

APPLICATION OF INTERNATIONAL COUNTER-TERRORISM MEASURES BY NATIONAL BODIES (COURTS)

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Abstract in original language

Článek pojednává o problematice mezinárodních protiteroristických opatření, konkrétně se pak zaměřuje na aplikaci sankcí (především zmražení majetku) zavedených OSN proti Al Kajdě a Talibanu. Cílem článku je analyzovat, zda v dané problematice hrají nějakou roli vnitrostátní soudy, a pokud ano, jak se s touto problematikou dle národní legislativy vypořádávají či mají vypořádat.

Key words in original language

Mezinárodní sankce, OSN, Al Kajda, Taliban, vnitrostátní soudy.

Abstract

The contribution deals with international counter-terrorism measures, concretely it is focused on application of the UN sanctions (mainly of assets freeze) against Al-Qaida and the Taliban by member states of the United Nations. The aim of the contribution is to analyze if there is some role of national courts in mentioned international sanctions regime and if so how the courts are or should be dealing with this issue.

Key words

International sanctions; the United Nations; Al-Qaida; the Taliban; national courts.

1. INTRODUCTION

After the determination of international terrorist acts perpetrated by the members of Al-Qaida and the Taliban as *a threat to international peace*, the UN Security Council ("UNSC") has decided what concrete measures would be taken to maintain and restore international peace and security.¹ These measures, namely assets freeze, arms embargo and travel ban, were firstly adopted in *the Resolution 1267 (1999)* and the subsequent resolutions² have further developed them, as well as a

¹ Under Art. 39 of the UN Charter the UN Security Council is competent to determine the existence of threat to international peace and security and to decide what measures shall be taken to maintain or restore them.

² The UNSC Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1988 (2011) and 1989 (2011). All Resolutions were adopted *under the Chapter VII* what means (in conjunction with Art. 25 of the UN Charter) that all the UN member states have to implement the

procedure of listing and delisting of alleged terrorists and their supporters on the Consolidated List³. The aim of the measures has been to affect the concrete individuals - members of terrorist groups or their supporters, concretely to stop them in perpetrating terrorist acts.

This submitted contribution is concentrated on a particular issue of *assets freeze* imposed on individuals listed on *the Consolidated List* administered by *the Al-Qaida and Taliban Committee*⁴. At the outset it demonstrates how is the measure implemented and applied by national bodies in the Czech Republic and further it is analysed *a role of national courts* (not only in the Czech Republic) - if they have any competences in this area and if so, how they are or should be dealing with this issue.

2. APPLICATION OF MEASURES

2.1 APPLICATION BY NATIONAL BODIES

Member states of the UN implement the given UNSC Resolutions including the measures and the Consolidated List by *national acts*.

For demonstration how does this international legal regulation work in practice, for example in *Czech Law* there is one concrete Act, namely *the Act on Carrying Out of International Sanctions*⁵, which provides a general framework for application of all international sanctions imposed by the Security Council or the European Union.

measures to their national legal system and imposed them on the persons and organizations listed on the Consolidated List. The last UNSC Resolutions 1988 (2011) and 1989 (2011) has changed the Al-Qaida and Taliban sanctions regime, split them and now are the measures applied only against Al-Qaida terrorists and their supporters.

³ The Consolidated List is a list where are stated names of alleged terrorists and their supporters who are listed and sanctioned by the above mentioned measures. See concretely: The List established and maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. The Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Last updated 30 December 2011 [cited 31 December 2011]. Available from: http://www.un.org/sc/committees/1267/qa_sanctions_list.shtml.

⁴ The Al-Qaida and Taliban Committee (also known as the 1267 Committee) was established by the Resolution 1267 (1999) as a subsidiary body of the UNSC. It decides e.g. on the listing and delisting of alleged terrorist and their supporters.

⁵ Act No. 69/2006 Coll., *on Carrying Out of International Sanctions*, as amended ("Act on Carrying Out of International Sanctions").

In the case of Al-Qaida and the Taliban there is a slightly different position of member states of the European Union (e.g. the Czech Republic) because this organization considered that *these measures [stated in the Resolutions concerning Al-Qaida and the Taliban terrorists and their supporters] fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions of the Security Council as far as the territory of the Community is concerned.*⁶ Thus the EU (Council of the EU) adopted directly effective Regulation which implements the measures as well as the Al-Qaida and Taliban Consolidated List (in Annex of the Regulation) which is updated by amendments of the EU Commission for all EU member states. The EU member states have to establish a national mechanism which could apply the measures on the listed natural and legal persons and have to stipulate the sanctions that could be imposed on perpetrators of the Regulation.

In the Czech Republic there is *Ministry of Finance*⁷ as a responsible administrative body for coordination of implementation and application of the measures and for imposition of sanctions on perpetrators of obligations stipulated by the Regulation.⁸

A concrete application of the measures is primarily based on *reporting duty* of both legal and natural persons to the above mentioned administrative body in the case if they are in possession of assets of the listed person or organization.⁹ Then the administrative body has to *decide*¹⁰ *on a restriction or a prohibition of disposing of such assets*¹¹. There might be a *remonstrance* (a special appeal) against this decision to the Minister of Finance.¹²

⁶ Council Regulation (EC) No 881/2002 of 27 May 2002 *imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan.*

⁷ More precisely *Financial Analytical Unit of Ministry of Finance* ("FAU").

⁸ International Sanctions. Ministry of Finance of the Czech Republic [online]. Last modified 15December 2011 [cited 20 December 2011] Available from: http://www.mfcr.cz/cps/rde/xchg/mfcr/xsl/EN_Internat_sanction.html.

⁹ Sec. 10 par. 1 of the Act on Carrying Out of International Sanctions.

¹⁰ A usual *time limit* is *30 days*, but this limit might be extended in justified cases. (Sec. 12 par. 2 Act on Carrying Out of International Sanctions).

¹¹ Sec.12 par. 1 a) of the Act on Carrying Out of International Sanctions.

¹² Sec.12 par. 3 of the Act on Carrying Out of International Sanctions.

2.2 APPLICATION BY NATIONAL COURTS

The listing on the Consolidated List and subsequent imposition of international counter-terrorism measures by the Al-Qaida and Taliban Sanctions Committee on the individuals constitutes *serious restrictions of their particular human rights*. The important fact is that listed persons have no possibility to challenge the listing before independent and impartial competent court on the international level. There is *no court of the United Nations that has competence in dealing with the listing or delisting of individuals*.¹³ The only UN body that considers delisting requests is *the Office of the Ombudsperson*.¹⁴ However this body is not comparable to independent and impartial judicial body because its recommendations are not binding for the Al-Qaida and Taliban Committee.¹⁵

The consequence is that national bodies have to apply measures interfering to human rights of persons *without any discretion* (because UNSC resolutions under the Chapter VII are legally binding for all UN member states and under Art. 103 of the UN Charter the obligations arising from the UN Charter prevail over obligations arising from other international treaties) and with awareness of the fact that the given persons had no possibility to challenge these restrictions effectively.

In this situation the last chance of the listed individuals to have their assets unfrozen is an independent and impartial national court that is competent to decide if there is a violation of individual's rights by a state body (which froze his/her assets). Because of the complicated cases concerning assets freeze, there are cases before the highest judicial instances of the UN member states.

2.2.1 CZECH REPUBLIC

In the Czech Republic there has not been yet any case of challenging the listing and the assets freeze before any Czech court.

¹³ MALENOVSKÝ, J. Mezinárodní právo veřejné: jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému. 5., podst. upr. a dopl. vyd. Brno: Masarykova univerzita, 2008, s. 395.

¹⁴ Par. 21 of the Resolution 1989 (2011).

¹⁵ Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities. The Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Published 13 April 2011 [cited 25 December 2011]. Available from: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/245.

An application against the remonstrance of the Minister of Finance (more precisely *an application on cancellation of the administrative body's decision*) shall be submitted *to an administrative court*.¹⁶ If this administrative court would reject the application, the appellant may submit *a cassation complaint to the Supreme Administrative Court* (on the grounds stipulated in Sec. 103 of the Code of Administrative Justice) and if this Court would reject this complaint, the individual may submit *a constitutional complaint to the Constitutional Court*¹⁷ challenging the assets freeze that e. g. was made under a decision of Ministry of Finance and in accordance with the national legislation but *contrary to his/her right to a fair trial* because he or she has *no effective legal remedy* to challenge the listing or the assets freeze before an independent and impartial judicial body because Ministry of Finance only carried out the decision of the UNSC or more precisely of the EU (EU Council and EU Commission).

There is one important fact in the (Czech) judicial proceedings where is EU Regulation taken into account (applied) - the national court should *suspend the proceedings* and should *request for a preliminary ruling of the Court of Justice of the EU* concerning the (in)validity of the legal act of the EU (because of the violation of human rights).¹⁸ Or the listed individual may submit on the same grounds *an action for annulment of Regulation No 881/2002* to the Court of Justice of the EU, in so far as it concerns him or her.¹⁹

2.2.2 SWITZERLAND

In contrast to a theoretical situation in the Czech Republic analysed above, in Switzerland there was at least one challenge to the assets freeze and the listing of an individual.²⁰

¹⁶ Sec. 65 par. 1 of the Act No. 150/2002 Coll., Code of Administrative Justice, as amended ("Code of Administrative Justice").

¹⁷ Art. 87 par. 1 d) of the Act. No. 1/1993 Coll., Constitution of the Czech Republic, as amended: *The Constitutional Court has jurisdiction over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms.*

¹⁸ Art. 267 of the Treaty on the Functioning of the European Union.

¹⁹ Such action was submitted by Mr. Y. A. Kadi. See e.g. *Judgment of the Court (Grand Chamber) of 3 September 2008, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P.

²⁰ The case is now pending before the Grand Chamber of the European Court of Human Rights: *Nada vs. Switzerland* (Application no. 10593/08).

The Swiss Federal Council adopted in 2000 *the Anti-Taliban Order* implementing the measures against listed individuals and organizations. One of the listed individuals was Mr. Nada who complained about it but all his administrative appeals were rejected.²¹

The case was brought before *the Swiss Federal Court*.²² The application for delisting of Mr. Nada was dismissed. According to the judgment the main reason for dismissal was Art. 103 of the UN Charter where is stated *the prevalence of obligations arising from the UN Charter (and from the Resolutions adopted under the Chapter VII of the UN Charter) over the obligations emerging from other international treaties* (even human rights treaties). Moreover the court held that the UN member states have no discretion in listing or delisting of persons or organizations and delisting of Mr. Nada (because of violation of fundamental human rights) by the Switzerland could jeopardize the application of the Al-Qaida and Taliban sanctions.²³

2.2.3 THE UNITED KINGDOM OF THE GREAT BRITAIN AND THE NORTHERN IRELAND

In the United Kingdom there were some cases concerning the Al-Qaida and Taliban sanctions.

The transposition of the UNSC Resolutions concerning measures against Al-Qaida and the Taliban alleged terrorists and their supporters and the Consolidated List was made into *British Law* by Her Majesty's Treasury Orders - namely by *the Terrorism Order 2006* and *the Al-Qaida and Taliban Order 2006* (in accordance with the (British) United Nations Act 1946 which authorises the making of Orders in Council as are 'necessary or expedient' to give effect to UNSC Resolutions²⁴).

The listing and imposition of the sanctions stated in mentioned Orders was challenged by A, K, M, G and HAY before the Supreme Court of

²¹ Exposé des Faits: Nada vs. Switzerland. The European Court of Human Rights [online]. Published 17 March 2009 [cited 30 December 2011]. Available from: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=848716&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

²² Judgment of the (Swiss) Federal Court of 14 November 2007, case 1A.45/2007/daa.

²³ Judgment of the (Swiss) Federal Court of 14 November 2007, case 1A.45/2007/daa., par. 6.2.

²⁴ Sec. 1 of the United Nations Act 1946

the United Kingdom.²⁵ The court held that *the Treasury acts ultra vires* in issuing the Orders because the measures *gravely interfere to the fundamental human rights*, the individuals were listed on the grounds of "*reasonable suspicion*"²⁶ (that the individual/organization is perpetrator or supporter of terrorist acts)²⁷ and the listed persons/organizations have *no right of access to a court*.²⁸

Even if this judgment seems to be only national matter and have principally no impact on international law, contrary is the case. As we can see in *the Eleventh Report of the Monitoring Team*²⁹ for the Al-Qaida and Taliban Sanctions Committee, the Monitoring Team has stressed as an important trend, that national courts, concretely the Supreme Court of the United Kingdom as one of that courts, ruled in favour of listed persons because of impossibility of judicial remedy.³⁰

3. CONCLUSION

This contribution may be concluded that there is no doubt about the importance of fighting against terrorism and the UN member states and their national bodies are aware of this fact. A complicated issue

²⁵ Judgement of the Supreme Court of the United Kingdom, Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants) Her Majesty's Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant) R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant), 27 January 2010 (2010) UKSC 2 ("Judgement of the Supreme Court of the United Kingdom").

²⁶ "Reasonable suspicion" is a sufficient ground for the listing and subsequent freezing of assets.

²⁷ Par. 197 of the Judgement of the Supreme Court of the United Kingdom

²⁸ Par. 185 of the Judgement of the Supreme Court of the United Kingdom.

²⁹ *The Monitoring Team is composed of independent experts, appointed by the Secretary-General, with expertise in counter-terrorism, financing of terrorism, arms embargoes, travel bans and related legal issues and assists the Committee in evaluating the implementation of the sanctions regime by Member States.* General Information on the Work of the Committee. Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Created 31 January 2007 [20 December 2011]. Available from: <http://www.un.org/sc/committees/1267/information.shtml>.

³⁰ Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities. Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities [online]. Published 13 April 2011 [cited 25 December 2011]. Available from: http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/245, par. 31.

seems to be the way of the fighting. The main opponents of the way chosen by the UNSC are courts.

There are various approaches of national courts to the question of their role in the application of international counter-terrorism measures. Some of them have recognized the main role of the UNSC in determining measures that have to be taken to maintain and restore international peace and security, and the violation of human rights of the listed persons do not take into consideration because the obligations arising from Resolutions prevail over the obligations arising from other treaties, even human rights treaties. Some of them have not admitted implicitly that the UNSC is enabled not to adhere to human rights standards and the redline of the judgments is that even during the fight against international terrorism (a threat to international peace and security) there has to be a possibility to challenge the stipulated restrictions before an independent and impartial judicial body (to have effective judicial remedy) to be sure that these strict restrictions are not imposed on innocent persons.

The national courts (as well as the Court of Justice of the EU) have to be considered as very important defenders of human rights in this area. Their judgments evidently represent the main reason why is the UNSC improving the listing and delisting procedure to be more consistent with human rights and consequently to affect less innocent people and organizations.

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