ibid.* [363].

⁹⁶ *Ibid.* [366].

property in both types of cases is very similar, at least for the moment.⁹⁷ This level is rather low, which concurs with the generally moderate status of judicial protection of property in international human rights law.⁹⁸

However, this was not the end of the matter in the *Kadi I* case. The Court of Justice continued by considering whether the procedural requirement, inherent in the right to respect for property as laid down in the ECHR, was respected in the circumstances of the present case.⁹⁹ This would, according to the Court, require Mr Kadi to have had a reasonable opportunity of putting his case before the competent authorities.¹⁰⁰ The Court found that the regulation implementing the UNSC measures did not furnish any such guarantee, and hence concluded that Mr Kadi's right to respect for property had been infringed.¹⁰¹

Accordingly, the Court of Justice made a distinction between the restriction on the use of property, as such, and the procedures by which it came about. In principle, it seemed prepared to accept the limitations on the right to respect for property if there had been an opportunity for Mr Kadi to put his case before the competent authorities. If such an opportunity was indeed found to exist, the Court might have deferred to the findings of that authority on whether there was sufficient proof of Mr Kadi's involvement in terrorism. In this way a fair balance could have been struck between the individual's right to respect for property and

⁹⁷ This may change somewhat when courts start to determine that the freezing of assets constitutes a deprivation of property and not a mere control of its use. See *supra* subsection 7.2.1. But even then, as was also mentioned there, the decision-maker's discretion will remain considerably broad.

⁹⁸ See *supra* footnote 7. With regard to the level of protection of property under the ECHR (n 7) see *Emberland 2006* (n 7) 156. The Court of Justice relied on the ECHR to determine the extent of the fundamental right to respect for property as a general principle of EU law. *Kadi I* (appeal) (n 88) [356].

⁹⁹ *Kadi I* (appeal) (n 88) [367]-[368].

¹⁰⁰ *Ibid.* [368]. 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 ECHR (n 7) 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 7) 106.

¹⁰¹ *Kadi I* *ibid* [369].

the public interest of combating international terrorism.¹⁰² However, no such authority was found to exist. This finding relates closely to the Court's assessment of lawfulness of the limitations on Mr Kadi's rights to a fair trial and to an effective remedy,¹⁰³ which will be discussed in the subsequent subsection.

7.2.2. The Right to Effective Judicial Protection

The *Bosphorus* case concerned a third party affected by measures intended to target others. The UNSC did not impose these measures specifically on the Bosphorus company, on the basis of special intelligence information of some sort. They were meant as general measures with the aim of putting pressure on the FRY. In contrast, the *Kadi* case, and many similar cases,¹⁰⁴ concerned individuals who themselves were direct targets of the sanctions measures. A Sanctions Committee specifically designated these individuals on the basis of reasons and evidence in possession of the states that transmitted these individuals' names to it. The UNSC did not establish, at the same time, a fair procedure for the targeted individuals to challenge the justification for the imposition of the sanction measures, as far as they concerned themselves. There is no effective remedy at the UN level for the individuals adversely affected,¹⁰⁵ and nor are there any procedures in place to guarantee them a fair trial before domestic courts. This puts these individuals in the position of having to endure, in addition to a limitation on their right to peaceful enjoyment of property, a serious interference with their rights to a fair trial and to an effective remedy. The latter two rights are especially important, as they function also as a mechanism to safeguard individuals' enjoyment of (other) human rights.

¹⁰² See similarly the discussion in *infra* section 7.3.

¹⁰³ See footnote 106.

¹⁰⁴ See, for example, Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2005] ECR II-3353; Case T-253/02 *Chafiq Ayadi v Council of the European Union* [2006] ECR II-2139; Case T-49/04 *Faraj Hassan v Council of the European Union and Commission of the European Communities* [2006] ECR II-52; and before other courts *Youssef Mustapha Nada v Staatssekretariat für Wirtschaft* [2007] 1A.45/2007; *The Queen (on the Application of Othman) v Secretary of State for Work and Pensions* [2001] EWHC 1022 (Admin) 2001 WL 1422967.

¹⁰⁵ See chapter 3.7.

In the *Kadi I* case, the Court of Justice found these fundamental rights to be covered by the principle of effective judicial protection, which is a general principle of European law.¹⁰⁶ From this principle it followed, according to the Court, that the responsible European institution was bound to communicate the grounds for an individual's designation to that individual and to the Court.¹⁰⁷ This is necessary for the individual to properly defend his case, and for the Court to carry out a review of the lawfulness of the measure. The Court added that, with a view to ensuring national security and international cooperation, certain restrictions could be imposed on the communication of confidential information to the individual concerned.¹⁰⁸ However, that does not mean, the Court held, that the restrictive measures could escape all judicial review.¹⁰⁹ For that purpose, the Court must be supplied with the evidence underlying an individual's designation.¹¹⁰ It suggested that it should in its review draw a balance between, on the one hand, legitimate security concerns, which would mitigate against full disclosure of the information available, and on the other, the need to provide designated individuals with a sufficient measure of procedural justice.¹¹¹

Without referring explicitly to the principle of proportionality, the Court of Justice indicated what a fair balance would entail. This balance may result in certain restrictions on the communication of evidence and grounds to the targeted individuals.¹¹² The Court found that the rights to a fair trial and to an

¹⁰⁶ The Court held that the principle of effective judicial protection 'has been enshrined in Articles 6 and 13 of the ECHR'. *Kadi I* (appeal) (n 88) [335].

¹⁰⁷ *Ibid.* [336], [349]-[351].

¹⁰⁸ *Ibid.* [342].

¹⁰⁹ *Ibid.* [343].

¹¹⁰ *Ibid.* [350]-[351].

¹¹¹ *Ibid.* [344]. See also *Secretary of State for the Home Department v AF (FC) and another (Control Orders II)* [2009] UKHL 28; and *A and Others v The United Kingdom* [2009] (App No. 3455/05). See chapter 8.

¹¹² The Court also accepted limitations on the individual's right to be heard during the administrative proceedings culminating in the impugned decision. This right, as such, is not guaranteed under international human rights law. Yet, its non-observance may have an adverse effect on the individual's enjoyment of his human right to a fair hearing after that decision. The Court held that the individual's right to be heard could be suspended until after the adoption of the sanctions. This was necessary, according to the Court, in order to maintain

effective remedy, as comprised by the principle of effective judicial protection, could be subject to limitations, but held that an essential core must be maintained. What this core entails and how, in this type of case concerning individuals directly targeted by UNSC sanctions, a fair balance is struck between the conflicting interests involved will be discussed extensively in chapter 8.3.¹¹³ For the present chapter's purposes it is sufficient to note that the Court of Justice found that the individual's interest in enjoying his rights to a fair trial and to an effective remedy could not be totally outbalanced by an objective as important as combating international terrorism.

7.2.3. Appraisal

The intensity with which courts engage in an assessment of proportionality is often decisive for the outcome of a case. Courts can apply a very strict proportionality standard, while they may at the same time largely defer to the findings of the decision-maker. Such deferential review will take away much of the proportionality analysis' potential force in keeping a judicial check on the executive.¹¹⁴

In both the *Bosphorus* and the *Kadi I* cases the Court of Justice made an assessment of proportionality *in abstracto*, in regard to the lawfulness of the limitations placed on the applicants' right to property. Thereby, the Court left the decision-maker a larger discretion than if it had made the assessment *in concreto*. However, the Court's approach seems to be in concordance with the level of judicial protection of the right to property, as recognized under international human rights law. Especially when the restrictions on that right are classified as a control of use rather than a deprivation of property, the decision-maker enjoys a particularly wide scope of discretion. As was mentioned earlier, judicial

the surprise effect, and thus to secure the measures' effectiveness. *Kadi I* (appeal) (n 88) [338]-[341].

¹¹³ Discussion in a separate chapter is justified due to this topic's central importance to the present research.

¹¹⁴ Andenas and Zleptnig 2007 (n 11) 391. See also Arai-Takahashi 2002 (n 5) 153.

protection of the right to property in international human rights law is generally rather low.¹¹⁵

Still, it is difficult to see how a fair assessment can be made between the overall importance of ending a war, or combating international terrorism in general, and the limitation of the enjoyment of fundamental rights of just a few abstractly circumscribed adversely affected parties.¹¹⁶ It is unlikely that, *in abstracto*, an individual's interest in maintaining the enjoyment of his fundamental rights ever stands a chance in the face of general interests as important as ending wars, or combating international terrorism. Accordingly, the individual's interests would then always be outweighed by the imperative security objectives pursued by the UNSC.

For an effective application of the proportionality analysis in the *Bosphorus* case, the Court should have engaged in an assessment of whether the specific measures against Bosphorus were justified by the effect they sought in the furtherance of the measure's aim. Hence, it should have balanced the actual contribution of the impoundment of the specific aircraft for the furtherance of ending the war in the FRY against the actual loss for Bosphorus.¹¹⁷ If regard is then given to the fact that the lease for the aircraft was paid on blocked bank accounts, this question cannot readily be answered in the affirmative.

Similarly, in the *Kadi I* case the Court of Justice should have determined whether the gain to international peace and security by freezing this particular person's

¹¹⁵ See footnote 7.

¹¹⁶ C Eckes *EU Counter-Terrorist Policies and Fundamental Rights; The Case of Individual Sanctions* (Oxford University Press Oxford 2009) 413; see similarly I Cameron 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 *Nordic Journal of International Law* 159, 190.

¹¹⁷ The impoundment, it was argued, destroyed the company, which consisted only of four aircraft of which two were leased from JAT. The two leased aircraft could not be used for three of the four years lease. See *Bosphorus* (CJEU) (n 26) [19]; http://de.wikipedia.org/wiki/Bosphorus_Airways

assets was proportionate to the interference with this person's property rights.¹¹⁸ This would have also required the Court to review whether the measure was justified by sufficient evidence substantiating Mr Kadi's involvement in terrorism.¹¹⁹ If such involvement could not be established, the actual gain to international peace and security by freezing Mr Kadi's assets would remain obscure.

This is exactly where the shoe pinches and the apparently insurmountable difficulties arise. Evidence of the basis upon which the Sanctions Committee decided to designate certain individuals is not shared with the Court of Justice, nor with any other court; nor, for that matter, even with most states' authorities charged with the implementation of the sanction measures in the domestic legal orders. Hence in the *Kadi I* case, the Court could not have engaged effectively in a proportionality assessment *in concreto*. This issue will be discussed extensively in Chapter 8.

From the present discussion it appears that the Court of Justice's assessment of proportionality does not depend on whether the affected party is an 'innocent' company indirectly affected by the implementation of general sanctions (*Bosphorus*), or an individual directly targeted by UNSC sanctions measures (*Kadi*). However, some scholars have argued that judicial review of targeted sanctions is less inappropriate than judicial review of the necessity for the imposition of general sanction measures, which is a political decision *par excellence*. This argument, however, disregards the fact that it is not the necessity for the general measures, as such, that is subject to judicial review.¹²⁰ Rather, what needs to be reviewed is the proportionality, in light of the objective pursued, of applying these measures in a specific instance, leading to limitations on an individual's fundamental rights. Of course, in such an assessment the decision-maker enjoys a wide discretion as well. This, however, does not

¹¹⁸ Cameron 2003 (n 116) 191.

¹¹⁹ *Ibid.*

¹²⁰ See *ibid.*

distinguish the situation in *Kadi* from that in *Bosphorus*.¹²¹ What does distinguish these two types of cases is the sort of fundamental rights concerned.¹²² In the *Kadi* type of cases, in addition to the right to property, the rights to a fair trial and to an effective remedy are also engaged.

As was considered earlier, the international human rights to a fair trial and to an effective remedy do not contain explicit limitation clauses.¹²³ This does not mean that they cannot be limited. Limitations are permitted if the impugned measures are proportional to the legitimate aim pursued. In drawing a fair balance, an important factor could be whether the affected individuals have an alternative remedy available to effectively protect their human rights.¹²⁴ As will appear from the discussion in the subsequent section, no such alternative remedy is presently available to individuals directly targeted by the UNSC. Therefore, the Court of Justice in the *Kadi I* case engaged in a close scrutiny of the limitations on these rights, as were enshrined in the principle of effective legal protection. It did not defer to the decision-maker's finding. By suggesting techniques that would enable both interests to be guaranteed, it searched for a way to draw a fair balance in which the essence of the individual's fundamental rights was upheld.

In conclusion, the standard of judicial protection of the rights to a fair trial and to an effective remedy is higher than that of the right to property. Although the rights to a fair trial and to an effective remedy could be lawfully limited as well, their very essence is not easily outbalanced. In international law these rights can

¹²¹ Also the difference in nature of the affected party, as being either individuals or companies, does not seem to justify a different standard of protection of the right to property. The relevant provision in Protocol 1 to the ECHR explicitly seeks to guarantee peaceful enjoyment of possession of both natural and legal persons. Moreover, neither the Court of Justice nor the ECtHR mentioned in their respective *Bosphorus* judgments that the appellant concerned was a company, which should thus enjoy a different level of judicial protection. Moreover, in his research on human rights protection of companies under the ECHR (n 7), Emberland does not see the 'markedly reserved scrutiny of governmental interference with property rights' as a consequence of the status of the private applicant. Emberland 2006 (n 7) 156, 192. See also chapter 3.4 on human rights of companies.

¹²² Which is essentially also recognized by Cameron. Cameron 2003 (n 116) 191.

¹²³ See chapter 3.6.2.

¹²⁴ See *infra* subsection 7.3.1.

be regarded as central to human rights protection, because they seek to protect the maintenance of the system of international human rights law. They are, on the one hand, human rights in and of themselves but, on the other hand, they are also mechanisms intended to secure the (judicial) protection of other human rights. Without a possibility for judicial review, no independent assessment could be made of the proportionality of limitations on other human rights, such as the right to property. Similar reasoning may be applied to the Court of Justice's finding in the *Kadi I* case that the procedural limb of the right to property was violated, because no guarantee was furnished for the targeted individual to bring his case before the competent authorities. Accordingly, in principle, the right to property may be lawfully limited in the pursuit of an aim as important as the maintenance of international peace and security, and decision-makers enjoy a large scope of discretion in determining which measures are justified. However, these limitations cannot escape judicial review.

7.3. Assessing the Alternative Remedy at the UN Level

Chapter 3.7 discussed the development of the remedy available to directly targeted individuals before the UNSC Sanctions Committee. The present section seeks to analyse domestic courts' assessment of that remedy. The outcome of such assessment may influence those courts' review of the lawfulness of the limitations placed on the targeted individuals' fundamental rights.

7.3.1. The Alternative Remedy Test

As was mentioned in the previous subsection, the right of access to court is not considered to be absolute. If a fair balance is maintained, limitations could be placed on this right. Depending on where these limitations stem from the ECtHR employs, when assessing that balance, either a reasonable alternative means test or an equivalent protection test: both result in a measure of deference to the state involved.¹²⁵ If the limitations on an individual's right of access to court are a

¹²⁵ Note that the policy objectives underlying the equivalent protection test and the reasonable alternative means test are essentially similar; both seek not to undermine states' international cooperation through IOs. See A Reinisch 'Conclusion' in A Reinisch (ed.) *Challenging Acts of*

consequence of a state granting immunity to an IO before its domestic courts the ECtHR applies a reasonable alternative means test.¹²⁶ It then assesses whether the individual concerned has a reasonable alternative means available for effectively protecting his human rights.¹²⁷ If that is the case, the ECtHR does not consider the immunity granted by a state to an IO to constitute a violation of the adversely affected individual's right of access to court.¹²⁸ The present research, however, does not intend to discuss the UN's immunity before domestic courts. Rather, it concerns the position of individuals affected by states when implementing UNSC resolutions. Like immunities, these implementations could also have the effect of limiting individuals' right of access to court: in particular, in the case of targeted sanctions.¹²⁹ This issue should, however, be understood in the framework of ECtHR's equivalent protection test. As was explained earlier,¹³⁰ the ECtHR employs this test when it is asked to decide upon the lawfulness of limitations on an individual's human rights that were caused by conduct in which a state engaged in order to observe its obligations flowing from its membership of an IO, such as the implementation of that IO's decisions.¹³¹ Chapter 4.3.2, which dealt with the equivalent protection test, concluded that the ECtHR avoids applying such a test in relation to conduct required by the UNSC under Chapter VII of the UN Charter.

This section concerns domestic courts employing an assessment that should conceptually, on the basis of the distinction made above, be classified in the same category as the ECtHR's equivalent protection test, but which however in the application bears similarities to that court's reasonable alternative means test. The test applied by the domestic courts includes only an assessment of the

International Organizations before National Courts (Oxford University Press Oxford 2010) 258-273, 270.

¹²⁶ *Waite and Kennedy v Germany* [1999] 30 EHHR 261.

¹²⁷ See chapter 3.6.2.

¹²⁸ *Waite and Kennedy* (n 126) [68]. The Court has also applied this standard 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 12) 571-572.

¹²⁹ See footnote 136.

¹³⁰ See chapter 4.3.2.

¹³¹ See *Bosphorus* (ECtHR) (n 71).

alternative remedy at the UN level; it does not include any review of possible substantive guarantees provided for by the UN. In this regard this assessment is comparable to a reasonable alternative means test, which requires only the availability of a reasonable alternative to a domestic court for an individual to protect effectively his rights under the Convention, and therewith to counterbalance the limitation placed on his right of access to court. In contrast, the standard of equivalent protection considers both substantive guarantees and mechanisms for controlling their observance.¹³² Therewith it appears to include a broader spectrum of requirements than the reasonable alternative means test.¹³³

Whatever could be said of that, the question the domestic courts considered in the present section seek to answer is whether there is an alternative remedy available at the UN level for targeted individuals which would justify a limitation of their right of access to court. This requirement also appears to be a more feasible standard in regard to the UN, in the sense that it is more likely that it could (ever) be met than the more comprehensive requirements following from the equivalent protection test. Having regard to the total absence of substantive guarantees and the lack of any mechanism of control to ensure their observance in cases concerning individuals who are affected by UNSC action, the UN would probably not qualify as providing equivalent protection.¹³⁴

7.3.2. Domestic Courts' Review of the Remedy before the UNSC Sanctions Committee

Some domestic courts explicitly linked the assessment of the alternative remedy to the possibility of accepting as lawful the limitations on an individual's right of access to court, in case that remedy was found to be present and sufficient. Other courts have given their view on the level of fundamental rights protection

¹³² Ibid. [155].

¹³³ However, it is unclear whether the required level of protection under both tests is identical. C Ryngaert 'The European Court of Human Right's Approach to the Responsibility of Member States in Connection with Acts of International Organizations' (2011) 60 *International and Comparative Law Quarterly* 997, 1010.

¹³⁴ 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, 826.

provided by the procedures before the Sanctions Committee without explicitly making such link. Still, their evaluation of the fairness of the procedure remains relevant, also as a source of inspiration for other courts engaging in a similar assessment.

The General Court echoed the application of a reasonable alternative means test in the *Kadi I* case.¹³⁵ This was possibly due to the fact that it made an analogy with the concept of immunity.¹³⁶ It held that domestic regulations implementing UNSC measures that left no scope of discretion were immune from its review.¹³⁷ Subsequently, it determined that the procedure before the UNSC Sanctions Committee constituted ‘another reasonable method of affording adequate protection of [the] applicant’s fundamental rights’.¹³⁸ However, it did not phrase the existence of an alternative remedy as a requirement to justify the limitation of the individual’s right of access to court. Arguably, it used it as a mere attempt to diminish the relentlessness of its own rejection of jurisdiction.

At that time, the method consisted of the possibility for designated individuals to address a request for delisting to the Sanctions Committee, through their national authorities.¹³⁹ Hence the procedural guarantees depended on whether the state concerned was willing to exercise diplomatic protection.¹⁴⁰ In this regard, the General Court recognized the possibility for affected individuals to bring a case against a state that would wrongfully refuse to submit their case to the Sanctions Committee for re-examination.¹⁴¹ Moreover, in the subsequent *Ayadi* case, the

¹³⁵ 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.

¹³⁶ The General Court when refusing to engage in an indirect review of a UNSC resolution introduced in this regard the notion of immunity of UNSC resolutions. See *Kadi I* *ibid.* [288]. This is, however, quite an uncommon application of the concept of immunity.

¹³⁷ It could review only ‘the applicants’ fundamental rights as recognized by *jus cogens*.’ *Ibid.* [288].

¹³⁸ *Ibid.* [290].

¹³⁹ *Ibid.* [262].

¹⁴⁰ *Ibid.* [267].

¹⁴¹ *Ibid.* [270].

Court even seemed to regard it as an obligation for states to exercise diplomatic protection, under certain circumstances.¹⁴²

Similarly, the Swiss Federal Court in the *Nada* case held, after it described an obligation for the state to conduct criminal procedures against the individuals listed under resolution 1267, that if such a criminal procedure were to result in an acquittal, the state had to report that outcome to the Sanctions Committee and had the obligation to support delisting.¹⁴³ Still, that court acknowledged that the procedure before the Sanctions Committee was seriously deficient from the perspective of fundamental rights protection.¹⁴⁴

The General Court, however, sought to confirm the effectiveness of the remedy available. In the *Ayadi* case it referred to an example of individuals bringing a successful application before a Belgian court.¹⁴⁵ This court ordered Belgium to file a request for delisting with the Sanctions Committee, on pain of paying a daily penalty.¹⁴⁶ Belgium eventually made two unsuccessful requests for delisting.¹⁴⁷ Accordingly, this remedy was not able to ensure an effective follow up to the judgment.¹⁴⁸

¹⁴² See *Ayadi* (n 104) [149]. This ‘progressive statement’ was criticised by several legal scholars. See L v d Herik and N Schrijver ‘Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law’ in T Biersteker and S Eckert (eds.) *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (The Watson Institute for International Studies 2006) 9-23, 21.

¹⁴³ Therewith the Court seemed to connect the freezing of assets as a preventive measure under the regime instituted by UNSC resolution 1267 (1999) (n 44) to the obligation to conduct criminal procedures against suspects of financing of terrorism under UNSC resolution 1373. *Nada* (CH) (n 104) [9.2].

¹⁴⁴ *Ibid.* [7.4].

¹⁴⁵ *Ayadi* (n 104) [150].

¹⁴⁶ *Ibid.*

¹⁴⁷ 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].

¹⁴⁸ This situation might have changed. See UNSC Res 1989 (17 June 2011) UN Doc S/Res/1989 [27] and [33].

Over the course of time, the UNSC has made several consecutive improvements to the Sanctions Committee's procedures.¹⁴⁹ Moreover, it established a Focal Point to which the designated individuals could address their complaints directly.¹⁵⁰ After these improvements, Advocate General Maduro handed down his opinion in the *Kadi I* case. He still found there to be no 'genuine and effective mechanism of judicial control' at the UN level.¹⁵¹ If that had been the case, he added, the European courts might have been released from the obligation to judicially review the relevant UNSC resolution's implementation.¹⁵² Hence, he clearly suggested the possibility of deferring to the UNSC. The European Commission argued along similar lines in its defence before the Court of Justice. However, in its assessment of the effectiveness of the alternative remedy available, it arrived at the opposite outcome. It held that since there was an acceptable opportunity to be heard at the UN level, there was no obligation for the Court to intervene.¹⁵³

In response, the Court of Justice reviewed whether the sanctions regime's procedure at the UN was in conformity with the EU's system of judicial protection of fundamental rights.¹⁵⁴ It found the procedure, even having regard to its recent amendments, clearly not to offer the guarantees of judicial protection.¹⁵⁵ It remained, according to the Court, essentially diplomatic and intergovernmental.¹⁵⁶ Moreover, the Court condemned the fact that the Sanctions Committee did not have to provide any access to relevant information,¹⁵⁷ or any

¹⁴⁹ Consecutive amendments made it possible to grant certain exemptions for humanitarian purposes, UNSC Res 1452 (20 December 2002) UN Doc S/Res/1452, and UNSC Res 1735 (22 December 2006) UN Doc S/Res/1735; to require states transmitting names to provide a statement of reasons, UNSC Res 1617 (29 July 2005) UN Doc S/Res/1617 [4]; and a triennial re-examination procedure was introduced, UNSC Res 1822 (30 June 2008) UN Doc S/Res/1822 [25] and [26].

¹⁵⁰ UNSC Res 1730 (19 December 2006) UN Doc S/Res/1730.

¹⁵¹ Case C-402/05 P *Opinion of Advocate General Poiares Maduro* [2008] ECR I-06351 [54].

¹⁵² *Ibid.*

¹⁵³ *Kadi I* (appeal) (n 88) [319].

¹⁵⁴ *Ibid.* [320]-[325]. See also *Kadi II* (n 89) [117].

¹⁵⁵ *Ibid.* [321]-[322].

¹⁵⁶ *Ibid.* [323], see also [324].

¹⁵⁷ *Ibid.* [325].

reasons for a rejection of a request for removal from the list.¹⁵⁸ Hence the Court concluded that the remedy available at the UN level did not justify any limitation on the individual's right of access to court.¹⁵⁹ Therefore, it found that it must ensure a (full) review of the lawfulness of all European acts implementing the relevant UNSC resolutions.¹⁶⁰

The Canadian Federal Court in the *Abdelrazik* case,¹⁶¹ and the UK High Court¹⁶² and Court of Appeal¹⁶³ in the *A, K, M, Q and G* case, joined the Court of Justice in the critical appraisal of the Sanctions Committee's procedure. Still, the UK Court of Appeal attempted to save the effectiveness of the remedy through a means of 'obligatory' diplomatic protection, as other courts had suggested earlier. It held that designated individuals must have access to a court competent to consider, as far as possible, the basis for their designation.¹⁶⁴ If such a court were then to determine that that basis does not justify the listing, the consequence would be that the UK government would be bound to support delisting.¹⁶⁵ In this regard, the UK High Court, in another case, assumed that a request for delisting by the designating state would likely result in delisting.¹⁶⁶ The earlier mentioned Belgian case, however, proved differently.¹⁶⁷ Not surprisingly, the United Kingdom itself also experienced difficulties finding support for a delisting request in a case in which it was not the designating state.¹⁶⁸ Hence the effectiveness of the remedy through diplomatic protection is

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* [321]-[322].

¹⁶⁰ *Ibid.* [326].

¹⁶¹ *Aboufian Abdelrazik v The Minister of Foreign Affairs* [2009] 2009 FC 580 [51].

¹⁶² *A, K, M, Q, & G v HM Treasury* [2008] EWHC 869 (Admin) [18].

¹⁶³ *A, K, M, Q, & G v HM Treasury* [2008] EWCA Civ 1187 [114].

¹⁶⁴ *Ibid.* [119].

¹⁶⁵ *Ibid.* In the case at hand, the Court of Appeal concluded that an effective judicial review was possible, since it was the UK itself that procured the listing. Therefore, according to the Court, the UK must be considered to know all the facts leading to that individual's designation.

¹⁶⁶ *HAY v HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1677 (Admin); ILDC 1367 (UK 2009) [31].

¹⁶⁷ See *Sayadi and Vinck* (n 147) [10.8].

¹⁶⁸ *HM Treasury v Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) (*Ahmed*) [36] and [82]. Moreover, in contrast to the situation in the *A, K, M,*

rather limited, and does not appear to justify a limitation of the individual's right of access to court.¹⁶⁹

In order to meet the fierce criticism, the UNSC decided in 2009 to institute an Ombudsperson.¹⁷⁰ However, even after this amendment, Lord Hope for the Supreme Court in the *Ahmed* case considered that there was still no effective judicial remedy.¹⁷¹ In the same vein, Lord Phillips found that the targeted individual was not given sufficient information to be able effectively to challenge his listing.¹⁷² In the meantime, the General Court also changed its opinion in the *Kadi II* case, and joined the widely-shared criticism. It found that the Ombudsperson was not an impartial body, and was not able to guarantee the individuals concerned a fair hearing.¹⁷³ Moreover, it criticised the lack of a mechanism to ensure that these individuals are provided with sufficient relevant information in order to defend themselves effectively.¹⁷⁴ The Court further condemned the fact that the Committee still decided by consensus on whether an individual could be removed from the list.¹⁷⁵

Accordingly, the General Court concluded that there was no procedure for review at the UN level that could be equated with an effective judicial procedure for review.¹⁷⁶ Therefore, it found that it could not afford the European implementation of the relevant UNSC resolution any immunity from jurisdiction.¹⁷⁷ It had to secure a (full) review of the lawfulness of that European

Q and G case, the High Court held in the *HAY* case that since the UK was not the designating state it could not engage in an effective merits review. *HAY* (n 166) [45].

¹⁶⁹ See also *Ahmed* *ibid.* [82]. See also footnote 148.

¹⁷⁰ UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904 [20]. In the preamble to this resolution the UNSC took 'note of challenges, both legal and otherwise, to the measures implemented by Member States'.

¹⁷¹ *Ahmed* (n 168) [78].

¹⁷² *Ibid.* [149].

¹⁷³ *Kadi II* (n 89) [128].

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.* [126]. See *supra* footnote 136.

implementation.¹⁷⁸ However, the Court seemed to leave open the possibility that future procedures at the UN level would eventually provide an alternative remedy for the targeted individual to protect his rights effectively.¹⁷⁹ In this way, a dialogue might develop between domestic courts and the UNSC on what is required for effectively protecting the targeted individuals' human rights.¹⁸⁰

In June 2011 the UNSC again made several important amendments to the delisting procedures and the competences of the Ombudsperson.¹⁸¹ No court has yet pronounced on these changes. Hence it remains to be seen how different courts will assess them, and whether the UNSC is willing to adopt even further amendments to the procedure if they regard the present guarantees still to be insufficient. Possibly, at some point, courts will accept that the remedy provided at the UN level guarantees targeted individuals an effective possibility to protect their human rights. However, considering the major challenges in regard to the making available of sufficient information to the individual concerned for him to defend his case, this will not be achieved readily.

7.4. Conclusion

A proportionality assessment does not directly depend on the specific legal basis of the norms concerned. Rather it provides a framework in which the conflicting interests at stake can be balanced. It has a widespread application throughout international law and many domestic legal systems. Therefore, indirect application of a proportionality analysis to a measure imposed by a UNSC resolution may contribute to a common international understanding of what the limitations are of lawful implementations of UNSC action when it affects individuals' enjoyment of their human rights. Accordingly, proportionality analysis holds the promise of introducing a universally shared standard for

¹⁷⁸ Ibid.

¹⁷⁹ Ibid. [127].

¹⁸⁰ Note the similarity with the German Constitutional Court's *Solange I* approach. See BVerfGE 37, 271 of 29 May 1974. See also C Eckes 'Test Case for the Resilience of the EU's Constitutional Foundations' (2009) 15 European Public Law 351, 371.

¹⁸¹ See chapter 3.7.2.

lawfulness of human rights limitations. Providing a mere framework for the assessment of lawfulness, it leaves domestic courts sufficient latitude to apply this standard to the specific facts of the case at hand. Its effectiveness, however, depends largely on the measure of deference a court leaves to the findings of the decision-maker.¹⁸²

What appears from the cases analysed in the present chapter is that if assessed against the interest of maintaining international peace and security, the individual's interest in enjoying his right to property is generally outbalanced. In addition to the importance of the aim pursued, this is also due to the low level of judicial protection of that human right, which results in a low level of scrutiny. Thus the decision-maker enjoys a large measure of discretion and the courts engage in an abstract assessment of proportionality only. This is different when an indirect review is conducted against the human rights of access to court and to an effective remedy. The Court of Justice, for example, engaged in a full review and did not accept that the very essence of these rights was interfered with. Chapter 8 will further investigate what this essence entails.

In any case, the right of access to court may be lawfully limited when the individual concerned has an alternative remedy available which effectively guarantees his due process rights. When a court engages in such an assessment in relation to the remedies available at the UN, it indicates that it does not regard the international obligations under the UN Charter generally to prevail over individuals' human rights, or their domestic equivalent. Instead, it reviews the lawfulness of implementing those obligations from the perspective of the system of lawful limitations, as applied in human rights law and its domestic proxy. The ECtHR does not appear willing to apply a similar test in relation to state conduct required by the UNSC.¹⁸³ The CJEU and other courts, however, did not seem to

¹⁸² See Andenas and Zleptnig 2007 (n 11) 391. See also Arai-Takahashi 2002 (n 5) 153.

¹⁸³ See chapter 4.3.2 and 4.4.2.3. See similarly the Dutch Supreme Court's position in *Mothers of Srebrenica v The Netherlands* [2012] LJN: BW1999; ILDC 1760 (NL 2012) [4.3.3].

exclude the possibility of applying such an assessment. They engaged in an evaluation of the remedy available at the UN level for individuals subjected to the UNSC's targeted sanctions. Generally, these courts considered the remedy presently available to provide the individuals concerned with insufficient guarantees. The outcome of this assessment might change after the most recent amendments to the Ombudsperson procedure. However, considering the persisting drawbacks in that procedure, this is not to be expected.

By indicating what an alternative remedy should entail, courts may send a message to the UNSC. The promise of a deferential judicial review by domestic courts may persuade this body to organize an effective internal complaints procedure. However, considering all the constraints, especially in regard to the use of confidential information, it will not be easy for the UNSC to ever establish a mechanism that would obtain the approval of the domestic courts. The following chapter will thoroughly discuss this persistent problem of the lack of access to relevant information.