

International Law and the Silencing of Victims of Human Rights Breaches

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States create International Organisations (IOs) with the aim of pooling their resources together to achieve a common purpose, in an effort to better the world and the lives of individuals; therefore controlling their acts was not considered an essential task. However, international relations have come a long way since the emergence of the first International Organisations in the late 1800s and we have seen ‘the gradual emergence of a kind of superstructure over and above the society of states’ (Mosler 1974, p.189 as cited in Tzanakopoulos 2010, p.1). The first International Organisations, such as the International Telegraph Union and the Universal Postal Union had specific aims and limited remits. Over the years IOs have become more complex with effectively unlimited remits and have been given more complex roles to play in world affairs (Wellens 2002, p.14-15). The increasingly wider scope of their remits and greater authority, results in IOs acting more frequently and with deeper, far reaching consequences (White 2005, p.32). The increase in the activities of IOs over the decades has created a greater need to control IOs and hold them to account for their conduct in order to prevent them from becoming smoke screens for member entities to hide behind when implementing their own agenda or acting in contravention of international obligations (Klabbers 2011, p.6) thus resulting in people being silenced and denied their human rights.

The act of holding an IO to account is a delicate one as efforts must be made ‘to keep the balance between preserving the necessary autonomy in decision-making of International Organisations and guaranteeing that the International Organisations will not be able to avoid accountability’ (Klabbers 2011, p.6) IOs must be held to account to ensure common goals are reached and aims progressed. A failure to do so may result in distancing from the goal and in the wrong entity being attributed with the conduct and ultimately being held responsible.

The UN is one of the most active and arguably the most powerful IOs. One of the goals or desires of the group of States that established the UN was:

[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. (Preamble to the Charter of the United Nations 1945)

Consequently one of the purposes of the UN is:

To achieve international co-operation in [...] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. (Charter of the United Nations 1945, Article 1 paragraph 3)

Further to this aim, the people of the United Nations signed the Universal Declaration of Human Rights ('UDHR') in 1948. Two years later the Council of Europe, considering the UDHR and desirous to further its aim of maintenance and furtherance of Human Rights and Fundamental Freedoms, established the European Convention on Human Rights and Fundamental Freedoms (ECHR). The ECHR has been signed and ratified by all member States (MSs) of the Council of Europe. In Europe, notwithstanding domestic legislation,¹ the ECHR is used as the basis for human rights claims. Article 13 of the ECHR provides that every person has the right to an effective remedy before a national authority if his or her ECHR rights have been violated.

The international legal sphere, on the other hand, does not always provide a forum for mandatory judgements on breach of international obligations and the subsequent enforcement of international law in the way that the domestic legal order provides for domestic legal issues (Wellens 2002, p.38) The International Court of Justice (ICJ) for instance only has competence to hear State parties and cannot hear a case to which an IO is party (Statute of the International Court of Justice, Chapter II article 34 (1)). The founders of the ECHR were mindful of this void and the possible ramifications of allowing States to be the judge of their own conduct under article 13 ECHR. Therefore section II of the ECHR established the European Court of Human Rights (ECHR) and defined its scope and function whilst article 34 provided individuals with the right to bring applications to the ECHR against contracting States² that have violated their rights.

Over the years many parties have brought cases against States to the ECHR and the European Court of Justice (ECJ).³ Where these cases have involved the UN, the respondent State has argued that the conduct forming the subject of the action is not attributable to it but rather is attributable to the UN. One factor which makes this line of argument extremely

¹ For example the UK Government's Human Rights Act 1998

² The provision actually reads 'contracting parties', however at present only States are party to the ECHR. The EU, which is an international organisation, is in the process of acceding to the ECHR.

³ The ECJ is the court of the EU and interprets EU law to ensure uniform application across MSs. Individuals, groups and companies can bring claims concerning EU institutions before the ECJ.

attractive to States is that the UN enjoys immunity from suit pursuant to article 105 of the UNC and s.2 of the Convention on the Privileges and Immunities of the United Nations (CPIUN)⁴ (Wellens (n56) 88-89).⁵ Nonetheless, the UNGA and UNSC are able to seek advisory opinions from the ICJ without having to then act in accordance with the opinion (Statute of the International Court of Justice, Chapter IV). The UN also has ‘capacity to bring an international claim’ (Wellens 2002, p.38) however it cannot be sued itself. This immunity hardly seems just or acceptable from an organisation which has been put in place to create and maintain international order and respect for fundamental rights.

Whilst s.2 of the CPIUN gives the UN discretion to waive its immunity, the discretion rarely seems to be exercised. The Cholera outbreak in Haiti serves as an example. The incident, which has resulted in the death of thousands, is alleged to have been caused by UN Peacekeepers who travelled to Haiti from Nepal.⁶ A Boston group called Institute for Justice and Democracy in Haiti (IJDH) filed a class action on behalf of the victims and families of the deceased.⁷ The action is based on the standard clauses contained in part VIII ‘settlement of disputes’ of the Status of Forces Agreement (SOFA), signed by the UN and Haiti. (Agreement between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti) The clauses provide that disputes of a private law nature should be heard by a standing claims commission yet no such commission has been established. This is despite a decision by the UN Secretary General, in the mid ‘90s, that the standard clauses for settlement of disputes ‘should be retained so that the UN does not act as its own judge’ (Boon 2012). The IJDH claims for compensation have been rejected by the UN as they are deemed not be to receivable in terms of section 29 of the Convention on the Privileges and Immunities of the United Nations (CPIUN).⁸ The UN could choose to waive its immunity under section 2 of CPIUN however to date it has not shown any willingness nor likelihood of taking such action. Therefore, notwithstanding action taken by the UN and other organisations in response to the outbreak, the victims and families of the deceased have been left without recompense or remedy.

⁴ The reason immunity was originally granted to IOs was to ensure the independence and efficient functioning of the IO.⁴ However as will be seen from the analysis of cases, this immunity seems to be resulting in more than the independent and efficient functioning of the IO.

⁵ This means the UN cannot be sued in an international or domestic court.

⁶ See for example <http://www.bbc.co.uk/news/world-latin-america-20024400>

⁷ See generally <http://www.ijdh.org/>

⁸ See <http://opiniojuris.org/wp-content/uploads/LettertoMr.BrianConcannon.pdf>; <http://www.ijdh.org/wp-content/uploads/2013/07/UNSG-Letter-to-Rep.-Maxine-Waters.pdf>; <http://www.ijdh.org/wp-content/uploads/2013/07/20130705164515.pdf>

Individuals, as alluded to above, can bring actions against States without facing problems of immunity. This simplifies matters to some extent but only at the first step raising the action in a court. Once the case reaches a court room – or in written pleadings submitted prior to a hearing – individuals may be faced with the argument that the conduct complained of is not attributable to the State but to an IO, such as the UN.

Where a State denies that certain conduct is attributable to it, the task of attribution of conduct becomes pivotal as discernable from the cases analysed below. Attribution of conduct has to some extent been addressed by the UN International Law Commission's⁹ Articles on the Responsibility of States for Internationally Wrongful Acts and Draft Articles on the Responsibility of International Organizations. Nonetheless attribution of conduct remains 'one of the thorniest issues in the field of responsibility of international organizations' (Tzanakopoulos, 2011. p.17). The uncertainty surrounding the test or threshold for attribution of conduct complicates the task and often leads to States being able to evade having their conduct attributed to them.

The joint case of Behrami/Saramati (Behrami v France; Saramati v France, Germany and Norway) demonstrates the problems caused by this uncertainty and the immunity enjoyed by the UN. The facts of each case will be presented before an analysis of both is carried out. The *Behrami* case was brought by Mr Behrami before the European Court of Human Rights, on the grounds of article 2¹⁰ of the ECHR, against France, Norway and Germany. The facts of the case were that eight boys were playing in hills near the Mitrovica region of Kosovo and came across some undetonated cluster bomb units (CBUs) dropped during NATO Airstrikes in 1999. One boy, not realising the CBUs were live, threw a CBU which exploded in the air. The bomb killed one of Mr Behrami's sons and left the other son blind and disfigured. The main ground Forces in the area were KFOR¹¹ and UNMIK¹²; they were to work together but neither was accountable to the other. (Paragraph 118 Behrami/Saramati)

⁹ UN International Law Commission

¹⁰ 'Right to Life'

¹¹ The Kosovo Force (KFOR) was established under UN Resolution 1244 as the international security presence, without an official SOFA being agreed. The relevant UNSC Resolution provision leading to the creation of KFOR stated that an "international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control". NATO, with the assistance of Supreme Headquarters Allied Powers Europe, in actuality led the operation and had *de facto* command over the operation, rather than simply participating. KFOR troops are from 35 countries, both NATO members and non-members.

¹² The UN Mission in Kosovo (UNMIK), which was established under UN Resolution 1244 as the international civil presence, was classed as a UN subsidiary organ and was the first mission of its kind. UNMIK was established as the interim administration in Kosovo, with legislative and administrative powers as well as power to administer justice.

Following the incident, UNMIK, being tasked with police administration carried out investigations into the incident. The UNMIK police were not able to access the scene of the explosion without the permission of KFOR. It was established that KFOR was aware of the undetonated CBUs but had not taken any action as it did not consider the task a priority. KFOR marked out the site the day after the explosion. The Troop Contributing Nation Claims Office (TCNCO) on behalf of KFOR refuted any responsibility for the incident. KFOR argued that it had passed responsibility for the mine clearing operation to UNMIK on 5th July 1999. The UN Mission in Kosovo counter argued that whilst it was tasked with clearing the mines, it was to do so after KFOR had marked out the relevant sites and provided information to UNMIK pursuant to the KFOR Directive¹³ on CBU Marking; and therefore it was prevented from acting due to KFOR's failure to carry out its duties. Mr Behrami, as applicant, submitted to the court that the wrongful conduct was attributable to KFOR and, due to KFOR lacking independent legal personality,¹⁴ to France. France, as respondent, argued that the conduct of KFOR, whether carried out by French nationals or not, was attributable to the UN. The UN, as a third party, argued that the omission to de-mine was attributable to KFOR and in turn attributable to NATO rather than to the UN.

The Saramati action was brought, under articles 5, 6 and 13¹⁵ of the ECHR, by Mr Saramati, who had been arrested in Prizen on suspicion of attempted murder and illegal possession of a weapon. Approximately a month after he had been released on bail he was told by UNMIK police to attend the local Prizen police station to collect his possessions. Upon attending the station he was arrested by UNMIK police under orders of the Commander of KFOR (COMKFOR) who at the time was a Norwegian national but later was replaced by a French National. Mr Saramati's detention was, after his second arrest, extended by COMKFOR on two occasions. The Supreme Court of Kosovo would not order his release as they considered his detention to be wholly under the authority of the Kosovo Force. Mr Saramati submitted to the court that his wrongful detention was attributable to KFOR and, due to KFOR lacking independent legal personality, to the TCNs (the Troop Contributing

¹³ KFOR/OPS/FRAGO 300 which was adopted on 29 August 1999.

¹⁴ KFOR and UNMACC were not entities with independent legal personality and so cannot be recognised as legal persons; rights and responsibilities can only be held by legal persons. KFOR actions must be viewed as those of the entity controlling and acting through KFOR. The same is true for the UNMACC. The equivalent in domestic law would be a "trading as" name used by an individual or company. The trading as persona is not real and so we would have to look at who is using the name to carry out trade. B/S paras 118 - 120

¹⁵ 'Right to Liberty and Security'; 'Right to a Fair Trial' and 'Right to an Effective Remedy'.

Nations (TCNs)). The TCNs in turn argued that the wrongful conduct was attributable to the UN.

The dispute, over which entity had perpetrated the action in each case, resulted in the Court seeing it necessary to establish to which entity conduct was attributable prior to examining the merits of the argument. The Court after some deliberation essentially held that the mandate of each party, rather than their actions and subsequent undertakings, was decisive in the question of attribution of conduct as it held that the wrongful conduct in Saramati was attributable to KFOR and in Behrami to the UN Mission in Kosovo. Despite referring to article 7 (then article 5) of the Draft Articles on the Responsibility of International Organizations (DARIO) in paragraphs 28-33 of its Decision, the Court did not apply, or at least did not correctly apply Article 7, which provides that:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

The court by simply looking at control and responsibility structures on paper seemed to suggest that conduct outside of the mandate would not be attributable to the UN. This is not the case as evidenced by the terms of article 8 DARIO¹⁶ which attributes *ultra vires* conduct to an International Organisation and article 7 ARSIWA¹⁷ which attributes *ultra vires* conduct to a State. The Court seemed to ignore the practical and factual situation. Had the Court considered matters in a more practical sense it may have viewed KFOR's undertaking to mark out CBU areas¹⁸ together with the fact that KFOR marked out the relevant Mitovika site the day after the explosion as significant. The Kosovo Force's undertakings and actions showed that it was the entity responsible for marking out sites which UNMIK MACC (UNMACC)¹⁹ would then clear. Therefore the Court could have either attributed the omission to KFOR's failure to mark out the areas or else to both KFOR and UNMACC for

¹⁶ The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions.

¹⁷ 'The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.'

¹⁸ See the KFOR Directive on CBU Marking (KFOR/OPS/FRAGO 300) adopted on 29 August 1999; report of KFOR for July 1999 (submitted to the UNSC by the SG's letter of 10 August 1999)

¹⁹ The UN Mine Action Coordination Centre (UNMACC) established by UNMIK.

failing to mark out and failing to demine, respectively.

Moving on from this point, the Court had to determine to which entity the actions of UNMACC and KFOR, respectively, were attributable as both entities lacked international legal personality. The position is relatively straight forward in the case of UNMACC. UNMACC was controlled by UNMIK which was a UN subsidiary organ; rendering the UN Mine Action Coordination Centre a UN organ and its actions as attributable to the UN under article 6 DARIO.²⁰ The position in relation to the Kosovo Force is more complicated as it was not officially a subsidiary organ of any IO. The Court started the process of attribution of conduct by looking at the Chapter VII basis for KFOR and stated that ‘the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated’ (Behrami/Sarmati, para 133). Whether delegation of operational command is even necessary or indicative that conduct should be attributed to an entity is questionable and it has been said that the Court unnecessarily conflated the two issues leading to serious issues for public policy (Milanovic 2009, p85 and Sorathia 2011; p.271, 283, 287, 288 and 292).

The Court concluded that ‘the UNSC retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO’ (Behrami/Saramati para 140). It is not clear why, despite alluding to article 7 DARIO with its criterion of ‘effective control’ as relevant, the Court thought “ultimate control and authority” or “effective command” was the correct criterion. The Court referred to issues of procedural correctness, clarity and expresses, and reporting requirements of the Resolution and mandate when it decided that the UNSC had retained ultimate authority and control. These factors, whilst important internal policy considerations, are not decisive when dealing with attribution of conduct and the treatment of third parties. The factors have no real bearing on whether effective control is actually exercised on the ground, which is the basis on which conduct should be attributed according to article 7 of the Draft Articles on the Responsibility of International Organizations (Breitegger 2009, p.165; Milanovic 2009, p.85; Sari 2008, p.164 and Van Der Toorn 2008, p.18). According to the UN International Law Commission:-

The criterion for attribution of conduct either to the contributing State or organization or to the receiving organization is based according to article 7 on the factual control that is

²⁰ Article 6 provides:-

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
2. The rules of the organization apply in the determination of the functions of its organs and agents.

exercised over the specific conduct taken by the organ or agent placed at the receiving organization's disposal. (DARIO page 3, para 4 of commentary to article 7)

Therefore the author would respectfully argue that the Court's analysis of paperwork shows an error in its understanding of article 7 of the Draft Articles on the Responsibility of International Organizations and results in a flawed conclusion. The real question is not who had a mandate but who (if anyone) had *effective control* on the ground (Sorathia 2011, p.289; Milanovic & Papic, 2009, p.9).

Operational command is the type of authority generally held by NATO commanders and does not necessarily indicate effective control or otherwise. The Court, under headings concerning attribution to KFOR and UNMIK, actually considered attribution of conduct to the UN. The Court held all conduct as ultimately attributable to the UN. The action was consequently declared inadmissible due to the Court's lack of jurisdiction, *ratione personae*, over the UN. This allowed the MSs to circumvent; having conduct attributed to them and possibly having their responsibility engaged.

The author would argue that had the Court considered the question of effective control correctly, one of four positions may have arisen:-

- (a) Conduct was attributable to the relevant State (article 4 ARSIWA)

The conduct of a State organ is automatically attributable to the State under article 4 ARSIWA²¹. Accordingly, the starting point for the Court should have been that the conduct of each force was attributable to the State of nationality. The Court should have moved on from here to consider whether enough control had been relinquished by each State to engage the provisions of articles 6 or 7 DARIO, referred to above. If we look at actual structures and events on the ground, there is an argument that France retained so much control over KFOR that KFOR could not be considered as having been placed at the disposal of NATO, (or at the disposal of the UN if we accept the Court's decision that the Kosovo Force was controlled by the UN) and so conduct could have been attributed to France as primarily argued by the parties (Sari 2008,p.155; Van Der Toorn 2008, p.20; Sorathia 2011, p.271, 285, 288 and 290; and Milanovic & Papic 2009, p.8, 10, 19).

- (b) Conduct was attributable to NATO

²¹ Article 4 provides:-

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

The Kosovo Force was led by NATO under “unified command and control”. The Directive in which KFOR undertook to mark CBU areas, referred to “growing pressure for KFOR to dispose of NATO munitions.” The pressure on KFOR to “undo” NATO damage, would suggest that there is a close link between NATO and KFOR resulting in this expectation of KFOR. This in turn would suggest that NATO is, at least to some extent, in control of KFOR. The question would then be, is this control enough to overcome ARSIWA and render the state organs as seconded to NATO under article 6 DARIO or as placed at the disposal of NATO under article 7 DARIO? The level of control retained by the TCN would not allow article 6 to be satisfied however, if we view effective control as a non-exclusive type of control²², the level of control retained may have allowed effective control by NATO over some areas of conduct; rendering KFOR conduct attributable to NATO.

(c) Conduct was attributable to the UN

The Court states KFOR acted as a service provider to the UN Mission in Kosovo. However, UNMIK had no authority over KFOR to compel its adherence to the plan. Given that KFOR only had a general duty to report to the UNSC and was led under NATO unified command and control, it is difficult to see how the UN had effective control of KFOR in terms of article 7 DARIO.

(d) Conduct was attributable to more than one entity (articles 4 ARSIWA, 6 and 7 DARIO).

The Court’s failure to discuss the possibility of concurrent attribution of conduct has attracted much criticism (Breitegger 2009 p.172; and Boudeau-Livinec, Buzzini & Villalpando 2008, p.328). Now depending on the way in which one interprets “effective control”, it may or may not have been possible to have concurrent attribution. Interpreting effective control as exclusive control would mean that if both an IO (i.e. the UN and NATO) and the TCN exercise some control over KFOR, conduct must be attributed exclusively to the TCN as the TCN cannot be considered as placed at the IO’s disposal nor can it be considered as under the exclusive/effective control of the IO. However if we do not view effective control and exclusive control as intertwined, then attribution does not necessarily have to be exclusive. There is a possibility that the orders received by COMKFOR from NATO, the UN and France or Norway (depending on, which case we are looking at), which COMKFOR then handed down, coincided. The result may be that both an organic and control link exists and

²² Court reasoned at paragraph 138 that some degree of retained control by the TCNs is to be expected and that lack of exclusive control does not prevent effective control

consequently conduct can be attributed concurrently. There is also a possibility that some factors which led to the omission to mark out, or demine, the CBU areas related to NATO control or UN control whilst other factors may have resulted from the retention of control by the TCN. This would mean that different entities had control over the various acts which culminated in the wrongful acts and omissions forming the subject of the applications.

Had the Court attributed conduct currently to the TCNs, it could have subsequently declared jurisdiction over the TCNs alone as it had no jurisdiction over the UN or NATO. The Court could have then engaged the TCN's responsibility which would have avoided the applicants being left with no recourse or remedy. However the Court's decision allowed NATO, France and Norway to avoid having their acts and omissions attributed to them. The failure of the Court to consider these possibilities enabled Norway and France to circumvent having wrongful conduct attributed to them and their responsibility being engaged and set a worrying precedent for those seeking redress for violations of human rights during UN military operations.

The case is demonstrative of the uncertainty surrounding attribution of conduct and the test of effective control. The uncertainty exacerbates the task of attributing conduct whilst the lack of jurisdiction results in the whole exercise being meaningless, unless of course pressure is placed on the UN following such an outcome. The result in this case was that Mr Behrami, his surviving yet impaired son, and Mr Saramati were all silenced and left without recourse or remedy.

The problems caused by UN immunity and the elusive test of "effective control" can also be seen when looking at the infamous UN Security Council (UNSC) Sanctions Regime. Sanctions were initially used as political bargaining tools. The UN would place sanctions against a State until it conformed to and complied with certain treaties or expectations. The series of sanctions starting with Resolution 1267 (1999) are different in nature, in that they are not truly bargaining tools (Godhino 2010, p.68-70). They oblige States to amongst other things, freeze funds and assets of individuals, deemed by the Sanctions Committee²³ to be associated with Osama bin Laden²⁴ (now deceased), Al-Qaeda, the Taliban and the persons, groups, undertakings and entities associated with them. The Sanctions Regime has gone through some changes and now the Sanctions Committee, as well as maintaining the list of designated persons, can receive requests from States to add or remove names as well as

²³ Created by Resolution 1267.

²⁴ UN Resolution 1267 uses the less popular spelling: "Usama".

requests to derogate from freezing assets. An Ombudsman, separate to the sanctions committee has also been established to receive delisting requests.²⁵

The individuals who have their assets frozen, travel bans imposed on them and their lives interfered with, have not been charged with any offences; have not been given a statement of conduct with which they are expected to comply; nor do they have any foreseeable prospect of having the sanctions lifted. The sanctions are kept in force for long indefinite periods of time, causing them to become punitive despite guilt not being proven – contrary to article 7 ECHR²⁶ – and the individuals being given no real opportunity of defending the allegations. This is of course contrary to human rights obligations placed on States by international treaties or the State's constitution and causes the issue of attribution and subsequent responsibility to be of greater importance. The Sanctions Regime was considered in Kadi I, II and III.

Mr Kadi was designated on the sanctions listed in 2001 and sought to have his name removed. Mr Kadi first lodged an action, in 2001, at the Registry of the Court of First Instance of the ECJ against the Council of the European Union and Commission of European Communities (the institutions) for the annulment of Regulation No 467/2001 and 2062/2001, which – together with other Regulations – implemented the Sanctions Regime in the EU legal order. The Court of First Instance, in 2005, ruled that the sanctions imposed by the contested regulations were done so in strict implementation of a UNSC Resolution by virtue of the EC Treaty, notwithstanding the fact that the institutions argued that they were bound by the UNC (Kadi I, para 207). The Court of First Instance essentially saw the sanctions as being an act of the UNSC and therefore it did not undertake a review due to the UN's immunity.²⁷ The case was then appealed to the General Court (Seventh Chamber) of the ECJ. The General Court, in 2010, implicitly held that the conduct was attributable to the Community and that the Court could competently review acts of the Community. The ECJ found the Community measure was not consistent with the rights guaranteed by the Community and as such had to be voided in respect of Kadi within the following three months. The case was then appealed by the institutions and the UK to the Grand Chamber of the ECJ: Kadi III. The Grand Chamber agreed with the General Court and held that it was perfectly valid for the Community

²⁵ The establishment of this body was confirmed in letter, S/2007/178, dated 30th March 2007 from the UN Secretary General to the UNSC.

²⁶ 'No punishment without law'

²⁷ Although it argued that it could do so if the UN breached *jus cogens* established by the terms of the UNC: see Kadi I paras 226 – 231)

Judicature to review community acts. The Court could look at the reason behind implementation of a given Regulation. According to the Court the sanctions were implemented pursuant to the contested Regulations which were acts of the community and so were attributable to the community rather than the UNSC. The Grand Chamber, in 2013, confirmed that the Regulation must be voided in respect of KADI (Court of Justice of the European Union, 2013). The Court stated that it was acceptable for the Courts to step in to ensure that Community principles were upheld, despite the need to maintain a balance between aiding in the fight against terrorism and ensuring fundamental freedoms are not restricted. Prior to the Grand Chambers judgement, a delisting request sent to the Ombudsman by Mr Kadi was successful and his name was finally removed from the Sanctions list after more than 10 years of being on the list.

Whilst this was a victory for Mr Kadi on an individualistic level, it was not a victory on a collective level as the Sanctions Regime continues at large and individuals are still silenced unless they are able to expend the huge amount of time and resources required to bring a challenge. The Grand Chamber and General Court failed to recognise that the UNSC was exercising effective normative control over member States and the EU. Had the Grand Chamber and General Court recognised the concept of effective normative control, it could have attributed the sanctions to the UN and the EU concurrently. However even if the UN waived its immunity, its responsibility could only be engaged if the Sanctions Regime could be considered as violating *jus cogens* by which the UN is bound. There is also a concern that the UNSC will now attempt to make sanctions targets more vague and difficult to challenge.²⁸

It seems like the immunity the UN enjoys has made it possible, to go against one of its founding purposes and to exercise power in a disproportionate manner resulting in the silencing of those who have had their human rights violated. The immunity enjoyed by the UN together with the uncertainty surrounding the principle of ‘effective control’ and requirements for attribution of conduct, results in States seeking to attribute their acts to the UN. Therefore in order to achieve fairness for parties affected by the actions of an IO and preserve the aim of the IO, the immunity of an IO should be limited to the degree that court involvement is necessary without amounting to undue interference.

²⁸ See further Antonios Tzanakopoulos, *Kadi Showdown: Substantive Review of (UN) Sanctions by the ECJ* at <http://www.ejiltalk.org/kadi-showdown/>

The rules surrounding attribution of conduct and the concept of ‘effective control’ must be clarified. If normative effective control is not recognised and the acts of the UN are continued to be regarded as above the law, then many more will be silenced in their quest to enforce their human rights.

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