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CATCHING UP WITH SOCIETY - WHAT, HOW, AND WHY:
THE REGULATION OF THE UN SECURITY COUNCIL'S
TARGETED SANCTIONS

Machiko Kanetake

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Catching up with Society—What, How, and Why:

The Regulation of the UN Security Council's Targeted Sanctions

Machiko Kanetake*

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I INTRODUCTION

It is one of Professor Ryuichi Ida's favourite lines that law is, in a sense, a function of a given society.¹ This formula is broadly agreeable only because it is abstract enough to accommodate all the possible correlations between law and society, the complexity of which Professor Ida is too aware of. Yet the phrase still captures Professor Ida's basic understanding about law, namely, that law cannot be divorced

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¹ R. Ida, "Science, Technology and International Protection of Human Rights: The Development of Life Science and the Protection of Human Rights" in Japanese Society of International Law (ed.), *100 Years of Japan and International Law* (Tokyo: Sanseido, 2001) (written in Japanese), p. 207. Professor Ida further observed that if scientific technologies have an impact on society, they necessarily affect law, which is a function of the society: *Ibid.*

from the society in which it exerts its regulatory force. Or perhaps more accurately, his conviction is that law, or more precisely, law-makers, *will* be catching up to a social change. For Professor Ida, the identity of “law” is the “substantive binding force”. The substantive bindingness is sustained by social practice, deliberation, and understanding that a specific norm ought to be followed. In order not to lose its own identity, law cannot be distanced too much from social transitions.

The social dependency of law holds true especially with respect to formally non-binding standards which can be collectively called “soft law”.² Here, I define the dichotomy of “hard” and “soft” according to whether a standard qualifies as one of the sources of international law,³ notably treaties, custom, and general principles.⁴ As contrasted with hard law, which retains formal binding force, the scope of standards which can be called soft law are much less cumbersome; neither the combination of *opinion juris* and state practice necessary for customary international law, nor the procedures for concluding treaties, are required. More fundamentally, soft law does not require state consent which sustains the binding force of hard law. Soft law is sustained, not by the formal binding force, but by social practice involving not only states but also non-state actors. Soft law is therefore, by definition, more responsive to social transitions than is hard law. To put it the other way around, the development of soft law could be one indicator to learn how a society has transformed itself.

This chapter attempts to apply Professor Ida’s conviction and insights to a specific scenario. I analyse how social transitions accompany the development of international law—which is, in this chapter, broadly understood to include soft law—on the exercise of authority by international organisations, whose norm-making Professor Ida has extensively elaborated on. Among international organisations, the principles and rules governing the authority of the United Nations (UN) bear particular importance, as they have contributed to the development of common principles applicable to international organisations.⁵ Among the UN organs and bodies, this

² There is voluminous literature on soft law: compare, for instance, J. Klabbers, “The Redundancy of Soft Law”, Vol. 65, *Nordic Journal of International Law* (1996), pp. 167 et seq; C.M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, Vol. 38, No. 04, *International & Comparative Law Quarterly* (1989), pp. 850 et seq. The controversy surrounding “soft” law is inseparable from one’s understanding about “law” or more precisely, its bindingness: see J. Pauwelyn, “Is It International Law or Not, and Does It Even Matter?” in J. Pauwelyn, R. Wessel & J. Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012), pp. 127–131. For those who see “law” as a binary, black-and-white matter, “law” cannot be “softened”. If you accept “law” as a matter of degree, on the other hand, the combination the terms “soft” and “law” seems to be possible.

³ There are also other ways of defining the dichotomy of “hard” and “soft”. For instance, one defines “soft” law based upon (i) the imperativity of certain provisions or (ii) judicial enforceability. For the details of the different meanings given to the “hard” and “soft” dichotomy, see R. Ida, “Formation des normes internationales dans un monde en mutation - Critique de la notion de soft law” in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris: A. Pedone, 1990), pp. 333 et seq.

⁴ Statute of the International Court of Justice, 26 June 1945, 39 AJIL Supp. 215 (1945) (entered into force on 24 October 1945) (1945) Article 38(1). The question as to whether the sources laid down in Article 38(1) exhaust the rules which render a norm binding under international law (see, e.g., Pauwelyn, *supra* note 2.) is beyond the scope of this chapter.

⁵ For instance, an *ultra vires* doctrine, the legal personality of international organisations, an implied power doctrine, and a series of rules on immunities and privileges, have developed in relation to the practice of the UN and international judicial decisions on the UN: see E. Lauterpacht, “The Development of the Law of International Organization by the Decisions of International Tribunals”, Vol. 152, *Recueil des Cours* (1976), pp. 377 et seq; D. Akande, “International Organizations” in M.D. Evans (ed.), *International Law*, 3rd ed. (Oxford: Oxford University

chapter focuses on the UN Security Council's sanctions committees.⁶ I analyse the development of the principles of "fairness and transparency" that regulate the UN sanctions committees' decisions to designate specific individuals and entities as targets⁷ of restrictive measures, such as asset freeze. The case of targeted sanctions provides a good example to consider how formally non-binding principles emerge in response to judicial and political contestations that incrementally cast human rights law against the UN Security Council's decision-making.

The aim of this paper is a modest one; it by no means intends to provide any overall accounts for social transitions and corresponding legal development concerning the UN Security Council, much less any general observations on other UN organs or other international organisations. This chapter provides one scenario that supports the conviction and insights Professor Ida expressed through his works; namely, that international law, through soft law instruments, catches up with social transitions in international society. I first overview Professor Ida's general insights on law and society (Section II). I then situate his observations in the specific context of the UN Security Council's targeted sanctions, and analyse the following three inter-related questions: *what* transitions have international law and law-makers encountered in the context of the UN's targeted sanctions (Section III), *how* international law has caught up with social transitions (Section IV), and *why* it has done so (Section V). The analysis employed in this chapter has an obvious limit; it does not indicate what social transitions international law *ought* to catch up with. Yet this limit reflects the practice-oriented approach adopted by Professor Ida's works, which overall underscored the need for caution in not readily presuming a normative framework without foundation in society.

II CATCHING UP WITH SOCIETY: THE THREE INSIGHTS FROM PROFESSOR IDA'S WORKS

Professor Ida's extensive contributions to the ostensibly distinct areas of law—*le droit international de développement* and international bioethics law—were probably motivated by a common concern that existing international legal principles and rules encounter tremendous global-scale transitions. The broad proposition that law *will* be catching up with social transitions gives rise to three sets of questions: what transitions, how does international law catch up, and why?

The first question obviously depends on the fields of law and its specific legal rules at issue. With respect to *le droit international de développement*,⁸ which caught Professor Ida's interest especially during the 1970-80s, the primary transitions that led

Press, 2010), pp. 252 et seq.

⁶ On the development of sanctions regimes, see J.M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007).

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

⁸ For the overview of Professor Ida's contribution in this area, see Chapter 1, "Introduction: Ryuichi IDA and Purposes of International Law" (Hironobu Sakai, Akiho Shibata, and Shotaro Hamamoto).

to legal development were the dissatisfaction and demands raised by newly independent Asian and African states in the 1960-70s. They sought to qualify the way in which international law marginalised the problem of economic gaps between states. While the principle of self-determination under international law helped the decolonisation processes, it did not shed light on the economic inequality that many of the newly independent states had to encounter. Their dissatisfaction toward existing legal frameworks has generated the concept of “substantive equality”, which was developed and institutionalised through a series of UN General Assembly resolutions.⁹ In international law on bioethics,¹⁰ which was pioneered by Professor Ida in the 1990s, the rapid progress in life sciences, such as embryo research, human genome research, and reproductive technologies, has increased national and international concerns over the ethicality of life science research and its application. These concerns have generated the international principles and rules on bioethics.

On the second question of *how* international law catches up with social transitions, in both spheres of law, Professor Ida situated soft law as a bridge between social transitions and hard law. The legislative or interpretive development of “hard” international law is often time-consuming and may not be best equipped for responding to transitions in social facts and values. Professor Ida therefore found the potential in formally non-binding standards. Professor Ida observed as follows:

La notion de *soft law* est apparue comme une réponse face à la mutation de la société internationale de nos jours....[L]e processus de formation habituel des règles internationales, traités et coutumes, nécessite une durée considérable, de sorte que la droit ne peut rattraper l'évolution sociale. En revanche, les règles de *soft law*, surtout celles qui sont issues des résolutions, n'exigent pas un temps d'élaboration aussi long que les sources de droit traditionnelles.¹¹

As encapsulated by this sentence, the flexibility of soft law better enables it to catch up with the rapid changes in international society and the demands for law. Although Professor Ida was in fact one of the critics who voiced dissent on the use of the blanket term “soft law”,¹² his critical view was primarily based on the terminology. Professor Ida argued that the term “softness” ought to be more specified and be replaced by the alternative terms such as “droit programmatore”, “pré-droit”, and “lex in statu nascendi” in order to distinguish the different meanings given to the broad term.¹³ Professor Ida’s criticism did not downplay the normative significance of non-binding standards and their roles in the development of hard law.

⁹ See R. Ida, “La revendication d’une réelle égalité entre les Etats au sein des organisations internationales économiques (1)-Genèse de la CNUCED-”, Vol. 96, No. 3, *Hogakuronso/Kyoto Law Review* (1974), pp. 34–63; R. Ida, “La revendication d’une réelle égalité entre les Etats au sein des organisations internationales économiques (2)-Genèse de la CNUCED-”, Vol. 97, No. 3, *Hogakuronso/Kyoto Law Review* (1975), pp. 63–103.

¹⁰ For the overview of Professor Ida’s contribution in bioethics, see Chapter 1, “Introduction: Ryuichi IDA and Purposes of International Law” (Hironobu Sakai, Akiho Shibata, and Shotaro Hamamoto).

¹¹ Ida, *supra* note 3, pp. 339–340.

¹² R. Ida, “Qu’est-ce que le “Soft Law”? (1)—Critique de son utilité en qu’instrument d’analyse—”, Vol. 117, No. 5, *Hogakuronso/Kyoto Law Review* (1985) (written in Japanese), pp. 1 et seq; R. Ida, “Qu’est-ce que le “Soft Law”? (2)—Critique de son utilité en qu’instrument d’analyse—”, Vol. 117, No. 6, *Hogakuronso/Kyoto Law Review* (1985), pp. 1 et seq.

¹³ Ida, *supra* note 3, p. 340.

Non-binding standards and instruments played a significant role in *le droit international de développement* in formulating the concept of “substantive equality” as well as institutionalizing mechanisms to achieve it.¹⁴ The instruments progressively challenged the traditional international law which, under the abstract concept of a state, treated all states with the formal equality while disregarding the substantive inequality. In *international bioethics law*, the guidelines of experts and the declarations of international organisations such as UNESCO¹⁵ have filled the regulatory gaps in the practice of life science which has been rapidly transforming itself by the technological advancement.¹⁶

On the third question of *why* international law catches up with social transitions, for Professor Ida, the answer to this question is probably already given by the definition of “law”, or more precisely, its bindingness. He understands law as part of “social norms” or “social codes of conduct”¹⁷ which have substantive binding force within a society. In this vein, in Professor Ida’s works, law and ethics are situated on a continuation of the same platform in that they are both codes of conduct developed in a given society.¹⁸ Should law distance itself from social facts and values which generate social norms, law would lose its substantive binding force, and may lose its social regulatory identity.

The role of soft law in catching up with social transitions can be observed in many areas of international law, including the regulation of authority exercised by international organisations. Applying Professor Ida’s analytical perspectives to a specific context, the following sections of this paper engage with the case study on the development of the principles of fairness and transparency for the regulation of the UN Security Council’s targeted sanctions regimes. It illustrates how international law, through the formally non-binding standards, progressively catches up with human rights calls raised at the domestic and international levels.

¹⁴ For this paragraph, R. Ida, “Statut juridique des pays en voie de développement en droit international du développement—Egalité des Etats et inégalité du développement—”, Vol. 116, *Hogakuronso/Kyoto Law Review* (1985) (written in Japanese), pp. 609 et seq.

¹⁵ See R. Ida, “Bioethics and International Law” in *Ordine internazionale e valori etici (International order and ethical values): VII Convegno, Verona, 26-27 giugno 2003* (Editoriale Scientifica, 2003), pp. 370–371; R. Ida, “Nature juridique des normes internationales de la bioéthique—Cas des trois déclarations de l’UNESCO—”, Vol. 162, No. 1-6, *Hogakuronso/Kyoto Law Review* (2008), pp. 19 et seq.

¹⁶ For the roles of soft and hard law in life sciences in the national context of Japan, R. Ida, “The Significance of Soft Law Regulating Medical Practice” in N. Higuchi & Y. Tsuchiya (eds.), *Medical Ethics and the Law* (Kobundo, 2005) (written in Japanese), pp. 70 et seq.

¹⁷ R. Ida, “Le droit international et la bioéthique—Une esquisse du droit international de la bioéthique—”, Vol. 156, No. 3-4, *Hogakuronso/Kyoto Law Review* (2005) (written in Japanese), pp. 65–68.

¹⁸ See Ida, *supra* note 15, p. 367. His conceptualization of bioethics as a social norm may appear contradictory to his reference to the concept of “human dignity” because the notion, at least at an abstract level, appears to inhere in humanity itself, rather than any being dependent on any “social” factors. Nevertheless, such a concern is perhaps eliminated by the fact that Professor Ida has been analyzing the existence, meaning, and application of bioethics standards applicable to the level of “human society”, and, in search of the standards of human society, Professor Ida situates “international law” as a possible device to formulate and implement the standards applicable to the whole “human society”. In discussing human dignity, he notes the fact that “[m]any international instruments took this word [of human dignity] as the basic value of the human community”: Ida, *Ibid.*, p. 368.

III REGULATING THE UN SECURITY COUNCIL'S TARGETED SANCTIONS: WHAT CHANGES?

What social transitions brought about changes to a particular legal framework must be assessed by a separate quantitative study. Yet one broad factor that could be identified is the development of human rights law both at the domestic and international levels. Human rights law is relevant to the UN's targeted sanctions in three respects: it first encouraged the transition of sanctions from comprehensive to targeted ones (as will be overviewed in the next section); human rights law was invoked as a basis to challenge the sanctions committees' decisions (Section III-2 below); and it has finally facilitated the development of normative and procedural developments regulating the sanctions committees' decisions (Section IV below).

1 Human Rights Law as a Genesis of Targeted Sanctions

The development of international human rights law is one of the key achievements of the UN.¹⁹ The UN General Assembly played a crucial role in adopting the Universal Declaration of Human Rights²⁰ and major human rights conventions, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²¹ The UN Security Council, by contrast, has little relevance to international human rights law, at least under the assumption of the drafters of the UN Charter. As an organ established in the aftermath of World War II, the Security Council was supposed to exercise its authority against states, and not against individuals.²²

Yet comprehensive economic sanctions, such as those against Iraq in the 1990s, invited criticisms on both humanitarian and human rights grounds,²³ and required more targeted alternatives. Council Resolution 917 against Haiti,²⁴ adopted in May 1994, is the first Council resolution that enabled a sanctions committee to designate specific individuals and entities.

Under Resolution 917, the designation of the individuals was left in the hands of

¹⁹ See generally, L.B. Sohn, "The Human Rights Law of the Charter", Vol. 12, *Texas International Law Journal* (1977), pp. 129 et seq.

²⁰ *Universal Declaration of Human Rights*, UN GA Res. 217A (III) (10 December 1948).

²¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (1966); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

²² For instance, the targets of economic enforcement measures adopted by the Council were assumed to be member states. Article 41 of the UN Charter provides that measures not involving the use of armed force "may include complete or partial interruption of *economic relations* and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of *diplomatic relations*": Charter of the United Nations, 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) (1945) Article 41. The wording in these examples, such as the phrases "economic relations" and "diplomatic relations", suggests that economic sanctions were assumed to be taken primarily against member states.

²³ See, e.g., Sub-Commission on the Promotion and Protection of Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper Prepared by Mr. Marc Bossuyt*, UN Doc. E/CN.4/Sub.2/2000/33 (21 June 2000).

²⁴ UN Doc. S/RES/917 (6 May 1994).

the Security Council's Sanctions Committee established earlier under Resolution 841,²⁵ which was mandated to "maintain an updated list, based on information provided by States and regional organizations" of targeted persons, and to approve exceptions to the travel ban.²⁶ Since the Haiti sanctions, it has been a common practice for the Security Council to designate specific individuals and entities as targets of the asset freeze and travel ban. Between 1994 and May 2012, the Council instigated eighteen sanctions targeting specific individuals.²⁷ As noted above, the flourishing of these targeted sanctions is largely owed to the lessons learned from comprehensive economic sanctions which caused devastating humanitarian side effects. Targeted sanctions were thus devised as better alternatives from humanitarian and human rights perspectives.

2 Human Rights Law as a Challenge to Targeted Sanctions

While the use of targeted sanctions succeeded in avoiding widespread humanitarian effects, it has brought a new controversy with respect to its disrespect for the human rights of those individuals listed by the UN.²⁸ Criticisms have been

²⁵ UN Doc. S/RES/841 (16 June 1993).

²⁶ UN Doc. S/RES/917, *supra* note 24, para. 3. All states are mandated to impose travel ban and asset freeze measures against a potentially wide range of individuals under the following three categories: (a) Haitian military/police officers (and their immediate families), (b) participants in the coup and the subsequent governments (and their immediate families), and (c) those employed by or acting on behalf of the Haitian military (and their immediate families); *Ibid.* paras. 3, 4.

²⁷ Between 1994 and May 2012, the Council instigated eighteen sanctions targeting specific individuals and entities. (i) Haiti: UN Doc. S/RES/917, *supra* note 24, paras. 3, 4. (ii) Bosnian Serbs: UN Doc. S/RES/942 (23 September 1994) (1994), para. 14. The list was not drawn: see *Final Report of the Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia*, S/1996/946 (15 November 1996), para. 63. (iii) Angola: UN Doc. S/RES/1127 (28 August 1997), para. 4(a), (b); UN Doc. S/RES/1173 (12 June 1998), para. 11. (iv) Sierra Leone: UN Doc. S/RES/1132 (8 October 1997), para. 5; UN Doc. S/RES/1171 (5 June 1998), para. 5. (v) Al Qaeda and Taliban: UN Doc. S/RES/1267 (15 October 1999), para. 4; UN Doc. S/RES/1333 (19 December 2000), paras. 8, 10, 11; UN Doc. S/RES/1390 (28 January 2002), para. 2. In June 2011, the sanctions regime was split into two: for Al Qaeda, UN Doc. S/RES/1989 (17 June 2011). For Taliban, UN Doc. S/RES/1988 (17 June 2011). (vi) Liberia; UN Doc. S/RES/1343 (7 March 2001), para. 7(a). (vii) Iraq: UN Doc. S/RES/1483 (22 May 2003), para. 23(b). (viii) Liberia, UN Doc. S/RES/1521 (22 December 2003), para. 4(a); UN Doc. S/RES/1532 (12 March 2004) para. 1. (ix) DRC: UN Doc. S/RES/1533 (12 March 2004), paras. 13, 15; UN Doc. S/RES/1596 (18 April 2005); UN Doc. S/RES/1807 (31 March 2008). (x) Côte d'Ivoire: UN Doc. S/RES/1572 (15 November 2004), paras. 9, 11. (xi) Sudan: UN Doc. S/RES/1591 (29 March 2005), para. 3. Cf. UN Doc. S/RES/1054 (26 April 1996), para. 3(b). (xii) Lebanon/Syria, UN Doc. S/RES/1636 (31 October 2005), para. 3. (xiii) North Korea: UN Doc. S/RES/1718 (14 October 2006) (14 October 2006), para. 8. (xiv) Iran: UN Doc. S/RES/1737 (27 December 2006), paras. 10, 12. (xv) Eritrea/Somalia: UN Doc. S/RES/1844 (20 November 2008); UN Doc. S/RES/1907 (23 December 2009). (xvi) Libya: UN Doc. S/RES/1970 (26 February 2011). (xvii) Taliban: UN Doc. S/RES/1988. (xviii) Guinea-Bissau: UN Doc. S/RES/2048 (18 May 2012). For the summary and analysis of each sanctions regime, see Farrall, *supra* note 6.

²⁸ There are a number of human rights critiques regarding the Council-led sanctions. See, e.g., A. Reinisch, "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions", Vol. 95, No. 4, *American Journal of International Law* (2001); I. Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", Vol. 72, No. 2, *Nordic Journal of International Law* (2003); E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford; Portland Oregon: Hart Publishing, 2004) chapter 6; J.E. Alvarez, "The Security Council's War on Terrorism: Problems and Policy Options" in *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003).

particularly levelled against the sanctions regime imposed against Al Qaeda instigated by Security Council Resolution 1267,²⁹ under which the targets geographically proliferated across the globe.

An assets freeze certainly has a significant impact on the listed individuals' right to property,³⁰ and a person's privacy, reputation, and family rights.³¹ Despite the scale of impact on human rights, when individuals were designated as specific targets, no hearing was conducted prior to or following the designation of targets, nor were they informed of the detailed grounds for listing.³² No direct petition mechanisms had been institutionalised for the targeted individuals and entities claiming their non-involvement until the adoption of Council Resolution 1730 in late 2006.³³

The lack of procedural safeguards led to criticism directed against the Council for failing to ensure the right to a fair hearing³⁴ and the right to an effective remedy for those who are targeted by the Council and its sanctions committees.³⁵ Individuals are entitled to a fair hearing if the asset freeze, the deprivation of property, amounts to a "criminal charge"³⁶ or if it involves the determination of a person's "rights and obligations in a suit at law".³⁷ Arguably, the longer a suspected individual remains on the list, the more likely it is that the effect of sanctions will resemble a criminal charge.³⁸ These human rights concerns have invited a series of domestic and international contestations against domestic and EU law which has implemented the

²⁹ UN Doc. S/RES/1267 (15 October 1999). In December 2000, Resolution 1333 extended the reach of the assets freeze to members of Al Qaeda: UN Doc. S/RES/1333 (19 December 2000), para. 8(c). In January 2002, Resolution 1390 further expanded the targets of the assets freeze to those "associated with" members of Al Qaeda, and imposed a travel ban and arms embargo not limited to the territory of Afghanistan: UN Doc. S/RES/1390 (28 January 2002), para. 2. The sanctions regime was initially established against Al Qaeda and Taliban. The sanctions regime was split into two different sanctions regimes on 17 June 2011: for Al Qaeda, S/RES/1989 (17 June 2011); for Taliban, S/RES/1988 (17 June 2011).

³⁰ Universal Declaration of Human Rights, *supra* note 20, Article 17.

³¹ ICCPR, *supra* note 21, Article 17. See Cameron, *supra* note 28, pp. 159–173; P. Gutherie, "Security Council Sanctions and the Protection of Individual Rights", Vol. 60, *New York University Annual Survey of American Law* (2004), pp. 499–511.

³² For the procedural improvement regarding the Al Qaeda sanctions regime, see Section IV-2 of this chapter; M. Kanetake, "The Interfaces between the National and International Rule of Law: The Case of UN Targeted Sanctions", Vol. 9, No. 2, *International Organizations Law Review* (2012), Annex II.

³³ UN Doc. S/RES/1730 (19 December 2006).

³⁴ ICCPR, *supra* note 21, Article 14.

³⁵ *Ibid.* Article 2(3).

³⁶ *Ibid.* Article 14(1). Compare, e.g., Wet, E. De, "The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View" in E. De Wet, A. Nollkaemper & P. Dijkstra (eds.), *Review of the Security Council by Member States* (Antwerp; New York: Intersentia, 2003), pp. 15–16; Strengthening Targeted Sanctions through Fair and Clear Procedures: White Paper prepared by the Watson Institute Targeted Sanctions Project (Brown University), 30 March 2006, UN Doc. A/60/887–S/2006/331 (14 June 2006) (2006) at 14–18.

³⁷ ICCPR, *supra* note 21, Article 14(1). See Cameron, *supra* note 28, p. 192, and fn. 91. Compare with Watson Report, *supra* note 36, pp. 14–15.

³⁸ See Alvarez, *supra* note 28, pp. 132, 134–135; Gutherie, *supra* note 31, pp. 503–506. See also *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/63/223 (6 August 2008) (the Special Rapporteur, Martin Scheinin, observes that the indefinite freezing of the assets amounts to a criminal punishment due to the severity of the sanction).

decisions of the UN Security Council and its sanctions committees.³⁹

The most well-known case is *Kadi* before the EU courts, which has also shaped the fate of other similar cases in EU courts and its member states. Extensive debates have been conducted with respect to the case,⁴⁰ and I will not reiterate the details of the decisions. The then Court of First Instance (CFI), which is now the General Court (EGC),⁴¹ in September 2005 found itself structurally limited in carrying out the review (“*Kadi I*, CFI”).⁴² The Court of Justice (ECJ) in September 2008 (“*Kadi I*, ECJ”) set aside the CFI’s judgment and conducted the “full review” by upholding the autonomy of the EU legal order based upon the “rule of law”.⁴³ The EGC in September 2010 (“*Kadi II*, EGC”) then followed the ECJ’s decision in *Kadi I* and conducted the “full and rigorous” review of the measures, although the EGC still voiced criticism on the formalistic divide adopted by the ECJ with respect to EU and UN legal orders.⁴⁴ The ECJ in July 2013 (“*Kadi II*, ECJ”) intensified the level of “full review”, and found itself tasked with two things:⁴⁵ whether one of the reasons (for

³⁹ See the list of judicial decisions, Kanetake, *supra* note 32, Annex I (The List of National, European and International Cases regarding UN Targeted Sanctions). A large number of studies have been carried out on sanctions-related cases and wider domestic court decisions contesting the exercise of authority by the Council and its subsidiary organs. For a useful overview, see C. Eckes, “The Role of Judges Confronted with Norms from Different Origins: The Case of Counter-Terrorist Sanctions” in K.E. Jørgensen & K.V. Laatikainen (eds.), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power* (Routledge, 2013), pp. 171–184; A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford; New York: Oxford University Press, 2011) chapter 2 (Hilpold), 3 (Tzanakopoulos), 4 (Wouters and Schmitt), 5 (d’Aspremont and Brölmann).

⁴⁰ For a useful overview of literature on *Kadi*, see S. Poli & M. Tzanou, “The Kadi Rulings: A Survey of the Literature”, Vol. 28, No. 1, *Yearbook of European Law* (2009).

⁴¹ For the purpose of this paper, I continue to use the CFI (instead of EGC) as it would be convenient to distinguish *Kadi* decisions rendered in 2005 (by the CFI) and 2010 (by the EGC).

⁴² Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II–03649 (CFI) (Judgment of 21 September 2005, hereinafter *Kadi I* (CFI)). On the CFI judgment, see, e.g., A. Reinisch, “Introductory Note to Court of First Instance of the European Communities: *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*”, Vol. 45, *International Legal Materials* (2006); C. Tomuschat, “Case Note on *Yusuf and Kadi* [2006]”, Vol. 43, *Common Market Law Review*; M. Bulterman, “Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities”, Vol. 19, No. 3, *Leiden Journal of International Law* (2006); C. Eckes, “Judicial Review of European Anti-Terrorism Measures—The *Yusuf* and *Kadi* Judgments of the Court of First Instance”, Vol. 14, No. 1, *European law journal* (2008).

⁴³ Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I–06351 (ECJ) (Judgment of 3 September 2008, hereinafter *Kadi I* (ECJ)). On the ECJ judgment, see, e.g., D. Curtin & C. Eckes, “The *Kadi* Case: Mapping the Boundaries between the Executive and the Judiciary in Europe”, Vol. 5, *International Organizations Law Review* (2008); C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights* (Oxford University Press, 2009) chapter 5; P.J. Cardwell, D. French & N. White, “European Court of Justice, *Yassin Abdullah Kadi* and *Al Barakaat International Foundation v Council and Commission* (Joined Cases C-402/05 P and C-415/05 P) Judgment of 3 September 2008”, Vol. 58, No. 01, *International & Comparative Law Quarterly* (2009); G.D. Burca, “The EU, the European Court of Justice and the International Legal Order after *Kadi*”, Vol. 51, No. 1, *Harvard International Law Journal* (2010).

⁴⁴ Case T-85/09 *Kadi v. European Commission and Council of the European Union* [2010] ECR II–05177 (EGC) (Judgment of 30 September 2010, hereinafter *Kadi II* (EGC)). See *ibid.*, para. 151 (“full and rigorous judicial review”).

⁴⁵ Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi v European Commission* (ECJ) (Judgment of 18 July

listing) stated in the summary provided by the UN's Sanctions Committee was sufficiently detailed and specific,⁴⁶ and whether it is substantiated.⁴⁷ With regard to the former, the ECJ acknowledged that some of the reasons stated in the Sanctions Committee's summary were sufficiently detailed and specific.⁴⁸ Nevertheless, for the latter, the ECJ found that information or evidence which might have substantiated the reason for listing was absent,⁴⁹ and thereby annulled the contested EU regulation that implemented the decisions of the UN sanctions committees' decisions.⁵⁰

The proliferation of the individuals' claims before national courts has succeeded in inviting the international calls for procedural reform. In 2004, the UN High-Level Panel made an unequivocal call for a reviewing process in relation to the Al Qaeda and Taliban sanctions regime, noting that "[t]he way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions".⁵¹

Individuals' claims before national courts were accompanied by diplomatic initiative to study the political and legal issues involved in the Council's targeted sanctions, including the human rights compatibility of the listing procedure.⁵² In particular, the Watson Institute of Brown University's report entitled "Strengthening Targeted Sanctions Through Fair and Clear Procedures" addressed procedural guarantees to a greater extent,⁵³ and the report was presented to the Security Council

2013, hereinafter Kadi II (ECJ)), para. 130.

⁴⁶ In *Kadi II*, the ECJ held that EU institutions owe not only the obligation to communicate the allegations, but also the "duty of careful and impartial examination": *Ibid.* para. 115. This duty is part of the obligation to state reasons laid down in Article 296 of TEFU (*Ibid.* para. 116.), and part of procedural safeguards established through the jurisprudence of EU courts (see *Ibid.* para. 114.). The duty of careful and impartial examination requires EU institutions to assess the necessity of seeking the assistance of the UN Sanctions Committee and of member states in order to obtain the "disclosure of information or evidence, confidential or not": *Ibid.* para. 115. In determining the compliance of the competent EU authority with the duty of careful and impartial examination, the courts determine "in particular, whether the reasons relied on are sufficiently detailed and specific": *Ibid.* para. 118.

⁴⁷ According to the ECJ, the right to effective judicial protection requires EU courts to ensure that the listing decision is "taken on a sufficiently solid factual basis": Kadi II (ECJ, 2013), *supra* note 45 para. 119. This means that judicial review "must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated": *Ibid.* When security considerations preclude the competent EU authority to disclose information requested by EU courts, the courts determine whether the grounds of non-disclosure are well founded, and if they are, strike an appropriate balance between the protection of the rights and that of the security: *Ibid.*, paras. 125–128.

⁴⁸ Kadi II (ECJ, 2013), *supra* note 45, paras. 140–150.

⁴⁹ *Ibid.*, paras. 151–163.

⁵⁰ *Ibid.*, para. 164.

⁵¹ Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2 December 2004), para. 152.

⁵² The Swedish government took one of the first diplomatic initiatives, the so-called Stockholm Process, during 2001–2002, to invite governmental and non-governmental attention to the issue of procedural guarantees. See P. Wallensteen, C. Staibano & M. Eriksson (eds.), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options – Results from the Stockholm Process on the Implementation of Targeted Sanctions* (Uppsala: Department of Peace and Conflict Research, Uppsala University, 2003), available at <<http://www.smartsanctions.se/>> paras. 37, 282–285. The report was presented to the Security Council: see UN Press Release, SC/7673 (25 February 2003); UN Doc. S/PV. 4713 (25 February 2003).

⁵³ It recommended that an administrative focal point be designated within the UN Secretariat to which individuals

and the General Assembly in June 2006.⁵⁴ The call for procedural safeguards was also echoed by a number of member states and the wider UN family.⁵⁵

IV HOW TO CATCH UP?

A question can then be posed as to how international law regulating the decisions of the UN Security Council's sanctions committees can absorb human rights contestations raised at both the domestic and international levels. International law regulating the authority of the UN Security Council's sanctions committees includes the UN Charter, the decisions of the UN Security Council, common rules and principles of international organisations, and possibly non-binding international standards. As pointed out by Professor Ida,⁵⁶ the rigidity of hard law leaves soft law to reflect on and absorb human rights contestations into regulatory frameworks.

1 By Hard Law

The decisions of the UN and its organs are governed by the UN Charter as a constituent instrument. As the International Court of Justice (ICJ) affirmed this at the outset of the UN, the "political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations of its powers".⁵⁷ The same was reconfirmed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić* (1995), in which the Tribunal stated "neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)".⁵⁸

There are broadly two ways through which the UN Charter could catch up with social transitions; the formal amendment of the UN Charter, and interpretive development. As for the former, it is well-known that the amendment of the UN Charter is hampered by the complexity of political bargaining and the rigidity of the amendment procedures. The realistic possibility would therefore be to rely upon the interpretive development of the UN Charter. Just as with any other treaties, the interpretation of the UN Charter could change over time. The flexibility of interpretive rule for treaties allows one to take into consideration the UN Charter's "special characteristics"⁵⁹ that the instrument has not only conventional but also institutional

may submit their delisting requests: Watson Report, *supra* note 36, pp. 43–44. It also proposed several options for review mechanisms accessible to individuals: *Ibid.*, pp. 46–51.

⁵⁴ Watson Report, *supra* note 36.

⁵⁵ For governmental and institutional contestations, see further M. Kanetake, "Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee", Vol. 12, *Max Planck Yearbook of United Nations Law* (2008).

⁵⁶ See Section II of this chapter.

⁵⁷ *Admission of a State to the United Nations (Charter, Art. 4)* [1948] ICJ Reports 57 (Advisory Opinion of 28 May 1948), p. 64.

⁵⁸ Case No. IT-94-1-AR72 *Prosecutor v. Duško Tadić*, Appeals Chamber, *Decision on Jurisdiction* (ICTY) (Decision of 2 October 1995) para. 28 (in relation to the Council's power under Article 39 of the UN Charter).

⁵⁹ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Reports 151

dimensions.⁶⁰ Such characteristics could justify a greater emphasis on the purposes and subsequent practices among the interpretive elements contained in the Vienna Convention on the Law of Treaties.⁶¹

There is a divergence of views as to whether the UN Charter, particularly Article 1(3), imposes obligations, through Article 24(2), not only to “promote” respect for human rights, but also to “ensure” respect for human rights *strictu sensu*.⁶² Among the elements of treaty interpretation,⁶³ the textual reading of Article 1(3) suggests that the UN organs are required to “promote” respect for human rights, but not to “ensure” respect for human rights.⁶⁴ The use of the reserved language, “promoting and encouraging”, under Article 1(3) was deliberate. At the San Francisco Conference, a proposal was made to replace the terms with the words “to assure” or “to protect”. However, it did not win support among delegates. According to the subcommittee I/1/A, to assure or protect fundamental rights and freedoms is “primarily the concern of each state”,⁶⁵ and not of the UN. This is not surprising, inasmuch as the anticipated impact that the UN itself impinges upon the rights of individuals was significantly limited when the Charter was drafted.⁶⁶

(Advisory Opinion of 20 July 1962), p. 157.

⁶⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Request)* [1996] ICJ Reports 66 (Advisory Opinion of 8 July 1996), p. 75, para. 19.

⁶¹ For the interpretation of UN Charter provisions, see, e.g., G. Ress, “The Interpretation of the Charter” in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford; New York: Oxford University Press, 2002), p. 13; J.E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2005) pp. 65–108; Pollux, “The Interpretation of the Charter”, Vol. 23, *British Year Book of International Law* (1946), pp. 54 et seq; O. Schachter, “Interpretation of the Charter in the Political Organs of the United Nations” in S. Engel (ed.), *Law, State and International Legal Order: Essays in Honor of Hans Kelsen* (University of Tennessee Press, 1964), pp. 269 et seq.

⁶² One side observes that the compliance *strictu sensu* with human rights obligations, both under treaties and customary law, is not assumed by the Charter (i.e., obligation to promote): see J.A. Frowein & N. Krisch, “Introduction to Chapter VII” in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford; New York: Oxford University Press, 2002), p. 711. The other side argues that Charter obliges the Security Council to comply with human rights established under customary law and those under major human rights treaties (i.e., obligation to ensure): see Alvarez, *supra* note 28, pp. 125, 129–132 (with respect to the obligations established as customary international law); De Wet, *supra* note 36, pp. 8–14.

⁶³ The basic formula of treaty interpretation is to give “ordinary meaning” to the treaty terms: Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 311 (entered into force 27 January 1980) (1969) Article 31(1). An exception is when the parties have given a “special meaning” to a term: Article 31(4). Such ordinariness is nevertheless a highly relative notion, being sustained by multiple variables; namely, the terms’ context, the treaty’s object and purpose, and three other mandatory considerations, including subsequent practice: Vienna Convention on the Law of Treaties, *Ibid.* Article 31(1), (2), (3). While the reference to the preparatory works is one of “supplementary” means for interpretation and not part of the mandatory variables, reference to preparatory works can be readily licensed by Article 32.

⁶⁴ Under Article 1(3) of the UN Charter, it is one of the purposes of the UN “[t]o achieve international cooperation...in promoting and encouraging respect for human rights and for fundamental freedoms for all”: Charter of the United Nations, *supra* note 14, Article 1(3) (emphasis added). See F. Mégret & F. Hoffman, “The UN as a Human Rights Violator - Some Reflections on the United Nations Changing Human Rights Responsibilities”, Vol. 25, *Human Rights Quarterly* (2003), pp. 314 et seq.

⁶⁵ *Documents of the United Nations Conference on International Organization, San Francisco, 1945* (hereinafter ‘UNCIO Documents’) (London; New York: United Nations Information Organizations, 1945) vol. 6, at 705 (“Report of Rapporteur, Subcommittee I/1/A”, Doc. 723, I/1/A/19, 1 June 1945).

⁶⁶ In addition, with regard to Article 1(1) of the UN Charter, the Charter failed short of constraining the exercise of

The subsequent development in practice indicates that the Security Council has increasingly narrowed its discretion in terms of how to take into account the respect for human rights when acting under Chapter VII of the UN Charter. For instance, a range of measures to ameliorate the humanitarian and human rights-related impacts of sanctions have been implemented by the Security Council,⁶⁷ as exemplified by the Oil-for-Food Program for Iraq,⁶⁸ the provision of humanitarian exemptions,⁶⁹ the monitoring of humanitarian impact,⁷⁰ and more broadly, the methodological transition of the Security Council's sanctions from comprehensive ones to more targeted measures.⁷¹ Yet subsequent practice, albeit providing greater guidance as to how the UN and its organs take into account human rights, does not go so far as to suggest that the organs are formally bound by human rights law. Also, the development of the Charter through subsequent practices must be done by the practice that "establishes the agreement of the parties regarding its interpretation".⁷² To reinterpret UN Charter provisions requires member states' approval and compromise, which is probably time-consuming and favours the state-centric variables.

One may observe that the human rights obligation attaches *a priori* to the legal personality of international organisations, inclusive of the UN, enjoyed under international law.⁷³ In principle, however, international personality has no predetermined content in international law.⁷⁴ While the UN is "capable of possessing international rights and duties",⁷⁵ this capacity does not automatically dictate what rights and obligations the Organisation has.⁷⁶ The presumption that international organisations are born with no predestined entitlement and obligations is, of course,

Chapter VII authority by the UN Security Council to the same degree as in Chapter VI by not referring to the "principles of justice and international law" in the first part of Article 1(1) of the UN Charter regarding collective measures. On the drafting history of Article 1(1) of the UN Charter, see T.D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", Vol. 26, *Netherlands Yearbook of International Law* (1995), pp. 65–68.

⁶⁷ See generally, J.A. Frowein & N. Krisch, "Article 41" in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford; New York: Oxford University Press, 2002), pp. 745–746.

⁶⁸ See generally, *Review and Assessment of the Implementation of the Humanitarian Programme Established Pursuant to Security Council Resolution 986(1995) (December 1996–November 1998)*, UN Doc. S/1999/481 (28 April 1999).

⁶⁹ See generally, G.L. Burci, "Interpreting the Humanitarian Exceptions through the Sanctions Committees" in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001), pp. 143 et seq.

⁷⁰ See generally, De Wet, *supra* note 28, pp. 226–247.

⁷¹ See Section II-1 of this chapter.

⁷² Vienna Convention on the Law of Treaties, *supra* note 63, Article 31(3)(b).

⁷³ Reinisch, *supra* note 28, pp. 858–859; N.D. White, *The Law of International Organisations*, 2nd ed. (Manchester: Manchester University Press, 2005) page 217. Similarly, H.G. Schermers & N. Blokker, *International Institutional Law Unity Within Diversity*, 4th revised ed. (Boston: Martinus Nijhoff Publishers, 2003) p. 1002; F. Morgenstern, *Legal Problems of International Organizations* (Cambridge: Grotius Publications, 1986) p. 32.

⁷⁴ Schermers & Blokker, *supra* note 73, pp. 990, 992–993; White, *supra* note 73, pp. 40–41.

⁷⁵ See *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174 (Advisory Opinion of 11 April 1949), p. 179. The ICJ observed that "rights and duties [of the UN] are [not] the same as those of a State": *ibid.*

⁷⁶ The personality refers to the capacity of a person, but his entitlement and duties require separate scrutiny: see M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), pp. 75–87.

increasingly subject to qualification by the development of common rules on international organisations.⁷⁷ Yet the variance among international organisations has so far hampered the development of substantive rules, such as human rights law, into the corps of common institutional rules.

2 By Soft Law

Awaiting the time-consuming development by “hard” international law, non-binding standards have developed in order to regulate the listing decisions rendered by the sanctions regimes. The principles of “fair and clear” procedures, and more broadly, the principles of fairness and transparency, have been formulated through UN General Assembly and Security Council resolutions as the UN’s institutional regulatory standards. In paragraph 109 of the World Summit Outcome in 2005, the UN General Assembly “call[ed] upon the Security Council...to ensure that *fair and clear procedures* exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions”.⁷⁸ The principles of fairness and transparency have also been incorporated into Security Council resolutions themselves. The first appearance was the preamble of Resolution 1730, concerning all targeted sanctions regimes, in which the Council “committed to ensuring that fair and clear procedures exist” for the listing and delisting of individuals and entities.⁷⁹ The principles were upgraded to the operative part of Resolution 1822 regarding the Al Qaeda and Taliban sanctions regime in particular.⁸⁰ In Resolution 1904 adopted in December 2009, the Security Council also “[took] note of challenges, both legal and otherwise” to the sanctions measures, and “express[ed] its intent to continue efforts to ensure that procedures are fair and clear”.⁸¹

As suggested by the nuanced terms of “fair and clear” procedures, the principles do not necessarily signify the Security Council’s obligation to “ensure” respect for human rights. Nevertheless, they still require the organ to incorporate procedural safeguards for the targeted individuals and entities with respect to its decisions to designate individuals. While the fairness and transparency can be understood in a range of different ways, the principles are broadly understood to realise not only the general improvement of the listing, but also the following four procedural safeguards: (i) *periodical review* by the Council, (ii) the respect for the individuals’ *right to be informed* of the measures, (iii) the *right to be heard* directly by the decision-making

⁷⁷ Some examples include an *ultra vires* doctrine, the legal personality of international organisations, an implied power doctrine, interpretation of constituent instruments, and a series of rules on immunities and privileges: see Akande, *supra* note 5, pp. 255–276.

⁷⁸ 2005 *World Summit Outcome*, UN Doc. A/RES/60/1 (24 October 2005) para. 109 (emphasis added). Similarly, Report of the Secretary-General, *Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, UN Doc. A/60/825 (27 April 2006), para. 42; *The United Nations Global Counter-Terrorism Strategy*, UN Doc. A/RES/60/288 (20 September 2006), para. 15.

⁷⁹ UN Doc. S/RES/1730 (19 December 2006), pre. para. 5 (original italics omitted).

⁸⁰ UN Doc. S/RES/1822 (30 June 2008), para. 28. Similarly, UN Doc. S/RES/1904 (17 December 2009), para. 34; UN Doc. S/RES/1989 (17 June 2011), para. 42; UN Doc. S/RES/2083 (17 December 2012), para. 45.

⁸¹ UN Doc. S/RES/1904 (17 December 2009), pre. para. 9 (original emphasis omitted). Cf. UN Doc. S/RES/1822 (30 June 2008), pre. para. 12. Similarly, UN Doc. S/RES/1989 (17 June 2011), pre. para. 11; UN Doc. S/RES/2083 (17 December 2012), pre. para. 11.

body, and (iv) the *right to review* by an effective review mechanism.⁸²

A series of the procedural improvements at the UN Security Council's sanctions committees can be understood as the incremental realisation of these procedural safeguards.⁸³ For instance, the sanctions-wide Focal Point established in December 2006 under Resolution 1730 can be understood as an incremental step for the element of the *right to be heard*.⁸⁴ The Ombudsperson established for the Al Qaeda sanctions regime is also one realisation of the *right to be heard* and the *right to review*. In December 2009, particularly with respect to the Al Qaeda sanctions regime alone, the Focal Point was replaced by the Office of the Ombudsperson established under Resolution 1904, who not only receives delisting requests from individuals and entities,⁸⁵ but also assists the Committee's consideration to such requests "in an independent and impartial manner".⁸⁶ Council Resolution 1989 in June 2011 further awarded it the power to make recommendations on delisting.⁸⁷ Under the resolution, if the Ombudsperson recommends the Committee to consider "delisting", and if no decisions are rendered either by the Committee or the Council within the period of 60 days, the restrictive measures against the targeted individuals and entities would come to an end.⁸⁸ Council Resolution 1989 noted the Ombudsperson's "important role in improving fairness and transparency".⁸⁹

The Council's incremental procedural developments, fostered by both

⁸² B. Fassbender, *Targeted Sanctions and Due Process*, Study Commissioned by the UN Office of Legal Affairs (20 March 2006) (available at http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf); UN Doc. S/PV. 5474 (22 June 2006), p. 5 (statement by Mr. Michael, Legal Council of the UN, presenting the Secretary-General's view in the non-paper, presumably based on Fassbender's aforementioned paper); *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/61/267 (16 August 2006), paras. 38–41.

⁸³ The main procedural improvements are chronologically listed in: Kanetake, *supra* note 32, Annex II.

⁸⁴ The Security Council unanimously adopted Resolution 1730 based on a French proposal, requesting the Secretary-General to establish a "focal point" to receive delisting requests as a mechanism to be applied to all Council sanctions involving designated individuals: UN Doc. S/RES/1730 (19 December 2006).

⁸⁵ UN Doc. S/RES/1904 (17 December 2009), para. 21. On the establishment and function of the Ombudsperson under Resolution 1904, see C. Michaelsen, "The Security Council's Al Qaeda and Taliban Sanctions Regime: 'Essential Tool' or Increasing Liability for the UN's Counterterrorism Efforts?", Vol. 33, No. 5, *Studies in Conflict & Terrorism* (2010), pp. 456–459.

⁸⁶ UN Doc. S/RES/1904 (17 December 2009), para. 20. The delisting process under Resolution 1904 follows the three steps: information gathering by the Ombudsperson (two months), "dialogue" between the Ombudsperson and the petitioner (two months), and Committee discussion and decision (two months): see *ibid.*, Annex II. For the function of the Ombudsperson under Resolution 1904, see *Ibid*; L.B. de Chazournes & P.J. Kuijper, "Mr Kadi and Mrs Prost: Is the UN Ombudsperson Going to Find Herself between a Rock and a Hard Place?" in H. Waele & E. Rieter (eds.), *Evolving Principles of International Law* (Martinus Nijhoff Publishers, 2012), pp. 81–90.

⁸⁷ UN Doc. S/RES/1989 (17 June 2011), para. 21. See also *ibid.*, Annex II, para. 7(c).

⁸⁸ See UN Doc. S/RES/1989 (17 June 2011), Annex II, para. 12. In cases where the Ombudsperson recommends *retaining the listing*, the restrictive measures on the petitioner remain in place "unless a Committee member submits a delisting request" which will be considered under its normal consensus procedures: *ibid.*, Annex II, para. 11.

⁸⁹ UN Doc. S/RES/1989 (17 June 2011), pre. para. 13. The Monitoring Team of the Al Qaeda Sanctions Committee notes that this procedural development "came as close to meeting the calls for an independent and binding review mechanism as seemed possible": *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*, UN Doc. S/2012/968 (hereinafter "Thirteenth Report of the Monitoring Team of the 1267 Committee") (31 December 2012) para. 11.

governmental and non-governmental contestations, demonstrate that respect for the aforementioned four procedural safeguards has been, in principle, accepted and incrementally institutionalised within the targeted sanctions regimes. The concrete reforms in the listing procedures have led to the delisting of some of those targeted individuals and entities which brought court proceedings.⁹⁰ The principles of fairness and transparency are the UN's institutional standards and do not have any formal binding force upon the Security Council. Yet the principles are embedded in the discourse of the UN Security Council and its sanctions committees themselves, and have guided at least some of these incremental procedural reforms.

There is apparently a difference between hard and soft law with respect to the *identity of law-makers*. The interpretive development is ultimately a decision of member states.⁹¹ On the other hand, the principles of fairness and transparency were formulated by the UN General Assembly, developed by the reports prepared by scholars and practitioners (e.g., those of the Watson Institute⁹² and Fassbender⁹³), and ultimately accepted and materialised by the UN Security Council and its sanctions committees.

V WHY CATCHING UP?

The foregoing analysis finally brings us to the question of *why* the UN Security Council has accepted the principles of fairness and transparency and incrementally materialised them in the decision-making processes, apparently by way of responding to domestic and international human rights contestations.

1 For the Protection of Human Rights

A *liberalistic* answer to the question may well be that the UN Security Council accepted and materialised the principles in order to better protect the fundamental rights of those listed individuals. This human rights-based explanation should hold true in part. It was the domestic and international claims based upon human rights

⁹⁰ See Kanetake, *supra* note 32, Annex I (The List of National, European and International Cases regarding UN Targeted Sanctions). The delisted individuals and targets include: Aaran Money Wide Service (26 August 2002), Global Services International (26 August 2002), Aden (26 August 2002), Abdulaziz Ali (26 August 2003), Yusuf (24 August 2006), Nasco (14 November 2007), Sayadi (20 July 2009), Vinck (20 July 2009), Nada (23 September 2009), Barakaat International Foundation (22 October 2009), Nada Management Organization (22 October 2009), Hassan (9 September 2010), Abdulrahim (22 December 2010), Elostia (22 December 2010), Al-Faqih (T-135/06) (22 June 2011), Sanabel Relief Agency (22 June 2011), Abdrabbah (22 June 2011), Ayadi (17 October 2011, after Ombudsperson review), Abdelrazik (30 November 2011, after Ombudsperson's review), Maftah Mohamed Elmabruk (22 December 2010), MIRA (2 July 2012, after Ombudsperson's review), Al-Faqih (2 July 2012, after Ombudsperson's review), and Kadi (Delisted on 5 October 2012 after Ombudsperson's review).

⁹¹ For instance, the interpretive development through practices must be done through the practices that establish the agreement of the "parties" regarding its interpretation: Vienna Convention on the Law of Treaties, *supra* note 63 Article 31(3)(b).

⁹² Watson Report, *supra* note 36.

⁹³ Fassbender, Targeted Sanctions and Due Process, *supra* note 82.

violations that fostered normative and procedural developments. For instance, the establishment of the Focal Point in 2006 followed the UN High-Level Panel's human rights criticisms in 2004 against the Al Qaeda sanctions regime,⁹⁴ *Kadi I* before the then CFI (now the EGC) in September 2005, and the World Summit Outcome document in October 2005.⁹⁵ The Focal Point has invited contestation by national judges on the grounds that it was "obvious that this procedure does not begin to achieve fairness for the person who is listed".⁹⁶ The establishment of the regime-specific Ombudsperson in December 2009 also followed a series of human rights contestations, including *Kadi I* before the ECJ in September 2008. The Ombudsperson's procedure met criticism from national judges as lacking any effective judicial remedy.⁹⁷ The human rights contestations have led to the conferral of recommendatory power on the Ombudsperson in June 2011.

At the same time, the liberalistic account provides only a part of the picture. First, the problem of procedural safeguards had existed already from the inception of targeted sanctions in 1994. It was, however, only after the Al Qaeda sanctions regime that the problem attracted wide international attention. The liberalist's view does not fully explain this point. Second, despite some normative and procedural developments, the principles of fairness and transparency and their concrete realisation still appear to be significantly departed from any strict observance of human rights law or domestic human rights standards. While the fairness and transparency principles have been used interchangeably with "due process",⁹⁸ the permanent members of the UN Security Council tend to avoid the use of human rights languages when they discuss the fairness

⁹⁴ A More Secure World: Our Shared Responsibility, *supra* note 51, para. 152.

⁹⁵ 2005 World Summit Outcome, *supra* note 78, para. 109.

⁹⁶ *A, K, M, Q & G v. HM Treasury* [2008] EWHC 869 (Admin) (Justice Collins; High Court of Justice, UK) (Judgment of 24 April 2008), pt. 18.

⁹⁷ *HM Treasury v. Mohammed Jabar Ahmed and Others; HM Treasury v. Mohammed al-Ghabra; R (Hari El Sayed Sabaei Youssef) v. HM Treasury* [2010] UKSC 2 (UK Supreme Court) (Judgment of 27 January 2010) para. 78 (Lord Hope, with whom Lord Walker and Lady Hale agree). Lord Phillips observed that the Guidelines revised according to Resolution 1822 "fall far short" of providing the access to a court as well as the reasons for the listing to enable him to make an effective challenge: *ibid.*, para. 149 (Lord Phillips). Lord Mance also denounced the procedure of the 1267 committee, despite various modifications up to Resolution 1904, in that they do not provide judicial procedure for review, nor do they guarantee that individuals affected will know sufficiently about the case against them in order to be able to respond to it: *ibid.*, para. 239 (Lord Mance). See also *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/65/258 (6 August 2010) paras. 55–58 (the Special Rapporteur, Martin Scheinin, remains concerned that the revised delisting procedures do not meet the fundamental principles of the right to fair trial); *Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/67/396 (26 September 2012) paras. 27–59 (the Special Rapporteur, Ben Emmerson, recommended that the Ombudsperson should be renamed the Office of the Independent Designations Adjudicator (IDA), and that states should be obligated to disclose information to the IDA on conditions of confidentiality. The Rapporteur also suggested that the information obtained through torture should be excluded from consideration by the IDA.).

⁹⁸ See UN Doc. Doc. S/PV. 5474 (22 June 2006) at 3 (Mr. Moeller/Ms. Løj of Denmark), 12 (Mr. Burian of Slovakia), 15 (Mr. Pereyra Plasencia of Peru), 20 (Mr. Mayoral of Argentina), 21 (Mr. Al-Nasser of Qatar); UN Doc. S/PV. 5474 (Resumption 1) (22 June 2006) at 17 (Mrs. Núñez de Odremán of Venezuela), 19 (Mr. Adekanye of Nigeria); UN Doc. S/PV. 6347 (29 June 2010) (The promotion and strengthening of the rule of law in the maintenance of international peace and security); UN Doc. S/PV. 6347 (Resumption 1) (29 June 2010); UN Doc. S/PV. 6424 (15 November 2010) (Briefings by Chairmen of subsidiary bodies of the Security Council).

and transparency in the sanctions regimes.⁹⁹

2 In Response to the Political Power of Judicial Contestations

An alternative *realist's* explanation may, in part, account for normative and procedural developments. A hallmark of realist thought is to capture law as a simple reflection of the prevailing balance of power and to serve the political purposes of powerful states.¹⁰⁰ From this perspective, it can be argued that the principles of fairness and transparency and their concrete realisation reflect the policy proactively pursued by the governments of some European states. They proactively push forward the procedural safeguard in the sanctions regimes through a range of diplomatic routes. Switzerland, Germany, and Sweden commissioned the project of the Watson Institute of Brown University on targeted sanctions' fair and clear procedures.¹⁰¹ In April 2011, the like-minded European states proposed further improvement in the listing procedures.¹⁰²

In addition to these governmental diplomatic initiatives, the role of judicial organs, especially that of EU courts, can be understood as part of political power. This is counter-intuitive, given that judicial bodies are generally supposed to restrain power, not create it. Nevertheless, no matter what EU courts and domestic courts decide, the legal effect of the decisions is formally confined in respective legal orders and does not reach to the UN Security Council's exercise of authority. Outside respective legal orders, the impact of decisions of domestic and EU courts should be understood as part of *political* influence.

This explains the fact that the problem of procedural safeguards attracted attention only after the Al Qaeda sanctions regime. What has helped the problem to emerge was the geographical proliferation of targets, which not only exacerbated the scale of human right problems but diversified political and judicial recourses available to the targeted individuals and entities. The use of national courts with which the individuals indirectly contested the UN Security Council's listing decisions has been an influential apparatus for attracting international political attention to the targeted individuals' claims. The international political significance of national courts greatly varies depending upon the geographical location. Suppose that *Kadi* decisions were rendered by a court of a small state, that the state is not a well-known advocate of the

⁹⁹ See e.g., UN Doc. S/PV. 5474 (22 June 2006); UN Doc. S/PV. 5474 (Res. 1) (22 June 2006).

¹⁰⁰ C. Reus-Smit, "The Politics of International Law" in C. Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), pp. 15–16.

¹⁰¹ Watson Report, *supra* note 36. Switzerland, Germany, and Sweden also sponsored earlier initiatives to reform targeted sanctions, although the initiatives were primarily addressed the effectiveness of sanctions through robust domestic implementation and international monitoring: the Interlaken Process (1998-2001), the Bonn-Berlin Process (1999-2001), and the Stockholm Process (2001-2002), sponsored by Switzerland, Germany and Sweden, respectively. See further T.J. Biersteker, S.E. Eckert, A. Halegua & P. Romaniuk, "Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes" in P. Wallenstein & C. Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System* (London: Frank Cass, 2005).

¹⁰² "Improving Fair and Clear Procedures for a More Effective UN Sanctions System" (Document submitted to the Security Council by Switzerland and the Like-Minded States in April 2011) (a proposal submitted by Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland).

rule of law, and that the decisions were not readily available in English. As such, the normative and procedural developments at the sanctions committees might have been far more moderate.

Yet this power-based account is not satisfactory either. Apparently, the decisions of the Security Council often hinge on the positions of the US government, which is much less reluctant to provide procedural safeguards in the sanctions regimes. With regard to the Al Qaeda sanctions regime, the vast majority of the names on the target list have been submitted by the US, either alone or in conjunction with other UN members,¹⁰³ and it has been a principal advisor of the Al Qaeda Sanctions Committee.¹⁰⁴ Since the UN does not have a general capacity to collect (as opposed to receive) international intelligence relating to them, national intelligence is the primary source.¹⁰⁵ The US, as a primary provider of the information, retains the political power in deciding how the sanctions regimes operate. Outside the sanctions' contexts, the US outweighs many other states with regard to many political and economic factors. This creates power disparities among UN member states. Given the predominant power of the US, it may be difficult to capture the normative and procedural developments as a good reflection of the balance of power.

3 To Secure the Effectiveness of Sanctions

A *rationalistic* or pragmatic account should remedy some of the shortcomings of liberal and realist explanations. Apparently, human rights contestations, especially those raised by domestic and EU courts, could hamper the effectiveness of sanction regimes.

Domestic organs have the ultimate authority to give effect to international decisions at the domestic level. No matter what decisions the UN Security Council makes, the international decisions would be binding only at the international level. This gives rise to the practical necessity for the UN to respond to legal impediments raised before domestic and EU courts. Also, the effective functioning of the sanctions regimes requires not only mere compliance through the adoption of appropriate domestic legislation, but also states' enhanced willingness to cooperate. In particular, the UN relies on member states' readiness to ensure that financial institutions within their jurisdictions are screening accounts and transactions in an effective and timely manner.¹⁰⁶ In order to maximise the effect of asset freeze measures, the UN Security Council needs to compromise its own procedures in line with the standards adopted at

¹⁰³ E. Rosand, "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions", Vol. 98, No. 4, *American Journal of International Law* (2004), p. 746.

¹⁰⁴ Richard Barrett, the Coordinator of the Monitoring Team since 2004, states: "The United States, of course, is intensely engaged through this whole process [of the fight against terrorism]. We find great support from them in our work on the committee...": CNN, Diplomatic License: Current Events at the United Nations, 3 September 2004, available at <http://transcripts.cnn.com/TRANSCRIPTS/0409/03/i_dl.00.html>.

¹⁰⁵ See S. Chesterman, *Shared Secrets: Intelligence and Collective Security* (Double Bay, N.S.W.: Longueville Media, published for Lowy Institute for International Policy, 2006), pp. 70–71.

¹⁰⁶ Fourth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Doc. S/2006/154 of 10 March 2006 (hereinafter Fourth Report of the Monitoring Team), para. 68.

the domestic level.

This rationalistic explanation is sound, but still not complete. In particular, this pragmatic account does not explain the fact that the major normative and procedural developments had started *before* the critical decisions such as *Kadi I* in the ECJ were rendered.¹⁰⁷ The mere fact that that court proceedings were instigated in major political constituencies in the eyes of the UN Security Council facilitated the international reform. The driving factor for the normative and procedural reforms was therefore not entirely the decisions that eventually find in favour of the listed individuals and legally undermine the implementation of sanctions at the domestic level.

4 Constituted by Institutional Discourse

Finally, a *constructivist's* account may overcome some of the shortcomings of the above explanations. It holds that the UN Security Council's decisions are, after all, constituted by wider institutional discourse, including that of human rights. This constructivist perspective of international relations does not sanction the idea that law and society are the distinctive forms and they could be explained by the rationality of actors involved. It advances the account that normative and ideational structures construct actors' identities through the process of socialisation, as well as shape a public justificatory claim that the actors give for their behaviour. International law is a central component of the normative structures that are constitutive of the actors' internal identities and external logics of argument.¹⁰⁸

This explanation appears to hold true in the case of targeted sanctions. The identity of the UN as a leading human rights advocate conditions their institutional discourse and behaviour, including those of the Security Council. Indeed, human rights discourse is deeply embedded in the practice of the UN.¹⁰⁹ The World Summit Outcome declared that human rights, along with the rule of law and democracy, belong to the universal and indivisible core values and principles "of the United Nations".¹¹⁰ The UN Security Council is not immune from such human rights discourse. Through the deliberation and communications with member states outside the Council, other UN organs and experts, and the wider international community, the UN Security Council, whose identity and discourse are already conditioned by the institutional narrative on human rights, was required to justify its decisions with the language of human rights, which has led to the adoption of fairness and transparency principles and procedural improvements.

¹⁰⁷ The UN Security Council's meeting held two months *after Kadi I* (ECJ) is noteworthy. While some states expressed concern about *Kadi I* (ECJ), the attention was paid rather to the implementation of Resolution 1822, which introduced the procedural development (narrative summaries of reasons, notice to the targets, and comprehensive review) *before* the ECJ's decision. This meeting suggests that the ECJ's decision was not to change the overall direction of the procedural development which had started before. See UN Doc. S/PV.6015 (12 November 2008).

¹⁰⁸ See Reus-Smit, *supra* note 100, pp. 21–23.

¹⁰⁹ See D. Forsythe, "The United Nations and Human Rights" in R. Thakur & E. Newman (eds.), *New Millennium, New Perspectives: The United Nations, Security, and Governance* (Tokyo: United Nations University Press, 2000), pp. 220 et seq.

¹¹⁰ 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), para. 119.

The practice of cross-referencing among judicial organs might have fostered the permeation of human rights contestations into the UN's discourse. For instance, with regard to the Al Qaeda sanctions regime, the Federal Supreme Court of Switzerland, in the case of *Nada* (2007), referred to the CFI's decision in *Kadi I* and reasoned the case in a similar line.¹¹¹ The UK Supreme Court in *Ahmed* (2010)¹¹² referred to the Canadian case of *Abdelrazik* (2009).¹¹³ And *Kadi I*, *Abdelrazik*, and *Ahmed*, together with *Sayadi* (2008) before the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR),¹¹⁴ were referred to by the European Court of Human Rights (ECtHR) in the case of *Nada* (2012).¹¹⁵ The ECJ in *Kadi II* (2013) referred to the *Nada* cases of the ECtHR and the Federal Supreme Court of Switzerland in order to reiterate the insufficiency of the UN's procedure and the resulting importance of a judicial review at the EU level.¹¹⁶

In addition to the effect of decisions themselves, judges' specific reasoning and narratives also determine the extent to which domestic and EU court decisions generate political momentum at the international level. For instance, the CFI's *jus cogens* review in *Kadi I* added the material through which the European decision facilitated the international regulatory reform at that time—despite the ECJ's subsequent rejection of *jus cogens* review. The Canadian Federal Court in *Abdelrazik* (2009)¹¹⁷ held that the Canadian government breached the applicant's right to enter Canada under Canadian constitutional jurisprudence. In *Abdelrazik*,¹¹⁸ Justice Zinn of the Canadian Federal Court criticised the 1267 Committee regime against Al Qaeda as “a denial of basic legal remedies and as untenable under the principles of international human rights”,¹¹⁹ despite the fact that it was not strictly necessary to refer to the sanctions committee's procedure. In *A and Others* (2008) before the UK Court of Appeal, an English judge has chosen the powerful term “prisoners of the state” to characterise the state of those targeted, which was also reiterated by the Supreme Court,

¹¹¹ The Swiss court conducted the *jus cogens* review and found that procedural deficiencies at the UN did not contradict *jus cogens*, as did the CFI in its 2005 decision. *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment* Case No 1A45/2007, DTF 133 II 450; ILDC 461 (CH 2007) (Switzerland, Federal Supreme Court, First Public Law Chamber) (14 November 2007). For details, see J. Reich, “Recent Developments: Due Process and Sanctions Targeted Against Individuals Pursuant to UN Resolution 1267 (1999)”, Vol. 33, *Yale Journal of International Law* (2008).

¹¹² *Ahmed* (UK Supreme Court, 2010), *supra* note 97.

¹¹³ *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada* 2009 FC 580 (Canada, Federal Court) (Judgment of 4 June 2009).

¹¹⁴ *Nabil Sayadi and Patricia Vinck v. Belgium* UN Doc CCPR/C/94/D/1472/2006 (views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the ICCPR) (29 December 2008). The Human Rights Committee found that there was a violation of Articles 12 and 17 of the ICCPR by Belgium. In particular, the Committee found unjustified the way that Belgium initially transmitted complainants' names to the Sanction Committee: see *ibid.*, paras. 10.7-10.8.

¹¹⁵ Appl. No. 10593/08 *Nada v. Switzerland* (ECtHR Grand Chamber) (Judgment of 12 September 2012).

¹¹⁶ *Kadi II* (ECJ, 2013), *supra* note 45, para. 133. The ECJ referred to *Nada*: *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment*, *supra* note 111 paras. 8.1–8.3; *Nada v. Switzerland*, *supra* note 115, para. 211.

¹¹⁷ *Abdelrazik* (Canadian Federal Court, 2009), *supra* note 113.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, para. 51.

and also by the EGC in *Kadi II*.¹²⁰ The EGC also described targeted sanctions as “particularly draconian”¹²¹ for the targeted individuals. These expressions and terms are reproduced by scholars and possibly by judges, and contribute to the gathering of political momentum to call for normative and procedural reforms on the international stage.

VI CONCLUSION

If the “soft” branch of international law could be a good indicator for social transitions, the development of the principles of fairness and transparency and the incremental procedural improvements to regulate the decisions of the UN Security Council’s sanctions committees seem to provide the following three contemporary features of international society.

First, the specific case discussed in this chapter is part of the broader trend to subject the institutional decisions of the UN and other international organisations to human rights norms. Human rights law has developed historically in the domestic legal order for the regulation of public authority exercised by states against individuals. Yet the exercise of authority by international organisations, including the UN, has great impact, not only on state organs, but also on individuals and entities within a state. The greater relevance of international organisations to domestic societies necessitates that the organisations justify their decisions in such a way as to address the concerns of individuals and non-governmental entities.¹²² In addition, with regard to the UN, its institutional commitment to promote human rights has determined its own identity. As the case analysed in this chapter illustrates, this institutional identity circumscribes the way in which it responds to the human rights contestations—regardless of the fact that the UN Charter only imposes the abstract obligation to “promote” respect for human rights on the UN and its organs.

Second, the case of targeted sanctions highlights that national courts may no longer hesitate in reviewing the acts of national governments even if the acts in question concern the implementation of international obligations imposed by UN Security Council resolutions. Judicial contestations can be seen outside the context of targeted sanctions. While domestic courts proactively invoke international law and the decisions of international organisations, the active application of international law has inevitably augmented the occasions for domestic courts to encounter differences between two legal prescriptions. The promising trend of judicial amenability to international law has then increasingly coincided with domestic judicial contestations against international law, including the decisions of international organisations. Specific techniques and grounds under which domestic courts avoid and contest the decisions of international institutions vary depending on whether those decisions are

¹²⁰ *A and Others v. HM Treasury* [2008] EWCA Civ 1187 (UK Court of Appeal) (Judgment of 30 October 2008) para. 125 (Sedley LJ); *Ahmed* (UK Supreme Court, 2010), *supra* note 97, paras. 4, 60; *Kadi II* (EGC, 2010), *supra* note 44, para. 149.

¹²¹ *Kadi II* (EGC, 2010), *supra* note 44, para. 149.

¹²² See M. Zürn, “Global Governance and Legitimacy Problems”, Vol. 39, No. 2, *Government and Opposition* (2004).

rendered by political or judicial institutions, and whether states have monist or dualist traditions, the kind of treaties involved, and the wider political and judicial climate surrounding the judges.¹²³ The protection of fundamental rights has been one of the important grounds for contestation. Courts invoke the safeguarding of human rights as a basis for which they directly or indirectly review the decisions of international organisations, including those of the UN's targeted sanctions.

Finally, the social elements which UN law and its law-makers have been catching up with are not only those occasioned by member state authorities, but also those initiated by non-governmental actors. As illustrated by the example of targeted sanctions, individuals' claims before national courts have invited international attention and contestations against the decisions of international organisations. While the human rights claims by individuals and entities are often unable to attract sustained international attention, the claims before national courts, especially those of the geopolitically influential regions, have attracted international attention and support, which created the momentum for generating new regulatory standards at the international level.

Overall, the application of Professor Ida's analytical standpoint to the context of UN law helps us to analyse, not only the role of non-binding standards in remedying the gaps between the social demand for law and the rigidity of law-making process, but also simultaneously the features of international society in which international law and theories sustain their *raison d'être*. Professor Ida's analytical standpoint deserves continued academic attention from legal scholarships, as it serves not only to bridge a gap between social transitions and international law, but also to create a link between the social dynamics and international legal scholarships.

¹²³ On the techniques and bases for national avoidance and contestations, see M. Kanetake, "The Interfaces between the National and International Rule of Law: A Framework Paper" in M. Kanetake & A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (Oxford: Hart Publishing, 2014).