

## **The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity**

Marko Milanović\*

### Table of Contents

Abstract .....	520
A. Introduction.....	520
B. A Critique of <i>Sayadi</i> .....	521
C. Some Alternatives .....	533
D. Conclusion .....	536

\* LL.B (Belgrade), LL.M (Michigan), PhD candidate (Cambridge); Associate, Belgrade Centre for Human Rights, formerly law clerk to Judge Thomas Buergenthal, International Court of Justice. E-mail: mm676@cam.ac.uk. This article originated in a post at the EJIL: Talk! blog. I am grateful to Andreas Paulus and Dapo Akande for their previous comments.

## Abstract

The article provides a critical review of the Human Rights Committee's views in *Sayadi v. Belgium*, a case dealing with United Nations Security Council (UNSC) terrorist blacklists. The case raised many complex issues of international law, most notably the question whether UNSC resolutions can prevail over human rights treaties by virtue of Art. 103 of the UN Charter. This issue – one of truly fundamental importance – has cropped up in several important recent cases which either addressed it or avoided it, including *Kadi* before the courts of the European Union, *Al-Jedda* before the UK House of Lords, and *Behrami* before the European Court of Human Rights. Regrettably, the Committee's decision did not do justice to the complexity and the gravity of the matters raised before it, as it failed to tackle the norm conflict issue head on and ignored the Charter's supremacy clause altogether. Such an approach advances neither the cause of human rights, nor the coherence of international law as a legal system.

## A. Introduction

On 22 October 2008, the Human Rights Committee delivered its views in *Sayadi v. Belgium*,<sup>1</sup> a case dealing with United Nations Security Council (UNSC) terrorist blacklists. The case raised many complex issues of international law, most notably the question whether UNSC resolutions can prevail over human rights treaties by virtue of Art. 103 of the UN Charter. This issue – one of truly fundamental importance – has cropped up in several important recent cases which either addressed it or avoided it, including *Kadi* before the courts of the European Union,<sup>2</sup> *Al-Jedda* before the UK House of Lords,<sup>3</sup> and *Behrami* before the European Court of Human

<sup>1</sup> *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006 (29 December 2008) [*Sayadi*].

<sup>2</sup> Case T-315/01, *Kadi v Council and Commission*, [2005] ECR II-3649; Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat International Foundation v Council and Commission*, Judgment of 3 September 2008, [*Kadi ECJ*].

<sup>3</sup> *R (Al-Jedda) v Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 AC 332, [2008] 2 WLR 31, 12 December 2007, [*Al-Jedda*].

Rights.<sup>4</sup> As I will now explain, the Committee's decision regrettably failed to do justice to the complexity and the gravity of the matters raised before it.

## B. A Critique of *Sayadi*

The facts of the case were these: the applicants, a married couple of Belgian nationality living in Belgium, ran the European branch of an American NGO that was put on a Security Council blacklist pursuant to the sanctions regime established in Resolution 1267 (1999) and its progeny.<sup>5</sup> In 2003, after the initiation of a criminal investigation against the applicants in Belgium, the applicants' names were, at Belgium's request, put on a list drafted by the Sanctions Committee and appended to a UNSC resolution. Pursuant to EU and Belgian implementing legislation, the applicants' financial assets were frozen, and they were banned from travelling internationally. The applicants were not given access to the reasons nor provided any information relevant for their listing. In 2005, the applicants asked a Belgian court to order the Belgian government to initiate delisting procedures before the UNSC Sanctions Committee, and obtained such an order. Additionally, the criminal proceedings against them were dismissed. The Belgian government did initiate a delisting procedure, as ordered, but the UNSC Sanctions Committee refused to delist the applicants.

Before the Committee, the applicants raised the violations of several articles of the International Covenant on Civil and Political Rights (ICCPR), claiming that they were denied due process in the UNSC sanctions proce-

<sup>4</sup> *Behrami and Behrami v. France, Saramati v. France, Germany and Norway*, ECHR (2007), App. Nos. 71412/01 & 78166/01, [*Behrami*].

<sup>5</sup> The 1267 regime, established to deal with sanctions against member of Al-Qaeda, the Taliban and affiliated persons and organizations, is based on a list drafted by a subsidiary organ of the UNSC, the Sanctions Committee, and it directly obliges UN member states to implement certain measures, including asset freezing, against persons on that list. The 1267 regime was expanded or modified by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008). A different sanctions regime was established pursuant to Resolution 1373 (2001), adopted after the September 11 terrorist attacks. Resolution 1373 set forth a variety of state obligations in the fight against international terrorism. The Counter-Terrorism Committee of the UNSC established by that resolution and its progeny monitor the implementation of the resolution, but it does not draft lists of individuals against whom sanctions must be implemented by the UN member states. For a general overview, see the comparative table of various UNSC committees at <http://www.un.org/sc/ctc/pdf/comparativetable.pdf>. (last visited 16 December 2009)

dure and that Belgium implemented the outcome of this procedure, with a considerable impact on their life and without providing them with any remedy. As is apparent even from the mere recitation of the facts of the case, the applicants' due process claims were certainly well-grounded. This is of course nothing new. Many critical proposals have been made over the years with a view of improving the listing process, and indeed the process has undergone considerable improvement through subsequent UNSC action.

Yet, however justified the applicants' claim on the merits, the actual examination of the merits by the Human Rights Committee faced a great impediment, a consequence of the nature of state obligations under the UNSC listing process. Under Art. 25 and Chapter VII of the UN Charter, the UNSC can pass resolutions that have binding force on UN member states. Art. 103 of the Charter further provides that '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' These obligations under the Charter include binding UNSC decisions made under the Charter, as confirmed by the ICJ in the *Lockerbie* case.<sup>6</sup>

Art. 103 of the Charter has a twofold effect: (1) it gives priority to Charter obligations over other international obligations (except for *jus cogens*), but it does not invalidate these conflicting obligations; and (2) it precludes the responsibility of a state for failing to abide by its conflicting obligation, so long as the conflict lasts.<sup>7</sup> To give an example: states A and B conclude a treaty of friendship, whereby they agree to freely trade with one another. Subsequently, the UNSC determines that state B is engaged in a threat to international peace and security, and passes a Chapter VII resolution ordering trade sanctions. State A would be obliged to implement the trade sanctions, notwithstanding its earlier trade treaty with B, and it would incur no responsibility for failing to abide by that treaty, even though the treaty is not void, but remains valid. As soon as the sanctions regime is terminated, the obligations arising from the trade treaty will regain full force.<sup>8</sup>

<sup>6</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. U.S.), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114, 126, para. 42.

<sup>7</sup> See Art. 59 of the ILC Articles on State Responsibility and the commentary thereto, UN Doc. A/56/10, chp.IV.E.2, at 365 23 April - 1 June and 2 July - 10 August 2001

<sup>8</sup> For more on Art. 103, see M. Milanovic, 'Norm Conflict in International Law: Whither Human Rights?', 20 *Duke Journal of Comparative and International Law* (2009) 1, 76-79, and the authorities cited therein.

Back to *Sayadi* – because the listing of the applicants was done by a Chapter VII resolution, Belgium argued that its obligations under the resolution prevailed over its obligations under the ICCPR, by virtue of Art. 103 of the Charter. Indeed, the preclusive effect of Charter obligations is only confirmed by Art. 46 ICCPR, which provides that "[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of specialized agencies in regard to the matters dealt with in the present Covenant."

As stated above, norm conflicts between a UNSC resolution and human rights treaties have been the subject of several recent cases. In *Al-Jedda*, the House of Lords found that a UNSC resolution prevailed over Art. 5 ECHR by virtue of Art. 103 of the Charter, in regard of – otherwise prohibited – preventive detention in Iraq. In *Behrami and Saramati*, the European Court of Human Rights was faced with the question whether a UNSC resolution authorized similar preventive detention without judicial review in Kosovo, and avoided the Art. 103 issue by inventing out of whole cloth an attribution rule that would impute the acts of NATO peacekeepers in Kosovo to the UN.<sup>9</sup> In *Kadi*, the EU Court of First Instance (CFI) held that Charter obligations prevailed over EU human rights guarantees, so long as they did not impinge on human rights protected by *jus cogens*. On appeal, the European Court of Justice (ECJ) reversed the CFI, essentially by holding that Charter obligations cannot prevail over EU human rights protections, as EU law is an independent constitutional legal order which UNSC resolutions can penetrate only on its own terms. In the ECJ's view, nothing prevented its review of EU legislation implementing UNSC resolutions vis-à-vis EU constitutional guarantees, even though that might lead to member states incurring responsibility at the international level.

With such complex issues at hand, and with such rich and developing case law to draw from, one would have expected the UN Human Rights

<sup>9</sup> For a critique of *Behrami*, see M. Milanović & T. Papic, 'As Bad As It Gets: The European Court of Human Rights' *Behrami and Saramati* Decision and General International Law', 58 *International & Comparative Law Quarterly* (2009), 267, esp. 289-293; see also A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami and Saramati* Cases', 8 *Human Rights Law Review* (2008), 151; K. Mujezinovic Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test', 19 *European Journal of International Law* (2008) 3, 509-531.

Committee to produce a worthwhile contribution to the ongoing debate. What we got instead is this:

“Although the parties have not invoked article 46 of the Covenant, in view of the particular circumstances of the case the Committee decided to consider the relevance of article 46. The Committee recalls that article 46 states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations. However, it considers that there is nothing in this case that involves interpreting a provision of the Covenant as impairing the provisions of the Charter of the United Nations. The case concerns the compatibility with the Covenant of national measures taken by the State party in implementation of a Security Council resolution. Consequently, the Committee finds that article 46 is not relevant in this case.”<sup>10</sup>

Art. 103 of the Charter is not even mentioned. The reasoning that the Committee gives – or rather, the lack thereof – is simply astonishing. Yes, *of course* the Committee is reviewing national measures taken by a state party in implementing the UNSC resolution, not the UNSC resolution itself. If it were otherwise, the Committee would have no personal jurisdiction, as it can only examine whether a state party, and not the UN, has committed a wrongful act under the ICCPR. This disposes of only one objection of Belgium, that the applicants were not within its jurisdiction or control, or that the act complained of was not attributable to Belgium.<sup>11</sup> But the question is no longer *what* the Committee is reviewing, but *what is it doing the reviewing against*. In Belgium’s argument, it is the *ICCPR* itself that was displaced or qualified by virtue of Art. 103 of the Charter.<sup>12</sup> Though Belgium’s implementation of the resolutions against the applicant might be characterized as wrongful under the ICCPR, this wrongfulness is precluded by the Charter – not to mention Art. 46 ICCPR.

In other words, Belgium’s argument was exactly that of the House of Lords in *Al-Jedda*. There the question was the lawfulness of preventive, executive detention by UK troops in Iraq. This act was (*Behrami* notwithstanding) undoubtedly attributable to the United Kingdom. The authority for this act was a UNSC resolution, and this resolution prevailed over Art. 5

<sup>10</sup> *Sayadi*, *supra* note 1, para. 10.3.

<sup>11</sup> *Id.*, para. 6.1.

<sup>12</sup> *Id.*, para. 8.1.

ECHR, which would have prohibited preventive detention. So was arguably the case here. The actual listing was done by a subsidiary organ of the UNSC, but the implementation of the measures prescribed by the UNSC could only have been done by Belgium. Only the implementation, not the actual listing, could have been attributable to Belgium, yet the implementation was nonetheless covered by the sanctions regime established by the UNSC, which presumably prevailed over the ICCPR by virtue of Art. 103 of the Charter. The application of Art. 103 may or may not have been avoided through some technique of norm conflict avoidance, but Art. 103 could not have been ignored as completely as it was by the Human Rights Committee.

Another useful comparison would be that with the ECJ's ruling in *Kadi*. The reason why the ECJ found the UNSC resolutions immaterial in that case was not just that it was reviewing EU legislation, a 'national' measure of implementation of a UNSC resolution, but that it was not reviewing this legislation against a human rights treaty subject to Art. 103 of the UN Charter, but instead against a corpus of constitutional norms independent of the Charter:

“[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. The question of the Court's jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.”<sup>13</sup>

In other words, *Kadi* was for the ECJ purely a domestic affair, exactly as if, for instance, the US Supreme Court was reviewing legislation passed by Congress against the US Constitution. One may or may not be persuaded by the ECJ's idea that a legal order created by treaties between sovereign states can truly be so completely independent from the UN Charter and international law – I am not.<sup>14</sup> But that is at least a reasonable (and reasoned)

<sup>13</sup> *Kadi ECJ*, *supra* note 2, paras 316-317.

<sup>14</sup> See Milanović, *supra* note 8, 102-110.

position. As a general matter, there is no conceptual problem in having a constitutional court say to other state authorities that the domestic constitution prevails over the state's international obligations, for the purposes of that internal legal order.

But in *Sayadi* the Committee gives us no reasoning whatsoever. That it is reviewing a national implementing measure, and not the UNSC listing itself, is again both inevitable and entirely beside the point. Of course, it could never have done what the ECJ did in *Kadi*, as the very idea that the ICCPR is a constitutional instrument independent of the UN Charter would be both preposterous and contrary to the text of Art. 46 of the ICCPR itself. What the Committee did instead was to sidestep Art. 103 of the Charter as if it was not even there. Let us take a look at how the Committee reasons with regard to the travel ban imposed by the UNSC:

“In the present case, the Committee recalls that the travel ban for persons on the sanctions list, particularly the authors, is provided by Security Council resolutions to which the State party considers itself bound under the Charter of the United Nations. Nevertheless, the Committee considers that, whatever the argument, it is competent to consider the compatibility with the Covenant of the national measures taken to implement a resolution of the United Nations Security Council. It is the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.<sup>15</sup>

The Committee thus looks at UNSC resolutions *within* the structure of the limitations clause of Art. 12(3) ICCPR, “whatever the argument” – but the whole point of Belgium's argument was that Art. 12, like the rest of the ICCPR, was inapplicable to the extent that it conflicted with its obligations under the UN Charter, pursuant to Art. 103 thereof. One may not like this argument – I do not – but one must still address it. What the Committee does instead is this:

<sup>15</sup> *Sayadi*, *supra* note 1, para. 10.6.



“The Committee notes that the obligation to comply with the Security Council decisions adopted under Chapter VII of the Charter may constitute a “restriction” covered by article 12, paragraph 3, which is necessary to protect national security or public order. It recalls, however, that the travel ban results from the fact that the State party first transmitted the authors’ names to the Sanctions Committee. The proposal for the listing, made by the State party on 19 November 2002, came only a few weeks after the opening of the investigation on 3 September 2002. According to the authors, this listing appears to have been premature and unjustified. On this point, the Committee notes the State party’s argument that the authors’ association is the European branch of the Global Relief Foundation, which was placed on the sanctions list on 22 October 2002, and the listing mentions the links of the Foundation with its European branches, including the authors’ association. The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors’ names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists and for the resulting travel ban.”<sup>16</sup>

The Committee again considers state obligations to comply with UNSC resolutions as something internal to the ICCPR, rather than obligations that are external to and can prevail over it. It further seems to consider that a state which communicates an individual’s name to the Sanctions Committee of the UNSC commits a distinct wrongful act under the ICCPR if it does so without sufficient factual basis, apparently on the Human Rights

<sup>16</sup> *Id.*, para. 10.7.

Committee's assessment, even if the UNSC Sanctions Committee thinks that there *was* sufficient factual basis for the listing. The state is thus responsible for the travel ban itself, even though the travel ban was ordered by the UNSC.

But yet again this makes very little sense. It is indeed possible to conceive of several distinct wrongful acts for which a state could be responsible under the ICCPR in regard of UNSC targeted sanctions.<sup>17</sup> The real problem is whether these distinct acts fall within the scope of the relevant UNSC resolutions and the preclusive effect of Art. 103 of the Charter.

First, there is the actual listing by the Sanctions Committee, but this act is not only clearly within the scope of the UNSC resolution and Art. 103, but it is also attributable to a subsidiary organ of an international organization, i.e. to the organization itself. It is in principle only the UN that can be responsible for this act, and not its member states.

Second, there is the implementation of the listing, through measures enacted by states, such as the seizure of assets or travel bans. These measures are undoubtedly attributable to the states that enacted them, but they are equally covered by UNSC resolutions – that is their whole point. Contrary to what the Committee says, it is impossible to address these implementing measures without dealing with Art. 103 of the Charter. If a UNSC resolution and the list adopted pursuant to it say that states must enact these measures against Mr. Sayadi, while the ICCPR says that they may not do so, there is an apparent norm conflict that must be either avoided or resolved.

Third, another option would be to consider the actual voting for the listing by the representative of a member state in the UNSC Sanctions Committee as a distinct wrongful act if it is done (1) without adequate factual basis, or (2) without adequate procedural safeguards at the UNSC level. This option of course carries enormous difficulties with it. First, it applies even in theory only to states that are members of the relevant bodies, such as the UNSC and its Sanctions Committee. Second, there is a serious question as to whether, say, the United States would have any obligations under the ICCPR to an individual located in Belgium, i.e. as to whether the treaty would apply extraterritorially in such a situation. Finally, even if the act of voting could be decoupled from the decision by an international organ to list

<sup>17</sup> It would be useful to recall at this point Art. 2 of the ILC Articles on State Responsibility, which provides that there is an internationally wrongful act if (a) that act is attributable to a state, and (b) the act constitutes a breach of the international obligations of that state. Art. 103 of the Charter operates under (b) – it precludes the wrongfulness of what otherwise might have been a breach of the state's international obligations.

an individual, it is hard to see why it could be decoupled from the implementing measures, because it is these measures that actually cause the harm to the individual concerned. If these measures cannot be contested because of Art. 103 of the Charter, why should the voting that preceded it be contestable? At any rate, this act was not before the Committee in *Sayadi*.

Fourth, and this brings us back to *Sayadi*, the submission of a person to the UNSC listing process by a state could be considered as a distinct wrongful act, if it was done (1) without adequate factual basis, or (2) without adequate procedural safeguards at the national level. Thus, rather than the implementing measures, it would be the *suggestion* that the applicants be listed that would constitute a violation of the ICCPR, and this is indeed what the Committee seems to have done at para. 10.7 quoted above. But this solution is not really much of a solution.

First, it is again unclear why the suggestion for the listing could be contested if the lawfulness of the implementing measures which actually cause the harm to the individual could not be contested. Thus, for example, in the *Segi* case the European Court of Human Rights found that institutions and individuals who have merely been put on an EU list, but against whom no actual measures were taken, cannot be said to have been victims of a violation of the ECHR: “[t]he mere fact that the names of two of the applicants [...] appear in the list referred to in that provision as ‘groups or entities involved in terrorist acts’ may be embarrassing, but the link is much too tenuous to justify application of the Convention.”<sup>18</sup> If, on the contrary, the listing has consequences, then the lawfulness of these consequences must be assessed, which leads us back to Art. 103 of the Charter. In fact, the Committee in *Sayadi* did find Belgium responsible for the *travel ban* itself, not merely for the suggestion that it be put in place,<sup>19</sup> and the ban was undoubtedly covered by relevant UNSC resolutions – but it did so without addressing Art. 103 in any way whatsoever.

Second, taking this route would require the Committee (or other body) to make determinations that would actually defy the whole purpose of the exercise. As stated above, it would have to determine that the submission for the listing was done either (1) without adequate factual basis, or (2) without adequate procedural safeguards at the national level. Both of these options are problematic, especially the former, and both seem to have been employed by the Committee when it stated that:

<sup>18</sup> *Segi and Others v. 15 States of the European Union* (dec.), App. Nos. 6422/02; 9916/02 (23 May 2002).

<sup>19</sup> *Sayadi*, *supra* note 1, para. 10.7 *in fine*.

“The State party has furthermore argued that, when a charitable organization is mentioned in the list, the main persons connected with that body must also be listed, and this has been confirmed by the Sanctions Committee. The Committee finds that the State party’s arguments are not determinative, particularly in view of the fact that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee (see paragraph 9.2 above). It also notes that the authors’ names were transmitted to the Sanctions Committee even before the authors could be heard. In the present case, the Committee finds that, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists and for the resulting travel ban.”<sup>20</sup>

The Committee continued as follows:

“The Committee notes that a criminal investigation that had been initiated against the authors at the request of the Public Prosecutor’s Office was dismissed in 2005, and that the authors thus do not pose any threat to national security or public order. Moreover, on two occasions the State party itself requested the removal of the authors’ names from the sanctions list, considering that the authors should no longer be subject, *inter alia*, to restrictions of the right to leave the country. The dismissal of the case and the Belgian authorities’ requests for the removal of the authors’ names from the sanctions list show that such restrictions are not covered by article 12, paragraph 3. The Committee considers that the facts, taken together, do not disclose that the restrictions of the authors’ rights to leave the country were necessary to protect national security or public order. The Committee concludes that there has been a violation of article 12 of the Covenant.”<sup>21</sup>

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, para. 10.8.

The Committee performed the same maneuver when it considered the possible violation of Art. 17 ICCPR, prohibiting unlawful attacks on one's honour and reputation:

“The Committee takes note of the authors’ argument that the State party should be held responsible for the presence of their names on the United Nations sanctions list, which has led to interference in their private life and to unlawful attacks on their honour and reputation. It recalls that it was the State party that communicated all the personal information concerning the authors to the Sanctions Committee in the first place. The State party argues that it was obliged to transmit the authors’ names to the Sanctions Committee (see paragraph 10.7 above). However, the Committee notes that it did so on 19 November 2002, without waiting for the outcome of the criminal investigation initiated at the request of the Public Prosecutor’s Office. Moreover, it notes that the names are still on the lists in spite of the dismissal of the criminal investigation in 2005. Despite the State party’s requests for removal, the authors’ names and contact data are still accessible to the public on United Nations, European and State party lists. The Committee therefore finds that, in the present case, even though the State party is not competent to remove the authors’ names from the United Nations and European lists, it is responsible for the presence of the authors’ names on those lists. The Committee concludes that the facts, taken together, disclose that, as a result of the actions of the State party, there has been an unlawful attack on the authors’ honour and reputation. Consequently, the Committee concludes that there has been a violation of article 17 of the Covenant.”<sup>22</sup>

The Committee is thus saying that the applicants should never have been suggested for a listing, i.e. that they have been submitted for the listing and then listed without adequate factual basis. The problem with this position is that the *UNSC Sanctions Committee* disagreed with it when the listing was made, and in fact *continued* to disagree with it when it rejected Belgium’s first request that the applicants be delisted. It is impossible to rule otherwise without exercising quasi-judicial review of a factual determina-

<sup>22</sup> *Id.*, para. 10.13.

tion by a body that was not only actually created to make such determinations, but also is the only body that is in possession of the full factual record, as well as quite obviously acting under UNSC authority, thus again bringing us back to Art. 103 of the Charter. If the whole topic of judicial review of decisions by the UNSC on questions of *law* (to which I will turn in a moment) is controversial, then such review on questions of *fact* (or legal qualification of such facts) is more controversial by an order of magnitude. It is one thing to say, for example, that there are legal constraints on what the UNSC can do, and that courts can enforce these constraints. But it is quite another to say that courts can, for example, question the UNSC's determinations as to whether a particular situation qualifies as a threat to international peace and security.

Not only does the Human Rights Committee thus (implicitly, but unavoidably) question the UNSC Sanctions Committee's factual determination that Mr. Sayadi and his wife qualify for a 1267 listing. But it does so without having any access to the relevant factual record, and without pay any deference to the body which is in fact institutionally far more competent. It does so, moreover, by relying on the fact that criminal proceedings against the applicants have been dismissed – thereby showing its lack of understanding that one of the basic points of the 1267 sanctions regime was to impose sanctions quickly and efficiently, even (or especially even) against those people who could not be successfully prosecuted.<sup>23</sup> It further relies on the fact that no other members of the same organization present in other countries were listed but for the applicants – but this again runs afoul of the Sanctions Committee's judgment that the applicants should nonetheless be listed. Though the Human Rights Committee may not like this, it cannot challenge the legal regime established by the UNSC and the factual determination made by its subsidiary bodies without coming face to face with Art. 103 of the Charter.

<sup>23</sup> *Sayadi*, Appendix B. This is well noted by Ivan Shearer in his dissenting opinion: "The chronology of events, set out in paragraphs 2.1-2.3 of the Committee's Views, demonstrates, in my opinion, that the State party acted in good faith in responding to the demands of the United Nations Security Council under the terms of a binding resolution. It is not reasonable to assert that, even on the assumption of the possession of a degree of discretion as to the manner in which such obligations should be carried out, the State party should have awaited the outcome of its criminal investigation, launched on 3 September 2002 (and thus more than two months prior to the transmittal of their names to the Sanctions Committee), and not concluded until 19 December 2005. Regard must be had to the presumed imminence and seriousness of the danger posed by individuals and associations listed by the Sanctions Committee."

### C. Some Alternatives

It is, of course, very, very easy to criticize, and I would not venture to do so without being able to point out some of the alternatives that were at the Committee's disposal. In my view, had the Committee truly wanted to tackle the norm conflict issue head on, which it had to do if it wanted to reach the merits of the case, it had several other options that would have been viable.

First, it could obviously have decided, as the House of Lords did in *Al-Jedda*, that the ICCPR was displaced or qualified by the UNSC resolutions, by virtue of Art. 103 of the Charter. This might not be a result to our liking, but it is a result that is hard to avoid – especially if the Committee wished, as it did, to assess Belgium's responsibility for the implementation of the sanctions against the applicants. Ivan Shearer's dissenting opinion in *Sayadi* takes this route.

Second, the Committee could have tried to minimize the scope of the conflict, or avoid it by attempting to harmoniously interpret the relevant UNSC resolution and the ICCPR. As a general matter, a very useful tool for such norm conflict avoidance would be a presumption that the UNSC did not wish to infringe on human rights absent a clear statement to the contrary. Such presumptions are a ubiquitous tool of interpretation in the domestic context, where courts narrowly interpret legislation which is couched in general and ambiguous terms in order to avoid a human rights issue. As I have argued elsewhere,<sup>24</sup> a clear statement rule is not only necessary to harmonize possibly conflicting norms of international law. Its purpose would be to foster the political responsibility of UNSC members, if they truly want to limit human rights through UNSC action. They would have to do so unambiguously and accept the political consequences of their actions, instead of relying on the usual array of diplomatic euphemisms. Indeed, in his concurring opinion in *Sayadi*, Sir Nigel Rodley precisely tries to introduce such an interpretative presumption: "the Charter wording strongly suggests that the first interpretation criterion is that there should be a presumption that the Security Council does not intend to take actions taken pursuant to its resolutions that should violate human rights."<sup>25</sup>

<sup>24</sup> See Milanović, *supra* note 8, 92-102.

<sup>25</sup> Individual opinion of Committee member Sir Nigel Rodley (concurring), in: *Sayadi*, Appendix B.

Unfortunately, however, this presumption is of only limited use in a case such as *Sayadi*. Its application requires both a level of generality in the language of a UNSC resolution and a consequent margin of discretion in which a state bound by that resolution is free to act. Neither of these conditions existed here. Once the applicants were listed by the UNSC Sanctions Committee, Belgium had to implement measures against them – it had no discretion in the matter whatsoever, short of disobeying the UNSC. Thus, while the presumption of conformity with human rights and the clear statement rule are good ways of avoiding a norm conflict in situations where, for example, the UNSC authorizes member states to take ‘all necessary measures’, and the member states interpret this broad authorization as allowing for preventive detention without any judicial review (as was the case in *Behrami*), it is hard to do so here.

The only discretion that Belgium had was in making its proposal to the Sanctions Committee that the applicants be listed. But, as I have explained before, it is impossible to find that this proposal was wrongful and at the same time avoid Art. 103 if the alleged defect was a lack of sufficient factual basis, since the Sanctions Committee thought and still thinks that there *is* sufficient factual basis for the listing. If, on the other hand, the defect with the listing, or Belgium’s suggestion for the listing, was not substantive but merely procedural in nature (and assuming for a moment that these procedural standards could somehow be found in the ICCPR), the scope of the Committee’s decision should have been far more limited than it in fact was. It could not have held, as it did, that the applicants’ continued presence on the list or the ban on their travel were unnecessary, nor could it have indicated to Belgium, as it did,<sup>26</sup> that the proper remedy for the violations was for Belgium to do all it could to have their names removed from the list.

It is moreover hard to see what kind of process Belgium could have given to the applicants before making its proposal for the listing, while at the same time preserving the effectiveness of the sanctions regime. If Belgium had to, say, conduct a full adversarial hearing before it suggested the listing of certain individuals, at which it would have to give these individuals the opportunity to challenge the government’s account of the facts that warranted their listing, not only would it probably have to disclose sensitive intelligence information to these individuals, but they would then have ample opportunity to evade the freeze on their assets or even escape the coun-

<sup>26</sup> *Sayadi*, *supra* note 1, para. 12.



try before a travel ban is imposed. Indeed, as I see it, the point of procedural safeguards in the listing process is in the correction of error *after* a listing is made – but this of course brings us right back to Art. 103.

Finally, and as the applicants in the case in fact suggested,<sup>27</sup> the Committee could have directly engaged in the review of the relevant UNSC resolution. It could have done so on two grounds. First, it could have tested the *external* validity of the UNSC resolution against the one certain body of law that the UNSC cannot override – *jus cogens*. Just like a treaty, a UNSC resolution conflicting with a peremptory norm – say ordering states to torture suspected terrorists – would be null and void. Second, the Committee could have tested the *internal* validity of the resolution against the UN's constitutive instrument, the Charter.<sup>28</sup> Generally speaking, there is little doubt that, as a matter of substantive law, an *ultra vires* decision of the Council which is contrary to the Charter has no binding force.<sup>29</sup> When it comes to human rights in particular, a persuasive argument can be made that the Council is *Charter-bound* to conform to certain human rights norms, not limited just to the norms of *jus cogens*. A textual argument would be that Art. 24(2) of the Charter requires the Council to act “in accordance with the Purposes and Principles of the United Nations,” while Art. 1(3) provides for “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” as one of the purposes of the UN.<sup>30</sup>

On the facts of *Sayadi*, the former approach would have obviously been fruitless. The rights affected by the UNSC action – the freedom of movement and the prohibition of attacks on one's honour and reputation – cannot be qualified as *jus cogens* rights by any definition of the term,<sup>31</sup> nor

<sup>27</sup> *Id.*, para. 5.6.

<sup>28</sup> See Milanović, *supra* note 8, 92-97.

<sup>29</sup> See ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, para. 331: “Since obligations for Member States of the United Nations can only derive out of such resolutions that are taken within the limits of its powers, decisions *ultra vires* do not give rise to any obligations to begin with.”

<sup>30</sup> See generally D. Akande, ‘The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?’, 46 *International & Comparative Law Quarterly* (1997), 309.

<sup>31</sup> As Judge Higgins rightly stated in relation to *jus cogens*, “[t]he examples [of such norms] are likely to be very, very few in number.” R. Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, 55 *International & Comparative Law Quarterly* (2006), 791, 801.

could, for that matter, the right to property, which is not even protected by the ICCPR. But the second route was still there. The Committee could have held, for example that the absence of due process protections at the UNSC level meant that the listing procedures were contrary to the Charter, and that accordingly the UNSC resolutions could not prevail over the ICCPR by virtue of Art. 103. Of course, this route would have been fraught with peril. Not only would the Committee have had to read a substantive content into the rather meager human rights provisions of the Charter, but it would also have had to assert its authority – if only incidental – to review UNSC decisions. It is understandable why the Committee was reluctant to do so, but the irony is that it at the same time engaged in a conceptually much worse, if less explicit, transgression against the UNSC's prerogatives, when it disagreed with the factual determinations made by the UNSC Sanctions Committee, as I have explained above. Perilous though it might have been, this approach would at least have been principled.

#### D. Conclusion

The Committee's views in *Sayadi* are paradoxically both bold and timid. Bold, because the Committee admonished states that they cannot violate human rights when fighting terrorism merely because they have obtained the UNSC's imprimatur. Bolder even (more bold perhaps than wiser), because the Committee questioned the very appropriateness of the applicants' listing. But so very timid at the same time, in its search for a third way when there was none. In the final analysis, the Committee had only two options: either acknowledge the primacy of UNSC resolutions over the ICCPR, or engage in some sort of meaningful review of the lawfulness of the UNSC's actions. On the facts of *Sayadi* there was simply nothing else to be done. In other cases, on other facts, there could be several more legitimate ways of avoiding a norm conflict and getting around Art. 103. Pretending that Art. 103 is actually not there in the Charter, however, is certainly not one of them.

It is this very timidity of the Committee that makes its views so unconvincing, coupled with the paucity of its reasoning. The only truly meaningful discussion of these complex questions can be found in the individual opinions of some of the Committee's members. The silence in the views of the Committee itself, however, is positively deafening. Whatever disagreement there can be, it is particularly important for a body such as the Committee, which can only issue non-binding views and general comments, and

whose considerable authority relies solely on the expertise of its individual members, to provide adequate reasons for its decisions.

Lastly, unlike with the not-so-human-rights-friendly *Behrami* decision of the European Court of Human Rights, most of us probably approve of the end result in *Sayadi*. There is little doubt that critical decisions such as *Kadi* and *Sayadi* have exerted significant pressure on the Security Council, its subsidiary bodies, and its member states to improve their listing practices, and to show more respect for basic norms of due process. Indeed, the Committee's views in *Sayadi* were probably instrumental in bringing about the applicants' de-listing by the UNSC Sanctions Committee on 20 July 2009.<sup>32</sup> But this does not mean that the insubstantial nature of the Committee's reasoning in *Sayadi* should be subject to any less criticism – to the contrary. Only a principled approach to reviewing UNSC decisions can serve to guide us in the future.

<sup>32</sup> See the list of de-listed persons as updated on 10 August 2009, available at <http://www.un.org/sc/committees/1267/docs/Delisted.pdf> (last visited 13 December 2009).

