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The Security Council's 1267/1989 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review

STEPHAN HOLLENBERG*

Abstract
From a due process perspective, the essential problem with the UN Security Council's targeted sanctions regime is the persistent lack of sufficient access to confidential material relied upon for the designation of targeted individuals. Despite the Security Council's efforts to amend the procedures of the sanctions regime, it is highly unlikely that this deficiency can ever be remedied within its present top-down structure. Therefore, this article proposes to decentralize the regime's designation procedure, to mitigate the problem of being unable to challenge or review confidential information and evidence, which underlies an individual's designation. Such an amendment would entail that the designation of a particular individual and the possible subsequent judicial review procedure would take place domestically, prior to a universal blacklisting by the UN Sanctions Committee. As a consequence, any confidential material relied upon could stay within the designating state, and would be shared only with courts and possibly special security-cleared advocates, within that domestic legal order. This would make it more acceptable for the relevant authorities to make such information available.

Key words
confidential information; domestic courts; effective remedy; Security Council; targeted sanctions

1. Introduction

The latest decision of the European Court of Justice in the *Kadi II* case took the conflict between the effective implementation of the UN Security Council's targeted sanctions, and the protection of individuals' human rights, to another level.[1] The standard for judicial protection required by the Court of Justice is practically

* Assistant Professor at Utrecht University, Department of International and European Law, Netherlands Institute of Human Rights (SIM) [s.j.hollenberg@uu.nl]. This article is partly based on texts and ideas from Chapter 8 of my dissertation: *Challenges and Opportunities for Judicial Protection against Decisions of the Security Council* diss. University of Amsterdam, 11 June 2013. The research was made possible by the support of the NWO VICI Project on the Emerging Constitutional Order – The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-making. I would like to thank Erika de Wet, Jure Vidmar, Christiaan Duijst, Esther de Lange, Mike Videler, and Alice Welland for their insightful comments on earlier versions of this article. All mistakes remain of course my own.

1 Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and United Kingdom v. Yassin Abdullah Kadi* [2013] ECR I-0000 [hereinafter *Kadi II* Appeal]. See *infra* note 20.

unattainable within the current targeted sanctions regime.[2] Consequently, the conflict between various norms of international, EU and domestic law again stands in sharp relief.[3] On the one hand, there is the obligation under the UN Charter that member states must carry out the decisions of the Security Council.[4] This prevails over other obligations these states may have under any other international agreement.[5] On the other hand, international human rights law requires states to guarantee to individuals their due process rights.[6] However, due to the rule of precedence, obligations under international human rights treaties may be set aside by obligations created by the Security Council.[7] Still, the same does not hold for obligations under domestic law, and at least from the perspective of the EU judiciary; nor does it hold for obligations within the EU legal order.[8]

Moreover, by separating the domestic implementation of a sanction measure from its underlying international origin (a Security Council resolution), courts may engage in a review of that implementation against domestic, EU, and even international human rights law.[9] Thereby these courts circumvent the application of the rule of precedence of obligations under the UN Charter in international law.[10] Through this approach, several courts have repeatedly annulled domestic implementations of targeted sanctions against particular individuals.[11] Since the sanction measures imposed by the Security Council become operative only through

2 *Kadi II* Appeal, at para. 134. See also subsection 2.2.1.

3 On the multiple normative layers involved in this issue see: C. Eckes and S. J. Hollenberg 'Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of *Al Jedda*, *Ahmed* and *Nada*', (2013) 20 *Maastricht Journal of European and Comparative Law* 220.

4 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, Art. 25.

5 Ibid., Art. 103.

6 European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; CETS 5 [hereinafter ECHR], Arts. 6 and 13 and International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Arts. 2(3) and 14. In addition to being part of the human rights law catalogue, these rights are also tools to secure the protection of other human rights in particular instances.

7 See *R (on the application of Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, ILDC832 (UK 2007), at para. 35 and also *HM Treasury v. Mohammed Jabar Ahmed and others* [2010] UKSC 2 & UKSC 5; ILDC 1533 (UK 2010) [hereinafter *Ahmed*], paras. 74 and 175.

8 In the *Kadi I* case the Court of Justice clearly separated the EU legal order from general international law. See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-06351 [hereinafter *Kadi I*], at para. 288. It relied on the constitutional principles of the European legal order, which it found could not be prejudiced by obligations imposed by an international agreement. Ibid., at para. 285. Thereby it equated to a certain extent the EU legal order with a domestic legal order. It granted the UN Charter a position in the EU legal order's hierarchy in between primary and secondary EU law. Ibid., at paras. 307–8. Note that on the basis of the CJEU's characteristics that are most relevant for the analysis, it will be considered a domestic court for the purpose of the present discussion. See similarly S. J. Hollenberg, *Challenges and Opportunities for Judicial Protection against Decisions of the Security Council* diss. University of Amsterdam, 11 June 2013, 14–15.

9 See on this dualist approach Hollenberg, *supra* note 8, at Chapter 6.

10 See ibid. and UN Charter, Art. 103.

11 See, e.g., *Kadi I*, and *Kadi II*; *The Netherlands v. A and Others* [2011] LJN: BQ4781, at para. 5.5, and *The Netherlands v. A and Others* [2012] LJN: BX8351; ILDC 1959 (NL 2012), at para. 3.6.2; see also *Ahmed*. Even the ECtHR in *Nada v. Switzerland* [2012] ECHR 1691 appeared to require domestic courts to take such approach, with regard to the right to an effective remedy. See ibid., at paras. 212 and 176.

domestic implementation, widespread annulment by domestic courts will seriously impede the effectiveness of these measures.[12]

From a due process perspective, the core issue with the targeted sanctions regime is that there is no judicial (or at least sufficiently independent) reviewing mechanism at the UN level, through which a targeted individual can obtain an effective remedy.[13] In addition, the effect of remedies afforded by domestic courts through the annulment of domestic implementing measures remains limited to the legal order concerned. These courts cannot remove any individual from the UN sanctions list. Nor can they engage in a judicial review of the decision to put an individual on that list. This is in large part due to the lack of access to sufficient relevant information underlying the designations of individuals. The same deficiency also results in these courts left unable to guard the fairness of the proceedings.

The persistent lack of sufficient access to confidential material relied upon for the designation of targeted individuals constitutes the very essence of the due process problem. It will continue to bar the procedural fairness of the targeted sanctions regime. This issue cannot be remedied within the present top-down structure.[14] Therefore, the present article proposes to decentralize the designation procedure in order to mitigate this problem. Such an amendment would entail that designation of individuals and the possible subsequent judicial review procedure would take place domestically, prior to the universal blacklisting by the Sanctions Committee. As a consequence, any confidential material relied upon would stay within the designating state and be shared only with courts within that domestic legal order. This would make it more acceptable for the relevant authorities to share such information. As a consequence, domestic courts would be able to engage in a judicial review of the impugned decision, and would not need to resort to merely annulling domestic implementing measures.[15] Therefore the compliance of states – and thus the effectiveness of sanction measures – would rise, and at the same time judicial protection of the human rights of targeted individuals would increase.[16]

2. Sharing information

The main problem with the designation of individuals for the purpose of the targeted sanctions regime is that the motives and evidence for such a decision remain largely confidential. Most of that information stems from national intelligence agencies that have a legitimate interest in not sharing it with potential terrorists. However, keeping

12 Special Rapporteur 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', (26 September 2012) UN Doc A/67/396, at para. 23. See also N. Blokker, 'Reviewing the Review: Did the European Court of Justice in *Kadi* Indirectly Review Security Council Resolutions? On the Downside of a Courageous Judgment', in M. Bulterman et al. (eds.) *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (2009), 315 at 325.

13 E. de Wet 'From *Kadi* to *Nada*: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions', (2013) 12 *Chinese Journal of International Law* 787, 788–90; C. Feinäugle 'COMMISSION v. KADI. Joined Cases C-584/10 P, C-593/10 P, & C-595/10 P', (2013) 107 AJIL 878, 882.

14 See discussion in section 3.1.

15 See *supra* notes 11 and 12.

16 See *supra* note 6.

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large parts of a case secret from the individual concerned interferes with the principle of effective judicial protection.[17] Two reasons follow from this principle, which demonstrate why sharing such information is important. First, it is an indispensable prerequisite for the targeted individual to effectively defend himself against the allegations.[18] Second, it is a necessary requirement for courts to be able to effectively engage in a review of the complaint, and to be able to guarantee the individual a fair trial. For the latter purpose, these courts will need to check whether the individual concerned obtained sufficient information to be able to defend himself, and to ensure that no material was unnecessarily withheld from him on the basis of a claim for confidentiality. Accordingly, under the principle of effective judicial protection, information has to be shared with the individual concerned and the courts involved. These issues will be discussed in subsection 2.1. and subsection 2.2. respectively.

2.1. Providing the individual an opportunity to effectively defend himself

With regard to the information that has to be made available to the individual concerned, a distinction can be made between the reasons for his designation, and the evidence substantiating the allegations against him. The former is currently communicated in the form of a narrative summary of reasons;[19] the underlying evidence however is often kept entirely secret. First, subsection 2.1.1. will consider the requirements applicable to the statement of reasons. Second, subsection 2.1.2. will examine the way in which secret evidence and other confidential material is presently handled.

2.1.1. Statement of reasons

According to the Court of Justice of the EU (CJEU),[20] a statement of reasons should be provided with the targeted individual immediately following the initial decision to implement the sanctions against him.[21] This obligation is imposed upon the

17 According to the Court of Justice this general principle of EU law has been enshrined in Arts. 6 and 13 of the ECHR. *Kadi I*, at para. 335.

18 *Kadi II* Appeal, at para. 337. Note that for reasons of readability this article will when necessary use the male pronoun only. This choice in no way reflects the writer's perspective on gender emancipation, and the use of the male pronoun should be understood to include the experiences of all persons. An exception is made in relation to the Ombudsperson, since a woman currently holds that office.

19 These are also publicly available at <http://www.un.org/sc/committees/1267/narrative.shtml> (last visited 29 November 2013).

20 The CJEU consists of the Court of Justice and the General Court. See Treaty on the European Union, as amended by the Treaty of Lisbon, Official Journal C83 of 30.3.2010 (TEU), Art. 19. When relevant this article will distinguish between the Court of Justice and the General Court. Otherwise it will refer to the overall institution of the CJEU.

21 In order to ensure the effective application of a decision to freeze an individual's assets, it is inevitable that the targeted individual is not informed of the sanction before its actual application. Obviously, this practice is necessary to avoid the targeted individual being able to transfer his funds from one to another account before they can be frozen. The EU judiciary accepted that for that reason, the targeted individual's enjoyment of this fundamental right could be limited lawfully in relation to the procedure leading to the initial decision to impose sanctions. This limitation must be remedied, however, by communicating to the targeted individual the decision, and the grounds and evidence underlying that decision, immediately after the imposition of the sanctions. See Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* [2006] ECR II-4665 [hereinafter *OMPI*], at para. 140; see also *Kadi I*, at paras. 336–7 and 3489.

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relevant EU authorities within the context of the administrative proceedings.[22] Non-observance of this obligation results in repercussions for subsequent judicial proceedings. This is because a statement of reasons is the sole safeguard that allows a targeted individual to make effective use of the legal remedies available to him.[23] Such a statement is necessary to enable the individual concerned to determine whether the decision is well founded, or whether he has reason to challenge it. Further, in the latter situation he must be able to defend himself against the allegations. Without knowing the reasons behind the decision to impose sanctions against him, he cannot effectively challenge that decision before a court, because he would not know which allegations to refute. Therefore, he would not be able to effectively enjoy legal protection, which constitutes a violation of his right to an effective legal remedy.[24]

Accordingly, the CJEU has repeatedly held that if the impugned decision is taken, the obligation to provide a targeted individual with a statement of reasons afterwards is a prerequisite for guaranteeing his right to effective judicial protection.[25] However, the Court of Justice in the *Kadi II* case considered that not disclosing any further information to the Court and the individual concerned will not as such result in an infringement of the right to effective judicial protection.[26] The Court only assesses the quality of the motivation underlying the particular allegations, in light of the comments made by the targeted individual.[27] The motivation needs to identify, individual specific and concrete reasons explaining the decision to impose targeted sanctions on the individual concerned.[28]

While the General Court in first instance of the *Kadi II* case rejected all the reasons for the decision against Mr. Kadi as being too general and vague,[29] the Court of Justice on appeal accepted four of the five reasons as being sufficiently detailed and specific.[30] It only denounced the allegation that Mr. Kadi 'had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden'.[31] It considered this reason insufficiently detailed and specific since it did not specify the identities of the firms and persons concerned, nor when the alleged conduct took place and for which purpose. However, the Court did not dismiss the reason that alleged that Mr. Kadi was 'one of the major shareholders in the Bosnian bank Depostina Banka in which planning sessions for an attack against a United States facility in Saudi

22 See *OMPI*, *supra* note 21, at para. 94. See also C. Eckes and J. Mendes, 'The Right to be Heard in Composite Administrative Procedures: Lost in Between Protection', (2011) 36 *European Law Review* 651, 651.
23 *OMPI*, *supra* note 21, at para. 140.
24 *Kadi I supra* note 8, at paras. 34–9.
25 Ibid., at para. 349; Case T-85/09 *Kadi v. European Commission* [2010] ECR II-05177 [hereinafter *Kadi II* First Instance], at para. 181; *OMPI*, *supra* note 21, at para. 165.
26 *Kadi II* Appeal, *supra* note 1, at paras. 137–9.
27 Ibid., at para. 137.
28 Ibid., at para. 116.
29 *Kadi II* First Instance, *supra* note 25, at para. 177. See also Hollenberg, *supra* note 8, at 313–4.
30 *Kadi II* Appeal, at paras. 142–9.
31 Ibid., at para. 114.

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Arabia might have taken place'.[32] The Court did not comment on the absence of any timeframe in the allegation, but only confirmed that the financial institution and the nature of the alleged terrorist project were properly identified.[33] Moreover, it did not find the fact that the terrorist project was expressed as a mere possibility incompatible with the duty to state reasons. It held that 'the reasons for listing ... may be based on suspicions of involvement in terrorist activities, without prejudice to the determination of whether those suspicions are justified'.[34]

The Court of Justice applied a less stringent standard to the statement of reasons than that applied by the General Court.[35] However, the Court of Justice explicitly took as its point of departure that it is for the authorities 'to establish, in the event of a challenge, that the reasons relied on against the person concerned are well founded'.[36] Therefore, a mere denial by the targeted individual of the allegations against him would be enough to cast into doubt the authorities' motivation, if they are unable to found those allegations. Apparently the Court of Justice finds it sufficient for the individual to be brought to such a position, that he knows which specific allegations to deny. Indeed, Mr. Kadi's challenge against the allegations mainly consisted of denying that his firms or business partners, as far as he was aware, were involved in (financing) terrorism.[37] This turned out to be quite an effective defence. The rebuttal by the authorities consisted solely of denying the relevance of Mr. Kadi's unawareness, and then submitting new interpretations of the allegations in light of his denial, supplying no further information in support.[38]

The problem for these authorities is that even if they have the relevant information,[39] they must take care not to substantiate the allegations with confidential material that might pose a security threat when disclosed to potential terrorists. The following subsection will deal with this dilemma.

2.1.2. Evidence and other confidential information

When targeting individuals allegedly involved in (financing) terrorism, states have a legitimate interest to not disclose to these individuals security sensitive material.[40] However, refraining from disclosure would severely limit the ability of these individuals to defend themselves against the allegations, since they would have no opportunity to refute the evidence underlying their designation. In addition, non-disclosure is not only against the interest of the individuals concerned, but it also adversely affects the aim of the sanctions regime. As previously discussed, certain courts will for these reasons annul domestic implementations of sanction measures against individuals, either because they are in breach of the right to effective judicial protection or because the designations are based on unsubstantiated allegations.

32 Ibid., at paras. 148–9.
33 Ibid., at para. 149.
34 Ibid.
35 Ibid., at para. 140.
36 Ibid., at para. 122.
37 Ibid., at paras 151, 154, 157, and 160.
38 Ibid., at paras. 152–3, 155, 158–9, and 161–2.
39 See *infra* subsection 2.3.
40 *Kadi I*, *supra* note 8, at para. 342; *OMPI*, *supra* note 21, at para. 148.

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This seriously hampers the effectiveness of the targeted sanctions regime. Accordingly a balance will have to be found between providing for the legitimate security interests of states, and ensuring adversely affected individuals have a sufficient degree of judicial protection.[41]

The European Court of Human Rights (ECtHR) tried to solve the tension between these two competing interests the *Chahal* case,[42] to which the Court of Justice of the European Union (CJEU) repeatedly referred in cases concerning targeted sanctions.[43] In *Chahal*, which concerned the intended deportation by the UK of an asylum seeker, the ECtHR recognized that, in matters involving national security, domestic authorities could be required to rely on confidential information.[44] However, the Court added that invoking national security concerns does not absolve authorities from judicial review.[45] Whatever the circumstances, a minimum level of information should be disclosed in order to guarantee the right of individuals to a fair trial. In addition, the ECtHR demanded that where full disclosure is not possible, this limitation is counterbalanced in such a way that the individual concerned has a possibility to effectively challenge the allegations made against him. The Court suggested that a special advocates procedure could be used to assist in arriving at a fair balance.[46] Special advocates are security-cleared lawyers who operate in certain categories of cases that involve the use of confidential information, which cannot be communicated to the individual concerned.[47] They are afforded access to such information and are present at in-camera hearings at the courts engaged in reviewing the case. Through this procedure the advocates can test both the secret material's evidentiary value (the representation function), and the executive's claim for confidentiality (the disclosure function).[48] They can also cross-examine witnesses and assist the court in testing the strength of the state's case.[49]

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41 See *Kadi II* Appeal, *supra* note 1, at paras. 146–7. See also *Kadi I*, *supra* note 8, at para. 342 and *OMPI*, *supra* note 21, at para. 141.

42 *Chahal v. The United Kingdom* [1996] (App. No. 22414/93).

43 See *Kadi I*, *supra* note 8, at para. 344; *Kadi II* Appeal, *supra* note 1, at para. 146; *OMPI*, *supra* note 21, at para. 156.

44 *Chahal*, *supra* note 42, at para. 131. See also *Öcalan v. Turkey*, Judgment, 12 May 2005, ECHR (App. No. 46221/99), at para. 106.

45 *Chahal*, *supra* note 42, at para. 131.

46 Ibid. See *infra* note 49.

47 The mechanism originated in Canada, and is in place in countries such as New Zealand and the United Kingdom. See J. Ip, 'The Rise and Spread of the Special Advocate', (2008) *Public Law* 717, 719, and 728. In response to the *Chahal* decision the UK adopted the special advocates procedure in special immigration cases. See House of Commons Constitutional Affairs Committee, The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates' Seventh Report of Session 2004–05 Vol. I [hereinafter House of Commons], at para. 48. Subsequently, the UK extended this model to other categories of cases, including those concerning anti-terrorism measures, such as preventive detentions and control orders. Ibid., at para. 50. See also Ip, at 721. In the latter context, the fairness of the procedure was subject to judicial review in several cases brought by individuals who were suspected of being involved in terrorism-related activities. See *A and Others v. The United Kingdom*, Judgment, 19 February 2009, ECHR (App. No. 3455/05) and *Secretary of State for the Home Department v. AF (FC) and another* [2009] UKHL 28 [hereinafter *Control Orders II*].

48 See House of Commons, *supra* note 47, at para. 23.

49 Note that the ECtHR has not given 'a ringing endorsement' of the special advocates procedure as such. See House of Commons, *supra* note 47, at para. 49. It merely considered what should be the minimum level of disclosure of confidential information in cases in which a special advocates procedure is in place. Moreover, it confirmed that a special advocates procedure could be a means to ensure a fair balance between the conflicting concerns, in the sense that it could provide an important safeguard in addition to an independent

In the subsequent *A and Others* v. *United Kingdom* case, which concerned the issue of preventive detention, the ECtHR further explained the requirements to be taken into account when drawing a fair balance between a targeted individual's human rights and the need to protect the confidential nature of security sensitive information, as indicated in the *Chahal* case.[50] It again acknowledged both interests, but also recognized a core requirement in the right to a fair trial that cannot be derogated from, even in view of legitimate security concerns.[51] It imposed as a rigid principle that no matter what,[52] whatever compelling security interest was involved;[53] the affected individual must always 'be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.[54]

However, with regard to the domestic implementations of Security Council targeted sanctions; no special advocates procedures are in place. The UK government did not create a statutory power for the use of special advocates in such proceedings,[55] and likewise no such procedure is available in the European legal order,[56] or other domestic legal systems.[57] What should a fair balance entail in this situation? What information should be disseminated to the targeted individual, and are other procedural guarantees available to secure his right to a fair trial?

The ECtHR did not consider whether the required level and type of information that has to be disseminated to the individual concerned is dependent on whether a special advocates procedure is in place. It could be argued that it should, because the Court based the criteria for the dissemination of information on whether the affected

court. However, the procedure has not been free from critique. See Ip, *supra* note 47, at 731 and House of Commons, *supra* note 47, at para. 86. Problematic is, for example, that in practice special advocates primarily submit arguments for the release of allegedly confidential information. Their representative function remains limited, since they are, in principle, allowed to receive instructions from the adversely affected individuals only before they have had access to the confidential material. Therefore the affected individuals can only instruct the special advocate in advance, on the basis of the executive's statement summarizing the case. See *Control Orders II*, *supra* note 47, at paras. 72–4 and Hollenberg, *supra* note 8, at 309–11.

50 E. de Wet, 'Distilling Principles of Judicial Protection from Judicial and Quasi Judicial Decisions' (expert workshop on Due Process Aspects in the Implementation of Targeted United Nations Security Council Sanctions, organized by the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame New York 30 October 2009), at 18.

51 *A and Others v. The United Kingdom*, *supra* note 47, at paras. 205 and 220.

52 See *Control Orders II*, *supra* note 47, at paras. 71 and 119.

53 See ibid., at para. 116.

54 *A and Others v. The United Kingdom*, *supra* note 47, at paras. 205 and 220. See also *Control Orders II*, *supra* note 47, at paras. 59, 65, 80–1, and 116.

55 It appeared to have been the government's intention to make statutory provision for special advocates from the outset. Still, two years after the adoption of the domestic implementation, no such procedure was yet in force. This delay remained unexplained. *A, K, M, Q, & G v. HM Treasury* [2008] EWCA Civ. 1187, at paras. 57–8 and 153. See also *supra* note 47.

56 As to the lack of such procedure in relation to the EU autonomous sanction regimes see C. Eckes, 'Decision-making in the Dark? Autonomous EU Sanctions and National Classification', in I. Cameron (ed.) *EU Sanctions: Law and Policy Issues concerning Restrictive Measures* (2013), 177 at 191.

57 This can of course be explained by the fact that that states do not have any discretion when implementing the sanction measures imposed by the Security Council. They can do no other than taking the prescribed measures against the individuals designated by the Sanctions Committee. See Hollenberg, *supra* note 8, at 29–35. But even if such special procedures were available, most domestic authorities that implement these sanctions do not possess relevant confidential information themselves, as will be considered further in subsection 2.3. This makes a special advocates procedure rather meaningless, since there is no information available that can be shared with such advocate.

individual could, with that information, effectively instruct a special advocate in order to enjoy a fair trial. In the absence of a special advocates procedure, it is to be expected that the individual, who must for his defence then rely entirely on his own knowledge, would need more information to be able to challenge the allegations made against him as effectively.

Still, despite the lack of a special advocates procedure in EU proceedings, the General Court in the *Kadi II* case relied on the standard for dissemination of information as applied by the ECtHR in the *A and Others* v. *the United Kingdom* case, in which such a procedure was available.[58] The General Court mentioned the existence of special procedures,[59] but did not consider their relevance in the context of assessing the level of information that had to be disseminated.

In contrast, the Court of Justice in the subsequent appeal of the *Kadi II* case did not refer at all to the possibility of employing techniques such as a special advocates procedure. It held that a fair balance between the interests involved could entail that the individual concerned is provided only with a summary of the content of the confidential information and evidence.[60] The Court appeared to consider that it may be the responsibility of the Court itself to compose such a summary on the basis of the information made available to it. Perhaps this indicates that this Court no longer intends to rely on the introduction of a special advocates procedure, but rather seeks to emphasize its own role in safeguarding a fair procedure. This will be further discussed in subsection 2.2.2.

The position of the Court of Justice on what (type of) information has to be shared with the individual concerned deviated from the ECtHR's finding in this regard. The ECtHR required dissemination of sufficiently specific allegations or grounds underlying the impugned decision, but it did not necessarily also require dissemination of the evidence relied upon. The ECtHR even stated that if all of the underlying evidence remains undisclosed, the procedure would still be in accordance with the European Convention on Human Rights (ECHR) if the adversely affected individual is made aware of sufficiently specific allegations on the basis of which he can effectively instruct a special advocate.[61] The ECtHR did not insist on disclosure of the evidence underlying the allegations against the individual concerned.[62] The individual is entitled only to the substance of the allegations.[63] The Court of Justice was more generous in this respect, by considering that it may provide the individual concerned with a summary of the content of the confidential information and evidence, if that would be necessary to safeguard his right to effective judicial protection.[64] This consideration might have been influenced by the fact that no special advocates procedure is in place in the EU proceedings to counter-balance the limitations posed on the individual's opportunity for defence.

58 *Kadi II* First Instance, *supra* note 25, at para. 176.
59 The General Court referred to the suggestion of employing such procedures made by the Court of Justice in the *Kadi I* case, but went on to ignore it in the application to the present case. Ibid., at para. 134.
60 *Kadi II* Appeal, *supra* note 1, at para. 129. See also subsection 2.1.2.
61 *A and Others v. United Kingdom*, *supra* note 47, at para. 220.
62 See also *Control Orders II*, *supra* note 47, at para. 86. See to the same effect Lord Phillips, at para. 59.
63 *Control Orders II*, *supra* note 47, at paras. 86 and 120.
64 *Kadi II* Appeal, *supra* note 1, at para. 129.

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2.2. Disclosure of information to the judiciary

Disclosing information to the judiciary serves two aspects of the principle of effective judicial protection. On the one hand, it enables courts to assess the lawfulness of the decision taken by the authorities that is adversely affecting the targeted individual – this will be discussed in subsection 2.2.1. On the other hand, disclosing sufficient information is necessary for courts to be able to guarantee the fairness of the judicial procedure – which will be considered in subsection 2.2.2.

2.2.1. Assessing the complaint

In the earlier *Kadi* judgments the CJEU established that it would have to engage in a 'full' or 'strict' judicial review of the lawfulness of the impugned decision.[65] This followed, according to the Court, also from the fact that no opportunity for an effective remedy existed at the UN level.[66] This link between the intensity of the review and the question of whether other remedies were available suggested that the Court might have been willing, in principle, to conduct a mere marginal review as soon as an effective remedy would be available at the UN level.[67] Such an approach may encourage the development of a remedy. A dialogue may emerge between institutions of different legal orders. Courts may indicate what they expect from an effective remedy for the individual concerned, and in return may signal to the Security Council that they would engage in a mere deferential review when the requirements are met. Indeed, the Security Council amended the delisting procedures in response to unfavourable judicial decisions.[68]

However, since the Court of Justice's latest decision in the *Kadi II* case it is clear that any potentially emerging dialogue has come to an end, and that it is not very likely that it will ever pay judicial deference to the Security Council in regard to this particular issue. The Court did not even acknowledge the institution of the UN Ombudsperson, and her recently expanded competences.[69] It confined itself to referring to the ECtHR's findings in the *Nada* case on the procedure at the UN level, which in turn referred to a Swiss national court's judgment from six years earlier, before all the relevant amendments were made.[70] Moreover, the Court of Justice demanded that a reviewing procedure at the UN level would meet the requirements of effective judicial protection.[71] It required nothing less than a fully-fledged court that is able to annul and retroactively erase an individual's designation.[72] This is a standard unlikely ever to be met by an organization highly intergovernmental in nature such as the UN, especially in the field of Security Council sanction measures.

65 See, respectively, *Kadi I*, *supra* note 8, at para. 326 and *Kadi II* First Instance, *supra* note 25, at para. 144.
66 *Kadi I*, *supra* note 8, at paras. 321–6. *Kadi II* First Instance, *supra* note 25, at para. 126–7.
67 Such argument bears similarities to the *Solange I* reasoning. See BVerfGE 37, 271 of 29 May 1974, and C. Eckes, 'Test Case for the Resilience of the EU's Constitutional Foundations', (2009) 15 *European Public Law* 351, 371. See also Hollenberg, *supra* note 8, at 293–4.
68 For example, in the preamble to UNSC Res. 1904 (17 December 2009) UN Doc. S/Res/1904, the UNSC took 'note of challenges, both legal and otherwise, to the measures implemented by Member States'.
69 See section 3.1.
70 *Kadi II* Appeal, *supra* note 1, at para. 133. See *Nada*, *supra* note 11, at para. 211.
71 *Kadi II* Appeal, *supra* note 1, at para. 133.
72 Ibid., at para. 134.

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Not taking note of any potential international implications, the Court of Justice further specified the standard for its strict judicial review. It considered that it has to assess whether the facts invoked by the authorities are materially correct, and what their probative value is, in light of the comments made by the targeted individual.[73] In addition, the Court held that it also has to evaluate whether at least one of the reasons for listing is sufficiently detailed, specific and substantiated, and constitutes a sufficient basis on which to support the decision to place the individual concerned on the list.[74] Accordingly, it demanded a full review of the original Sanctions Committee's decision to designate a particular individual.[75] The UK Supreme Court ruled similarly, in a case that also concerned the implementation of targeted sanctions. It held that the right to an effective remedy requires that a targeted individual must have a means of subjecting the actual designation by the UN Sanctions Committee, which underlies the domestic implementation of the sanctions, to judicial review.[76]

Therefore these courts must be furnished with all the material that they will need to carry out such a review.[77] This leaves the relevant authority very little possibility not to share any of the essential information with the judiciary, including the evidence underlying the imposition of the sanctions.[78] While the Court of Justice considered that not all information had to be made available if the authorities would not be able to meet such a requirement,[79] it added that it could only base its decision on the information that was communicated to it.[80] In contrast, the High Court for England and Wales, in a case also concerning the imposition of targeted sanctions, held that as long as not all information is shared with the Court it is unable to determine whether a different outcome would have been possible.[81] Exculpatory evidence might have been withheld. Accordingly, the standards for discerning information imposed by different courts may diverge.

However, the ability to share any confidential information depends upon whether the domestic authorities that need to implement the measures are themselves aware of the grounds and evidence underlying an individual's designation, which is not often the case.[82] Subsection 2.3. will deal further with that essential issue.

2.2.2. Guaranteeing fair proceedings

As previously mentioned in subsection 2.1.2. the Court of Justice, as an independent judicial institution, appeared to consider itself in the *Kadi II* case able to sufficiently

73 Ibid., at para. 124.
74 Ibid., at para. 130.
75 See to the same effect: *Kadi II* First Instance, *supra* note 25, at para. 129.
76 *Ahmed*, *supra* note 7, at para. 81.
77 See also P. De Sena and M. Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values', (2009) 20 *EJIL* 193, at 225.
78 *Kadi II* First Instance, *supra* note 25, at para. 135.
79 *Kadi II* Appeal, *supra* note 1, at para. 122.
80 Ibid., at para. 123.
81 *HAY v. HM Treasury and Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1677 (Admin.), at para. 30.
82 Compare *A, K, M, Q, & G v. HM Treasury*, *supra* note 55, at paras. 119–20 to *HAY v. HM Treasury*, *supra* note 81, at para. 30. See Hollenberg, *supra* note 8, at 319–20.

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guarantee the individual's right to a legal remedy.[83] Similarly, in the *Kadi I* case the Court suggested that the infringement of Mr. Kadi's right to an effective legal remedy, resulting from the failure to communicate any evidence to him, could have been remedied had the Court been given enough information in order to sufficiently guarantee his judicial protection.[84]

In principle, this view seems to fit with the reasoning of the ECtHR in the *A and Others* v. *The United Kingdom* case.[85] In that decision, the ECtHR considered that a fair trial would be possible if judicial safeguards adequately counterbalance the limitations on the individual's rights.[86] The ECtHR found it primarily the responsibility of independent courts to ensure that the individual concerned is afforded an effective legal remedy.[87] The procedure of special advocates, considered above, could act as an important additional safeguard. Such a procedure may enhance the possibilities for targeted individuals to effectively challenge the imposition of sanctions before courts, in situations in which there is only limited access to confidential grounds and evidence,[88] but it is not the sole possibility. To guarantee a fair trial, the Court required only that there is at least some procedure followed by the judicial authorities to counterbalance the difficulties caused to the targeted individual, due to a limitation on his human rights.[89] What is important is that the overall process is fair.[90]

The prime responsibility for ensuring a fair process lies with the courts.[91] They are in the best position to review whether material was unnecessarily withheld from the individual concerned.[92] Indeed, the Court of Justice, as it indicated in the *Kadi II* case, considers it the responsibility of the Court itself to assess whether the reasons for confidentiality relied on by the authorities are well founded.[93] If it rejects those reasons it provides the relevant EU authority with the opportunity to share the information with the individual concerned. That authority, however, may refuse to do that. In that situation, the Court will not take such information into account in its assessment of the case against that individual.[94] However, if the Court confirms

83 *Kadi II* Appeal, *supra* note 1, at paras. 1269. See also Hollenberg, *supra* note 8, at 315.
84 *Kadi I*, *supra* note 8, at para. 350. See also *Kadi II* First Instance, *supra* note 25, at para. 144.
85 *A and Others v. The United Kingdom*, *supra* note 47.
86 Ibid., at para. 205.
87 Ibid., at paras. 218–19.
88 *Secretary of State for the Home Department v. MB and AF* [2007] UKHL 46 [hereinafter *Control Orders I*], at para. 35.
89 *A and Others v. The United Kingdom*, *supra* note 47, at para. 205. In the following paragraphs 206–9, it considered the role a trial judge may play in situations concerning the use of confidential information in criminal proceedings. See also Baroness Hale in *Control Orders I*, *supra* note 88, at paras. 62–3 and 65, and C. Eckes, *EU Counter-Terrorist Policies and Fundamental Rights; The Case of Individual Sanctions* (2009), 198. See, similarly, D. Barak-Erez and M. Waxman, 'Secret Evidence and the Due Process of Terrorist Detention', (2009) 48 *Columbia Journal of Transnational Law* 3.
90 See *A and Others v. The United Kingdom*, *supra* note 47, at para. 208. See also *Control Orders II*, *supra* note 47, at para. 78, and see Ip, *supra* note 47, at 734.
91 See *A and Others v. The United Kingdom*, *supra* note 47, at para. 219, and to the same effect *Control Orders II*, *supra* note 47, at paras. 86 and 121.
92 *Control Orders II*, *supra* note 47, at para. 121.
93 *Kadi II* Appeal, *supra* note 1, at para. 126. See also the Draft Rules of Procedure of the General Court (17 March 2014) ST 7795 2014 INIT, Art. 105.
94 *Kadi II* Appeal, *supra* note 1, at para. 127.

the confidential nature of the information, it will employ certain techniques, which intend to strike a balance between the competing interests involved.[95] This may entail providing the individual concerned with a summary of the content of the information and evidence.[96] It is then for the Court to determine the consequences concerning the probative value of the confidential evidence.[97]

This role would mean that no information on which the authorities seek to rely could be withheld from the Court. Indeed it considered that 'the secrecy or confidentiality of … information or evidence is no valid objection' to supplying such information to the Court.[98] However, the suggestion that the Court of Justice will independently compose and forward to the individual concerned a summary of the information it obtained in confidence, could make states that possess relevant information even more reluctant to share it with the Court, or with the EU authorities. These states might be concerned that the Court imprudently composes such summaries, and might thereby discern security sensitive material to alleged terrorists.[99] Accordingly, the Court's decision makes it even more difficult for EU authorities to obtain confidential information from designating states.

2.3. The problem of domestic authorities not possessing all information

As previously mentioned, most (or even almost all) of the states that are under an obligation to implement Security Council's targeted sanctions in their domestic legal orders, do not have any knowledge of the grounds and evidence underlying the imposition of those sanctions. The same is true for the relevant EU authorities. In this regard the Court of Justice suggested that these authorities seek the assistance of the UN Sanctions Committee, 'in order to obtain, in [the] spirit of effective cooperation … the disclosure of information or evidence, confidential or not'.[100] However, in addition to the potential increase in reluctance to share such information with EU authorities, for reasons indicated above, the Sanctions Committee itself hardly possesses any further confidential information. States transferring names to the Sanctions Committee do not accompany that with a full dossier containing all the information they possess.[101] As a consequence, only authorities of the state that initiated a specific individual's designation at the Sanctions Committee might be

95 Ibid., at para. 128.
96 Ibid., at para. 129.
97 Ibid.
98 Ibid., at para. 125.
99 This concern might be mitigated if the procedure as indicated in the draft rules of procedure for the General Court is followed. There it is held that the General Court will invite 'the party concerned to produce, for subsequent communication to the other main party, a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known'. Accordingly, the Court will not itself compose such summary. Still, it is then for the Court to consider whether it can base its judgment on information not communicated to the party concerned. If so, it takes account of the fact that that party has not been in a position to respond to such information. Draft Rules of Procedure of the General Court, *supra* note 93, Art. 105(6) and (7).
100 *Kadi II* Appeal, *supra* note 1, at para. 115.
101 See D. Cortright, 'Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures', (November 2009) The Fourth Freedom Forum and the Kroc Institute for International Peace Studies, at 17, and Special Rapporteur, 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism', (26 September 2012) UN Doc. A/67/396, at para. 26.

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aware of all the grounds and evidence for listing. Occasionally, these authorities are organs of the same state as the court that is being requested to engage in a review of an individual's designation.[102] In that situation, a solution might be found, and the national authorities might be forced to share confidential information with their own courts.[103] However, often the designating authorities are not from the same state as the reviewing court, and these authorities share no confidential information with a court that is foreign to them.[104]

Therefore, the procedural deficits that follow from the lack of access to relevant information seem to be extremely difficult to remedy within the present system of the sanctions regime. Establishing special advocates procedures or applying other techniques that enable courts to guarantee the individuals concerned a fair process, is meaningless if no confidential information is made available to them. This means that certain courts will continue to annul domestic implementations of targeted sanctions, either because they regard them to be in breach of the right to effective judicial protection or because they find the designations of individuals to be based on unsubstantiated allegations. A substantial amount of annulments by these courts of domestic implementing measures will eventually undermine the effectiveness of the Security Council's system of targeted sanctions. Therefore, the Security Council will have to respond to these courts' decisions. A suggestion for a solution will be discussed in the following section.

3. A PROPOSAL FOR DECENTRALIZATION

What follows from the above discussion, is that the lack of access to confidential information for both courts and targeted individuals lies at the very core of the due process problems with the targeted sanctions regime. Over the years the Security Council has made many amendments to this regime,[105] but this issue has not been, and cannot be, adequately addressed at the UN level. Subsection 3.1. will explain why it is not possible to sufficiently guarantee due process rights at the UN level. Subsection 3.2. will then set out a proposal for decentralizing the system of designations and review, and subsection 3.3. will detail some of the aspects and potential problems anticipated with regard to such an amendment. Finally, subsection 3.4. will clarify how this amendment would change the role of the CJEU in assessing the implementation of targeted sanctions by EU member states. An assessment of that

102 *A, K, M, Q, & G v. HM Treasury*, *supra* note 55.
103 Ibid., at paras. 119–20.
104 *HAY v. HM Treasury*, *supra* note 81, at paras. 7 and 30. See also Hollenberg, *supra* note 8, at 319–20.
105 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, at paras. 25–6. In addition, it established a Focal Point to which the designated individuals could address their complaints directly. UNSC Res. 1730 (19 December 2006) UN Doc. S/Res/1730. Finally, the Security Council introduced the Office of the Ombudsperson, UNSC Res. 1904 (17 December 2009) UN Doc. S/Res/1904, and extended her competences, UNSC Res. 1989 (17 June 2011) UN Doc, S/Res/1989 and UNSC Res. 2083 (17 December 2012) UN Doc. S/Res/2083.

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potential new role is relevant since it is particularly the CJEU that took the lead in the judicial resistance against the implementation of targeted sanction measures.[106]

3.1. Impossibility of sufficiently guaranteeing remedy at the UN Level

The latest step in the course of a long development towards establishing a remedy at the UN level was the creation of the Office of the Ombudsperson.[107] This office is competent to receive individual complaints, on the basis of which it composes a comprehensive report on an individual's listing, after gathering all the relevant information and contacting the individual concerned.[108] However, even after this significant improvement, fundamental due process issues remain.[109] For the present discussion it is particularly relevant to mention that in a significant number of cases, the process before the UN Ombudsperson continues to suffer from a lack of access to sufficiently specific and confidential information.[110] States are very reluctant to share security sensitive information obtained by their national intelligence agencies, and under the present regime there is no obligation for them to do so.[111] Even if in some instances sufficient information is supplied,[112] the fact that such an exchange depends entirely on the discretion of states is difficult to reconcile with the demands of due process.[113] Yet, it cannot be expected that the Security Council would ever create an obligation upon states to disseminate sufficiently detailed security sensitive information to the Ombudsperson. It is hard to imagine that the permanent members of the Security Council would accept an interference with their own state sovereignty, with regard to an issue so closely tied to their national security. Accordingly, it is difficult to see how the problem of not sharing confidential information underlying an individual's designation could ever be solved at the UN level.

A general consideration intrinsic to this discussion is whether or not the interests of individuals could be sufficiently taken into account at all at the level of the Security Council. This inter-governmental body is entirely geared towards mediating

106 CJEU's groundbreaking decision in *Kadi I* influenced several other courts. See *supra* note 11.

107 See *supra* note 105. For an overview of this development including an evaluation of it by domestic and regional courts, see Hollenberg, *supra* note 8, at 88–98 and 288–94.

108 UNSC Res. 2161 (17 June 2014) UN Doc. S/Res/2161 Ann. II.

109 See *supra* note 107.

110 See, e.g., 'Letter dated 30 July 2012 from the Ombudsperson addressed to the President of the Security Council' (30 July 2012) UN Doc. S/2012/590, at para. 34; 'Letter dated 31 July 2013 from the Ombudsperson addressed to the President of the Security Council' (31 July 2013) UN Doc. S/2013/452, at paras. 47–9; and 'Letter dated 31 January 2014 from the Ombudsperson addressed to the President of the Security Council' (31 January 2014) UN Doc. S/2014/73, at paras. 29 and 61–2. Moreover, it is unclear to what extent the targeted individual has an opportunity to respond to that material. There is a significant divergence in opinion on this issue between the Ombudsperson and targeted individuals' lawyers. See Special Rapporteur, 'Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (26 September 2012) UN Doc. A/67/396, at para. 43.

111 Presently, the Ombudsperson has concluded agreements with 14 states on the sharing of information, see 'Letter dated 31 January 2014', *supra* note 110, at para. 11. See also <http://www.un.org/en/sc/ombudsperson/accessinfo.shtml> (last visited 8 July 2014). However, from the one agreement made publicly available on the website it appears that these agreements only indicate how the confidential information has to be treated, if shared. It does not at all create an obligation for states to actually share such information with the Ombudsperson.

112 See 'Letter dated 31 January 2014', *supra* note 110, at para. 61.

113 See also Hollenberg, *supra* note 8, at 97.

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between the highly political interests of states, in the course of which the interests of few single individuals are very likely to lose out. This is especially so, since no firm procedural guarantees are in place.[114] The Security Council proceedings are clearly not embedded in any rule of law system,[115] which would legally bind it to take account of the rights and interests of individuals. For example, as demonstrated in the present de-listing procedure,[116] even after the important amendments to the Ombudsperson's competences, ultimately (individual) states still have the final say on most issues.[117]

3.2. Towards a decentralized bottom-up procedure

Instead of attempting to mitigate the due process problems by (further) developing a centralized mechanism for some form of review, more success in balancing the competing rights could be gained from replacing the present top-down procedure with a decentralized bottom-up procedure.[118]

Such a procedure could operate in a manner somewhat comparable to the two-tier mechanism in the context of the EU's implementation of the 1373 regime.[119] In short, this procedure involves two consecutive steps. First, there needs to be a decision by a competent national authority, which should in principle be a judicial authority.[120] This decision must confirm that there are 'serious and credible evidence or clues' substantiating the allegations made against the individual intended to be targeted. This decision is communicated to the Council of the EU by a member state, together with a request for listing. Second, on the basis of that request, the Council may take the initial decision to designate a particular individual.[121] This two-tier bottom-up procedure has the benefit that the targeted individual has the opportunity to access some form of judicial review at the national level, before he is designated by the Council of the EU. Applying a similar procedure to Security Council's targeted sanctions regime would increase the opportunity for an adversely affected individual

114 In contrast to the position of the individual within the EU. See C. Eckes 'International Law as Law of the EU: The Role of the European Court of Justice', in E. Cannizzaro, P. Palchetti, and R. Wessel (eds.) *International Law as Law of the European Union* (2012), 353 at 355.

115 J. Alvarez, 'Judging the Security Council', (1996) 90 AJIL 1.

116 A single permanent member of the Security Council can block any request for de-listing on its own. This logically follows from UNSC Res. 2161 (2014), *supra* note 108, at para. 43. See also D. Tladi and G. Taylor, 'On the Al Qaida / Taliban Sanctions Regime: Due Process and Sunsetting', (2011) 10 *Chinese Journal of International Law* 771, 788.

117 For example on what information to provide, and whether to allow to be mentioned as the designating state. UNSC Res. 2161 (2014), *supra* note 108, at paras. respectively 47 and 53.

118 Feinäugle appears to have had a somewhat similar amendment to the sanction regime's proceedings in mind when he suggested a "delegation solution". Feinäugle, *supra* note 13, at 882.

119 See UNSC Res. 1373 (28 September 2001) UN Doc. S/Res/1373. Similar to the presently discussed 1267 sanctions regime, the 1373 regime requires states to freeze the funds of individuals who are suspected of being engaged in (supporting) international terrorism. However, an important difference is that within this regime there is no central UN Sanctions Committee to designate the individuals who have to be targeted by all UN member states. It is for states themselves to designate the individuals and take the required measures against them. The EU seeks to implement this 1373 regime centrally at the EU level, therefore EU member states need to transmit the names of the individuals they intend to target to the competent EU authorities.

120 See Common Position 931/2001/CFSP, 27 December 2001, Art. 1(4). But see Eckes andMendes, *supra* note 22, at 659.

121 This is called a composite administrative procedure. See Eckes and Mendes, *supra* note 22. See also *OMPI*, *supra* note 21, at para. 117.

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to enjoy a fair judicial procedure, before being listed as a supporter of terrorism by the UN Sanctions Committee. States wishing to target a particular individual would first need to grant him an opportunity to challenge the proposed decision before the domestic courts.

The major advantage of decentralization is that any confidential material relied on can stay with the originator state.[122] Intelligence agencies have to share security sensitive information only with their "own" domestic courts, and possibly with special security-cleared advocates.[123] This creates a lower hurdle for sharing such information, than the hurdle faced when sharing information with an international institution or a foreign court on the other side of the world. In the latter situation, the proceedings are entirely unfamiliar to the authorities that seek an individual's designation.[124] In addition, within many domestic legal systems there are already procedures in place to facilitate a confidential exchange of information. Examples include procedures in criminal proceedings,[125] cases concerning immigration, and domestic measures countering terrorism.[126] Not all of these procedures are without critique,[127] but they would have to be developed within each particular domestic constitutional system to meet the challenges posed by the increasing reliance on confidential information in variety of cases.[128] In that process there is no reason why such special procedures would then be reserved for certain fields of adjudication involving the use of secret material, and not be applied with regard to reviewing the imposition of targeted sanctions.

The independent judicial review of a proposal to list a particular individual would not have to limit the effective application of the sanctions regime. In most legal systems, courts leave a measure of discretion to the responsible authorities for interpreting relevant facts and circumstances and to decide upon which policy meas-

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122 On the originator controls principle (ORCON) within the EU see Eckes, *supra* note 56, at 186 et seq., and D. Curtin, 'Top Secret Europe' (Inaugural lecture delivered upon appointment to the chair of professor of European law) (20 October 2011) University of Amsterdam.

123 As to these special advocates see section 2.1.2.

124 This could be evidenced, for example, by the review conducted by a US District Court in a case brought by Mr. Kadi against his designation by the American Office of Foreign Assets Control (OFAC). The District Court was in a position to evaluate confidential material relied on by OFAC. Eventually, it found the material available to amply support OFAC's findings and its determination to continue Mr. Kadi's listing. *Kadi v. Geithner*, No. 09-0108, 19 March 2012, memorandum opinion (US District Court for the District of Columbia). Remarkably, some seven months after this decision, the Sanctions Committee delisted Mr. Kadi from the UNSC list, after having considered the Ombudsperson's comprehensive report <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm> (last visited 5 February 2013). Mr. Kadi remains, however, on the American list. <http://www.un.org/News/Press/docs//2012/sc10785.doc.htm> (last visited 5 February 2013).

125 *Doorson v. The Netherlands*, Judgment, 26 March 1996, [1996] (App. No. 20524/92), at para. 76. See also G. Van Harten, 'Weaknesses of Adjudication in the Face of Secret Evidence', (2009) 13 International Journal for Evidence and Proof 1, at 14–18.

126 See *supra* note 47. See also Eckes, *supra* note 56, at 191–6; S. Turner and S. Schulhofer, 'The Secrecy Problem in Terrorism Trials', (2005) Brennan Center for Justice at NYU School of Law, at 17 et seq.; and K. Roach, 'Secret Evidence and its Alternatives' in A. Masferrer (ed.), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (2012), 179 at 181.

127 See *supra* note 49. See also Van Harten, *supra* note 125, at 12 et seq., and Roach, *supra* note 126, at 182–5.

128 Roach, *supra* note 126, at 182–5. Note that the draft rules of procedure of the General Court of the EU envisage also a possibility for a confidential exchange of information. See Draft Rules of Procedure of the General Court, *supra* note 93, Art. 105, which largely follows the Court of Justice's decision in *Kadi II* Appeal, *supra* note 1, at paras. 126–9.

ures to take, especially when those measures seek to further peace and security.[129] It is generally accepted that it is not for courts to replace the findings of executive authorities with their own.[130] In determining the facts of a case, courts are not in a better position to make findings than any of the other branches of government.[131] How much discretion is granted depends essentially on the particular institutional set-up of a state.[132] In individual instances the amount of discretion may be influenced by several factors, such as the nature of the measure and the impact it has on the rights of the individual concerned.[133] However, international human rights law demands that in any case courts do not pay so much deference to the findings of executive authorities, as to make the review illusory.[134]

Another potential risk to the effectiveness of the sanctions is that the individual concerned is informed too early in the process of the state's intention to submit his name to the Sanctions Committee. This would give him an opportunity to evade the application of the sanctions measures. To avoid this, the Committee could institute a procedure by which an individual is placed on a tentative (entrance) list upon the first request of a state. The sanctions would then have to be implemented by states immediately, but only for a fixed period of time. Eventually, after completion of the domestic procedures, the outcome should be forwarded to the Sanctions Committee. If the allegations against the individual concerned were rejected in the domestic proceedings, his name would be deleted from the temporary list. If the allegations were confirmed, the members of the Sanctions Committee should consider the judgment, its reasoning, and other relevant circumstances surrounding the trial. In this assessment the Committee should pay appropriate deference to the court concerned, but should also be able to discern whether in the proceedings against the targeted individual, minimum requirements of procedural fairness were observed. If the Sanctions Committee is satisfied that the domestic judgment evidenced sufficient merit for an individual's designation, his name could be transposed to a definitive list. Review of this final list should then take place on a regular basis, by a domestic judicial authority in the state that originally submitted the name to the Committee. If that state, upon such judicial review, was to request delisting, then

129 C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (2013), at 142 et seq. See, e.g., L. Slocum 'OFAC, the Department of State, and the Terrorist Designation Process: A Comparative Analysis of Agency Discretion', (2013) 65 *Administrative Law Review* 387, at 402.

130 P. Craig, 'Unreasonableness and Proportionality in UK Law', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999), 85 at 87; and J. Rytter, 'Terrorist Threats and Judicial Deference', in D. Jenkins, A. Jacobson, and A. Henriksen (eds.), *The Long Decade: How 9/11 Changed the Law* (2014), 229 at 236. See, e.g. *OMPI*, *supra* note 21, at para. 159.

131 R. Alexy, *A Theory of Constitutional Rights* (2002), 399. See also C. Chan, 'Proportionality and Invariable Baseline Intensity of Review', (2013) 33 *Legal Studies* 1, at 14.

132 E. Jordão and S. Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review', (2014) 66 *Administrative Law Review* 1, at 38. See also *A and Others v. Secretary of State for the Home Department* [2004] UKHL 56, at para. 42.

133 J. Rivers, 'Proportionality and Variable Intensity of Review', (2006) 65 *Cambridge Law Journal* 174, at 204 et seq.

134 *Smith and Grady v. The United Kingdom*, (2000) 29 EHRR 493, at paras. 137–9. Rytter, *supra* note 130, at 234. See also Rivers, *supra* note 133, at 202–3.

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that is what should be done.[135] During a certain period of transition towards delisting, another state could in response to the request for delisting decide to institute its own domestic proceedings against the individual concerned, on the basis of its own material.

A decentralized approach as proposed here would add to striking a fair balance between the interest of maintaining international peace and security on the one hand, and protecting the human rights of individuals on the other. It provides targeted individuals with an opportunity for judicial review, while at the same time maintaining the system of universally applicable blacklists. It is even likely to increase the effectiveness of the sanctions regime since domestic courts will no longer annul the domestic implementing measures due to breaches of human rights norms. Moreover, for the individuals concerned it would create a more effective opportunity for a remedy than what the domestic courts presently offer. These courts may now annul domestic implementing measures, but cannot take the targeted individuals off the universal Security Council sanctions list. Accordingly, all UN member states remain under an international obligation to take the prescribed measures against the individuals listed. In addition, their names continue to be connected to allegations of supporting international terrorism, which constitutes an attack on their honour and reputation.[136]

The merit of the proposed amendment is also confirmed by the *Sayadi and Vinck* decision by the UN Human Rights Committee (HRC).[137] In this case, which concerned the implementation by Belgium of the Security Council's targeted sanctions against the claimants, the HRC focused specifically on the prior act of Belgium's request for listing with the Sanctions Committee. It did this with the argument that, since it was Belgium itself that transmitted the names of Sayadi and Vinck to the Sanctions Committee; it was thus responsible for their presence on the list.[138] The HRC thereby shifted the attention and the commencement of responsibility for the state from the moment the Security Council measure is implemented, to the moment the individuals are reported to the Sanctions Committee. It then found that Belgium had transmitted the individuals' names to the UN Sanctions Committee prematurely.[139] From this ruling it appears that from a human rights perspective, states cannot submit names to the Sanctions Committee for designation without due care.

3.3. Additional safeguards and a standard of fairness

New problems may still emerge. For example, states may choose to list individuals via a state of convenience, which may afford a lower level of domestic judicial protection. However, if a state opted for that route, it would have to supply sufficient

135 Note that in the *Sayadi and Vinck* case in *infra* note 137, it turned out not to be that self-evident that the state that requested listing would upon a request for delisting actually obtain such delisting. This situation may have changed due to UNSC Res. 1989 (17 June 2011) UN Doc. S/Res/1989, at para. 27.

136 See ICCPR, Art. 17.

137 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*).

138 Ibid., at para. 10.7.

139 Ibid.

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information to the relevant judicial institutions of the other state on which they can base their decision, since the state of convenience would have to show that it affords adequate legal protection. Hence circumvention of a state's own judicial institutions might in principle be possible, but sham trials can be filtered out.

An additional safeguard in this respect may be established by granting the existing UN Ombudsperson a role in evaluating the domestic judicial proceedings. Considering her position as an international organ she can engage in a very marginal check only, but still certain standards concerning a fair process could be demanded. If those standards are not met, the Ombudsperson should recommend to the Sanctions Committee that it should refuse to put the individual concerned on its definitive list. Another option in this regard is to compose a prefixed set of minimum requirements as to the fairness of the procedure, which needs to be observed by the national institutions charged with the domestic judicial review in these instances. Only states with national institutions, which meet those requirements would be allowed to submit names to the Sanctions Committee. In addition, a distinction could be made between A and B category institutions.[140] States with an A institution would always be allowed to transmit names of individuals, whereas states with a B institution would have the fairness of their proceedings checked on a case-by-case basis. In this way, circumvention through the use of states of convenience would become unattractive and difficult to organize effectively.

Another issue that could arise is that the courts of two different states might arrive at opposing outcomes on the same individual. In this situation the effectiveness of the sanctions regime would prescribe that the state, the court of which concluded in favour of designation, may proceed in that direction, if the proceedings before the court were found to meet the required standards of fairness.

For establishing the standards against which the fairness of a process could be evaluated, guidance must be sought from international human rights law in order to ensure a broad acceptance among various domestic and regional courts.[141] These standards may then include requirements, such as ensuring that the individual concerned has an opportunity to respond effectively to the allegations against him. This means that the allegations must be formulated sufficiently precise for him to rebut. With regard to the use of confidential information, certain techniques must be in place to counterbalance the adverse effect of withholding relevant information from the individual concerned. This may for example be achieved by means of a special advocate who is able to consult and test the confidential information, regarding both its reliability and its confidential nature.[142]

Ultimately it would be for the courts to safeguard the fairness of the procedure.[143] In this regard they would also need to be mindful of the fact that often the targeted

140 An analogy could be drawn here with the accreditation procedure for National Human Rights Institutions (NHRI) under the Paris Principles by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). See Statute of the ICC, as amended on 20 March 2012, sections 5, 6 (24), 9 (38), and Ann. I.

141 See for a reasoning to a similar effect Hollenberg, *supra* note 8, at 255–6.

142 See subsection 2.1.2, and House of Commons, *supra* note 47, at 23.

143 See subsection 2.2.2.

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individual will not be present in the state in which the proceedings take place. In order to ensure the fairness of the process in those instances they would either need to order that the individual concerned is brought before the court,[144] or that at least a special advocate visits him in his country of residence.[145]

In conclusion, a decentralized designation procedure resulting in universal listing with a central check on the fairness of the domestic procedures, may meet the most important challenge to achieving fairness within the present targeted sanctions regime. At the same time, it may enhance the co-operation and compliance of states.

3.4. The changing role of the CJEU

The proposed change in procedure would result in marginalizing the role of the CJEU in assessing the lawfulness of the implementation of the sanction measures. As a consequence, no confidential information would have to be shared with that court, since it would no longer be necessary for it to fully review the decisions to designate particular individuals. That is because the EU would not itself have to designate individuals and transmit their names to the UN Sanctions Committee, for a coherent implementation of the Security Council's sanction measures throughout the EU. If it would still choose to implement the decentralized Security Council sanctions regime, it would only have to require EU member states to transmit the names of individuals intended to be targeted, and a judicial decision supporting the allegations, to the relevant UN Sanctions Committee. Accordingly, in this regard there is no individual decision by EU authorities eligible for judicial review by the CJEU. On the other hand, the EU authorities may still find it necessary to implement at the EU level the Security Council's sanction measures against the individuals listed by the UN member states. However, if satisfied with the quality of the proceedings before the domestic courts of the originally designating states, the CJEU could pay deference to these judicial decisions and engage only in a review of the EU implementation, possibly comparable to its review of the aforementioned implementation of the 1373 regime.[146]

144 Fulfilment of a judicial process is a valid exception to the travel ban. UNSC Res. 2161 (2014), *supra* note 108, at para. 1(b).

145 Where possible the UN Ombudsperson also visits targeted individuals. See, e.g., 'Letter dated 31 January 2014', *supra* note 110, at para. 10.

146 When the CJEU is asked to review the lawfulness of the Council's decision, that review will concern only whether the Council could have lawfully concluded that a decision by a competent national authority based on serious and credible evidence and clues existed, and possibly some additional material the Council chose to rely on. Case T-256/07 *People's Mojahedin Organization of Iran v. Council of the European Union* [2008] ECR II-3019, at paras. 57–8, 144–5, and 147. With regard to the content of the decision of the competent national authority, the Court will ascertain only whether that authority based its decision, in its own assessment, on serious and credible evidence or clues. Ibid., at para. 68. It will not itself engage in a review of the existence of the 'evidence or clues' on which the national authority's decision was based, or whether these were indeed 'serious and credible'. Accordingly, the review by the European judiciary in cases concerning the EU's implementation of sanctions under the 1373 regime considers merely formal elements. The possibility for judicial review of the substantive grounds and evidence must be guaranteed, in principle, at the national level, before the competent national authority or on an appeal of that authority's decision. See Eckes and Mendes, *supra* note 22, at 660 and Eckes, *supra* note 89, at 311 et seq.

4. Conclusion

In principle, universally applicable sanction measures against individuals may be a useful tool in the combat against international terrorism. However, a balance needs to be found between guaranteeing the effective legal protection of adversely affected individuals, and safeguarding the legitimate security interests of states. To this end different methods and techniques can be employed. The ECtHR suggested that the use of special advocates may assist in arriving at a fair balance between the interests involved. The CJEU initially seemed to follow this example, but in the latest *Kadi II* decision appeared to find it more the responsibility of the CJEU itself to guarantee fair proceedings, possibly in response to the lack of a special advocates procedure at the EU level. The Court considered itself in the best position to assess the credibility of claims for confidentiality of certain information, and to determine which information could be disseminated to the individuals concerned.

The problem is that most of the states, or for that matter the EU, that are required to implement the sanction measures do not possess the confidential material underlying an individual's designation and therefore cannot possibly share it with their judicial institutions. However, when no confidential information can be shared with the courts involved – and to a limited extent with the targeted individuals – no fair proceedings can ever be guaranteed. In response, courts will continue to annul domestic implementations of the Security Council's targeted sanctions, because the individual's right to effective legal protection is not observed. Alternatively, courts may annul domestic implementing measures because the allegations against the targeted individuals are not underpinned by evidence. In this regard, the Court of Justice demanded a full review of the decision to impose sanctions on a particular individual. It required a judicial evaluation of whether the reasons for listing were substantiated and whether they constituted a sufficient basis for the decision taken.[147]

However, it is highly unlikely that states would be willing to share confidential security sensitive information obtained by their national intelligence agencies, with any foreign courts – let alone with targeted individuals via those courts. Nor is it to be expected that the Security Council would ever impose an obligation upon states to share such information with the Office of the Ombudsperson. Therefore, the problem of lack of access to relevant confidential information can be countered only by decentralizing the current targeted sanctions regime. The Security Council should institute a two-step procedure for the imposition of targeted sanctions. National authorities seeking an individual's designation would need to ensure the individual a fair trial before domestic courts, prior to putting him on a universally applicable blacklist. To avoid undermining the sanctions' effectiveness, temporary sanctions (with a sunset clause) could be adopted immediately after a state requests designation. This would give the state a certain period of time to complete the domestic proceedings, which should guarantee the targeted individual a fair trial. A major advantage would be that the relevant state authorities might be more willing to

147 *Kadi II* Appeal, *supra* note 1, at para. 133.

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share confidential information with courts within their own state than with courts in a foreign state. The fairness of the individual's trial before these domestic courts could be guaranteed further by the use of special security-cleared advocates, who would have the opportunity to test the strength of the evidence, and the reasons for its confidentiality.

This solution places the emphasis on the situation before the definitive imposition of the sanction measures, which avoids the situation whereby states are confronted with a conflict of norms after the adoption of sanctions. Moreover, it creates a more effective remedy for the individuals concerned. Instead of annulling a mere domestic implementation of the international sanctions measures against the individuals, the judicial decision directly concerns the central listing itself. Hence the present solution will contribute to enhancing the co-operation and compliance of states – thereby increasing the sanctions' effectiveness – and it will encourage the protection of the human rights of targeted individuals.