

## From *Kadi* to *Bank Mellat*: Iran Sanctions and the Revival of the Due Process Dilemma

---

Maziar Peihani\*

### I. INTRODUCTION

*Council of the European Union v. Bank Mellat*<sup>1</sup> is an important addition to a series of suits that Iranian banks have brought before domestic and regional fora to challenge the sanctions regime imposed on Iran. In 2010, the United Nations Security Council (UNSC) imposed severe sanctions on Iran due to its nuclear program, requiring UN Member States to freeze the funds and stop the economic activities of individuals and entities specifically named as being involved in the nuclear program. Bank Mellat, Iran's largest private bank, was one of these entities. According to the UNSC, the bank was facilitating "hundreds of millions of dollars in transactions for Iranian nuclear, missile, and defense entities."<sup>2</sup> On this basis, the European Union (EU) authorities froze Bank Mellat's assets and closed its European operations. Bank Mellat challenged these restrictions, arguing that they infringed on its fundamental rights under EU law, including its rights to defense and judicial protection. On February 18, 2016, the Court of Justice of the European Union (CJEU) handed down its final judgment, finding for Bank Mellat. The CJEU affirmed the lower court's findings that the bank had not been given sufficient reasons for its listing and that there was no evidence that actually proved the bank's involvement in Iran's nuclear program.

The date of the *Bank Mellat* judgment is significant, coming only a month after the implementation of the landmark nuclear deal between Iran and the P5+1 (the UN Security Council's five permanent members and Germany), known as the Joint Comprehensive Plan of Action (JCPOA).<sup>3</sup> As part of the JCPOA, the EU had already released the assets of Bank Mellat in January 2016.<sup>4</sup> The CJEU's judgment means that

---

\* Maziar Peihani is a post-doctoral Fellow, International Law Research Program, Centre for International Governance Innovation.

<sup>1</sup> Case C-176/13 P, *Council of the European Union v. Bank Mellat*, 2016 E.C.R. (not reported) [hereinafter *Bank Mellat CJEU*]; Case T-496/10, *Bank Mellat v. Council of the European Union*, 2013 E.C.R. (not reported) [hereinafter *Bank Mellat General Court*].

<sup>2</sup> S.C. Res. 1929, Annex I, ¶ 6, S/RES/1929 (June 9, 2010) [hereinafter *Resolution 1929*].

<sup>3</sup> For the Full Text of the Joint Comprehensive Plan of Action and its annexes, see U.S. DEP'T OF STATE, JOINT COMPREHENSIVE PLAN OF ACTION (2015), <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>.

<sup>4</sup> See CJEU Press Release, No. 14/16 *The Court of Justice Confirms the Annulment of the Fund-Freezing Measures in Place against Bank Mellat Since 2010* (Feb. 18, 2016), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-02/cp160014en.pdf>.

the bank's funds were unlawfully frozen between 2010 and 2016, thus enabling the bank to sue for the damages that it has suffered as a result of wrongful designation. The judgment is an important victory for Bank Mellat and could prompt other Iranian banks, which suffered a similar fate, to follow suit. More importantly, the judgment highlights how accountability and due process deficits continue to compromise the implementation of targeted sanctions that are intended to achieve collective security goals.

This case also bears striking resemblance to *Kadi*,<sup>5</sup> the most important European litigation to date on UN sanctions and due process. Similar to the CJEU's final judgment in *Kadi v. Commission*, colloquially referred to as *Kadi II*,<sup>6</sup> *Bank Mellat* reveals a sharp tension between the UN and EU legal orders. In *Kadi II*, the CJEU refused to recognize and implement a Security Council resolution when it did not conform to the EU constitutional principles, thereby challenging the primacy of UNSC resolutions under international law. The *Bank Mellat* case demonstrates a similar evasiveness with respect to international law. The CJEU continues to regard the EU as an autonomous legal system completely separate from international law. Contrary to what Advocate General Maduro has suggested, the Court approached the case as if the two legal systems "pass each other like ships in the night."<sup>7</sup> The Court is clearly disinterested in engaging international law or examining the dependency paths and channels of interactions between the two legal orders. In contrast to *Kadi*, however, *Bank Mellat* can be construed as a bolder judicial revolt against the UN administered sanctions regime. Both the Advocate General and the CJEU are less sympathetic to the arguments that a due process compromise is necessary to safeguard international peace and security. They explicitly refused to respect the Security Council's judgment on Bank Mellat's involvement in Iran's nuclear program. I argue that this refusal reflects the greater accountability and due process deficits that are found in the Iran sanctions regime.

This note first sets out the background of the *Bank Mellat* case and provides an overview of the relevant judgments delivered by the General Court and the Court of Justice. It then identifies the parallels between *Kadi* and *Bank Mellat*, with an emphasis on the confrontation between the UN and EU legal orders and the perceived supremacy of EU constitutional values. The note then delves deeper into the dynamics of the Iran sanctions regime, illustrating the accountability and due process shortcomings that have undermined its legitimacy and hindered the effective implementation of its targeted measures. The note concludes by critiquing the CJEU's reluctance to go beyond the confines of EU law when looking at the collective security measures adopted by the UNSC, while at the same time welcoming the

---

<sup>5</sup> The litigation comprised of four decisions: Case T-315/01, *Kadi v Council and Comm'n*, 2005 E.C.R. II-0000 [hereinafter CFI *Kadi*]; Joined Cases C 402/05 & C 415/05, *Kadi v. Council*, 2008 E.C.R. I-06351, [hereinafter *Kadi I*]; Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II-5177, [hereinafter *Kadi II*]; Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Comm'n v. Kadi*, 2013 E.C.R. (not reported) [hereinafter, *Kadi II Final Decision*].

<sup>6</sup> *Kadi II Final Decision*.

<sup>7</sup> Opinion of Advocate General Poiares Maduro, Joined Cases C 402/05 & C 415/05, *Kadi v. Council* (Jan. 16, 2008), ¶ 22.

judgment as a victory for accountability and a potential catalyst for reforming the UN sanctions regime.

## I. BACKGROUND ON THE BANK MELLAT LITIGATION

### A. Political and Legal Context

Expressing serious concerns over Iran's nuclear program, the UNSC adopted Resolution 1737 in December 2006.<sup>8</sup> The resolution required all Member States to freeze funds, financial assets, and economic resources of individuals or entities that were involved in Iran's nuclear program. Such persons or entities were designated in an annex to the resolution.<sup>9</sup> As Iran continued to pursue its nuclear enrichment activities and refused to collaborate with the International Atomic Energy Agency (IAEA), the UNSC gradually adopted harsher sanctions against the country. Resolution 1929, adopted in June 2010, was particularly significant in this respect, as it required UN Member States to refrain from providing financial services or transferring funds and resources that could contribute to Iran's proliferation-sensitive activities.<sup>10</sup> In addition, Resolution 1929 required Member States to freeze any assets or resources belonging to the entities that the UNSC considered to be involved in Iran's nuclear or ballistic missile programs that came within the territories of the Member States.<sup>11</sup> Annex I to the resolution listed these entities, one of which was the First East Export Bank (FEE Bank), which "is owned or controlled by, or acts on behalf of, Bank Mellat. Over the last seven years, Bank Mellat has facilitated hundreds of millions of dollars in transactions for Iranian nuclear, missile, and defence entities."<sup>12</sup>

The European Council implemented the UNSC resolutions against Iran through a number of regulations and decisions, including the Common Position 2007/140/CFSP, Regulation No. 423/2007, and Decision 2010/413.<sup>13</sup> In particular, the last instrument, Decision 2010/413, designated the persons and entities whose assets and funds should be frozen.<sup>14</sup> Bank Mellat was listed in Annex II of Resolution 1929 as an entity that provided support for Iran's nuclear program.<sup>15</sup> The reasons for its listing were as follows:

#### 1. Bank Mellat was a state-owned bank.

<sup>8</sup> S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

<sup>9</sup> *See id.* at ¶ 12.

<sup>10</sup> Resolution 1929, *supra* note 2, ¶¶ 5, 7.

<sup>11</sup> *See id.* at ¶ 21.

<sup>12</sup> *Id.* at Annex I, ¶ 6.

<sup>13</sup> *See* Council Common Position No. 2007/140/CFSP of 27 February 2007 Concerning Restrictive Measures against Iran, 2007 O.J. (L 61) 49; Council Regulation (EC) 423/2007 of 19 April 2007 Concerning Restrictive Measures against Iran, 2007 O.J. (L 103) 1; Council Decision of 26 July 2010 Concerning Restrictive Measures against Iran and Repealing Common Position 2007/140/CFSP, 2010 O.J. (L 195) 39.

<sup>14</sup> Council Decision of 26 July 2010, *supra* note 13, Annexes I & II.

<sup>15</sup> *Id.*

2. The Bank engaged in a pattern of conduct which supported and facilitated Iran's nuclear and ballistic missile programmes.
3. It had provided banking services to the UN- and EU-listed entities, to entities acting on their behalf or at their direction, or to entities owned or controlled by them.
4. It was the parent bank of the FEE Bank which was designated under UNSCR 1929 (2010).
5. It provided banking services to the Atomic Energy Organization of Iran (AEOI) and to Novin Energy Company (Novin), which were subject to restrictive measures adopted by the UNSC.
6. It managed the accounts of officials of the Aerospace Industries Organization and an Iranian procurement agent.<sup>16</sup>

However, as will be illustrated in the following paragraphs, the adequacy and credibility of such reasons for imposing sanctions on Bank Mellat were challenged before the EU courts.

#### B. *Bank Mellat's Action Before the General Court*

In October 2010, Bank Mellat brought an action for the annulment of the restrictive measures imposed by the European Council. The bank put forward three pleas. First, it claimed an infringement of the European Council's obligation to give reasons for the restrictive measures, as well as infringement of the Bank's rights of defense and effective judicial protection. Second, it claimed that the restrictive measures were based on a manifest error of assessment. Third, it advanced a claim for infringement of its right to property and of the principle of proportionality.<sup>17</sup> The European Council countered that as a state entity, Bank Mellat could not enjoy fundamental protections and guarantees. The General Court rejected the Council's argument.<sup>18</sup>

With regard to the first plea, the General Court found the Council in breach of its obligation to give reasons for the listing because some of the reasons were excessively vague or did not provide any details on the entities or transactions involved.<sup>19</sup> Such lack of detail was also an infringement of the bank's right to judicial protection. Additionally, the Council was found to have infringed on the bank's right of access to files. This finding was based on the late disclosure of a listing proposal by a Member State. Since the Council had relied on the information in the proposal for adopting restrictive measures, it was required to disclose the proposal to the bank in good time so that the bank could defend itself.<sup>20</sup> With regard to the second plea, the General Court found a manifest error of assessment, as none of the reasons relied on by the

---

<sup>16</sup> See Bank Mellat CJEU, *supra* note 1, ¶ 56.

<sup>17</sup> See Bank Mellat General Court, *supra* note 1, ¶ 28

<sup>18</sup> See *id.* at ¶¶ 35–46.

<sup>19</sup> See *id.* at ¶¶ 76–77.

<sup>20</sup> See *id.* at ¶¶ 84–85.

Council could justify the adoption of restrictive measures.<sup>21</sup> Lastly, the General Court found the Council in breach of its obligation to assess the relevance and validity the evidence against Bank Mellat.<sup>22</sup> Since the General Court upheld both the first and second pleas, it had no reason to examine the third plea.<sup>23</sup>

### C. Council's Appeal to the Court of Justice

In April 2013, the European Council, joined by the UK, Ireland, and the EU Commission, brought an action before the CJEU to set aside the Judgment of the General Court and dismiss Bank Mellat's action. The Council argued that the General Court made an error of law by considering the reasons for listing separately instead of examining them together as a whole. As it submitted, the reasons were clearly related. For example, the third reason specified more precisely the pattern of conduct mentioned in the second reason. Further, although the third reason did not identify the names of the UN- and EU-listed entities to which Bank Mellat provided services, it would have been possible for Bank Mellat to check those entities against the list of its customers and contest the reason given if none of its customers were among the EU-listed entities.<sup>24</sup>

The CJEU rejected the Council's arguments. It found that even when read in conjunction, the reasons were still not clear enough. For example, they would not enable Bank Mellat to establish specifically which banking services it provided to which UN- and EU-listed entities or entities associated with them. The CJEU also held that contrary to the Council's argument, it was not the duty of the Bank to compare the list of its customers against the listed entities or their employees; instead, it was the Council's obligation to do such a comparison and provide the necessary names and details in the statement of reasons.<sup>25</sup>

With regard to the Bank's right of access to the files, the Council submitted that the listing proposals did not contain any more details than those contained in the reasons, and therefore it was not necessary to communicate them to the Bank, as they provided no added value.<sup>26</sup> In response, the Bank argued that it was not for the Council to determine whether the listing proposals were of any value to the Bank's case.<sup>27</sup> In other words, it would be contrary to the right of defense to permit the Council to decide which elements of the file to disclose.<sup>28</sup> The CJEU upheld the General Court's finding that the Council was obliged to ensure, before adopting restrictive measures, that it notified Bank Mellat of the evidence adduced against it in good time, so that the Bank could have the opportunity to counter the charges.<sup>29</sup> The

---

<sup>21</sup> *See id.* at ¶¶ 138–39.

<sup>22</sup> *See id.* at ¶ 101.

<sup>23</sup> *See id.* at ¶ 140.

<sup>24</sup> *See Bank Mellat CJEU, supra* note 1, ¶ 64.

<sup>25</sup> *See id.* at ¶ 80.

<sup>26</sup> *See id.* at ¶72

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at ¶ 82.

late notification of the third proposal had thus infringed on the Bank's right to effective judicial protection.<sup>30</sup>

The Council's arguments regarding the manifest error of assessment also failed. First, the CJEU held that the listing of the FEE, Bank Mellat's subsidiary, by Resolution 1929 could not, on its own and in the absence of supporting evidence, justify the adoption of restrictive measures.<sup>31</sup> Second, the CJEU rejected the Council's argument that the evidence against Bank Mellat was confidential and that its disclosure could endanger the safety of its sources and its relationship with the supplying countries.<sup>32</sup> The Council did not raise this argument until the stage of appeal, and the Court of Justice therefore deemed it inadmissible, as its jurisdiction is limited to reviewing pleas argued before the General Court.<sup>33</sup> In sum, the CJEU did not find any error of law in the lower court's judgment that could affect the operating part of its judgment annulling the restrictive measures.

## II. BANK MELLAT AS A STRONG JUDICIAL REVOLT AGAINST THE U.N. SECURITY COUNCIL'S SANCTIONS REGIME

The UN Charter bestows upon the UNSC the primary responsibility for maintaining international peace and security.<sup>34</sup> If the UNSC determines a threat to international peace and security, it can then take a wide range of actions including imposing coercive actions. Article 41 of the UN Charter outlines an inclusive list of actions that the Security Council can adopt in response to threats to peace:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.<sup>35</sup>

Article 41, which is the key provision on sanctions, remained dormant for more than four decades due to the paralyzing effects of Cold War politics.<sup>36</sup> With the end of the Cold War, however, the UNSC embraced the sanctions with such enthusiasm that the 1990s were called the "sanctions decade."<sup>37</sup> A relatively recent and

---

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* at ¶ 114.

<sup>32</sup> *See id.* at ¶ 117.

<sup>33</sup> *See id.* at ¶ 116.

<sup>34</sup> U.N. Charter art. 24.

<sup>35</sup> U.N. Charter art. 41.

<sup>36</sup> *See* JEREMY M. FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 3 (2007).

<sup>37</sup> *See* Iain Cameron, *International Sanctions*, OXFORD BIBLIOGRAPHIES (Mar. 23, 2012), <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0032.xml?rskey=kUFRXe&result=1&q=ian+cameron+international+sanctions#firstMatch> (last visited Feb. 18, 2017).

increasingly common type of such sanctions are “targeted” or “smart” sanctions. Intended to mitigate the shortcomings of the “comprehensive sanctions,” these sanctions aim to target not the entire population of a country, but instead only particular persons or sectors of the economy.<sup>38</sup> They include measures such as travel bans, arms embargos, and the freezing of assets.<sup>39</sup>

When the UNSC adopts sanctions all Member States have a legal obligation to implement them. This obligation stems from a number of provisions in the Charter, including Articles 25 and 103. Under Article 25, Member States must carry out the decisions of the UNSC in accordance with the Charter.<sup>40</sup> Under Article 103, obligations under the Charter prevail over obligations arising from other international agreements.<sup>41</sup> Thus, Member States need to implement the binding decisions of the UNSC, even if they are in conflict with other legal obligations.

While the primacy of the UNSC’s decisions may seem undisputed under international law, the implementation of the sanctions imposed by the UNSC has faced important challenges in recent years. Sanctions against individuals and entities can interfere with their fundamental rights and due process safeguards guaranteed under domestic or international law. Since the targeted persons cannot challenge sanctions before an independent judicial body at the UN level, they bring actions for infringements of their fundamental rights before domestic and regional fora.<sup>42</sup> The most high-profile example is the *Kadi* litigation before the EU courts, which unfolded over the course of twelve years (2001–2013) and resulted in several judgments.<sup>43</sup> Mr. Kadi, a Saudi Arabian businessman, sought the annulment of the asset freeze that the EU authorities had imposed on him on account of the UNSC’s listing decisions. In its last judgment on the case (*Kadi II*), the CJEU reaffirmed that fundamental rights, including the right to defense, were an integral part of the EU constitutional principles and could not be overridden by any international agreements.<sup>44</sup> The court adopted a dualist approach whereby the contested EU regulations were detached from the UNSC’s resolutions, which they sought to implement:

Judicial review of the lawfulness of the contested regulation is not equivalent to review of the validity of the resolution which that

---

<sup>38</sup> S. Ghasem Zamani & Jamshid Mazaheri, *The Need for International Judicial Review of UN Economic Sanctions*, in *ECONOMIC SANCTIONS IN INTERNATIONAL LAW: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 219, 220–21 (Ali Z. Marossi & Marisa R. Bassett, eds., 2015).

<sup>39</sup> See David Cortright & George A. Lopez, *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in *SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT* 1, 2 (David Cortright & George A. Lopez eds., 2002); S. Ghasem Zamani & Jamshid Mazaheri, *The Need for International Judicial Review of UN Economic Sanctions*, in *ECONOMIC SANCTIONS IN INTERNATIONAL LAW: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 219, 220–21 (Ali Z. Marossi & Marisa R. Bassett, eds., 2015).

<sup>40</sup> U.N. Charter art. 25.

<sup>41</sup> U.N. Charter art. 103.

<sup>42</sup> See Erika de Wet, *From Kadi to Nada: Judicial Techniques Favoring Human Rights over United Nations Security Council*, 12 *CHINESE J. OF INT’L L.* 4 (2013).

<sup>43</sup> For the list of decisions on *Kadi*, see *supra* note 5.

<sup>44</sup> *Kadi II* Final Decision, *supra* note 5, ¶ 49.

regulation implements. That review does not challenge either the primary responsibility of the Security Council in the area concerned or the primacy of the Charter of the United Nations over any other international agreement. Nor is such judicial review intended to substitute the political judgment of the Courts of the European Union for that of the competent international authorities.<sup>45</sup>

Despite the Court's insistence that the decision was not meant to challenge the primacy of the UNSC's resolution, the annulment of EU restrictive measures effectively blocked the implementation of the resolution. Indeed, the court assumed the power of judicial review over the decision of the UNSC, though such review was purely driven by EU law. As Devika Hovell, a public international law scholar, observes, while "the CJEU purports to apply fundamental rights, it is clear that it makes no attempt to understand those rights in the global context."<sup>46</sup> The court did not engage with international law in its analysis. Nor did it make an effort to reconcile the two legal orders or at least consider how they depend on and interact with one another.<sup>47</sup>

Interestingly, a similar range of dilemmas, including the tension between the international and European community's legal order and the perceived autonomy of the EU legal system, can be observed in *Bank Mellat*. In the appeal, the Council argued that the General Court did not attach sufficient weight to Resolution 1929 when assessing the justification for the restrictive measures.<sup>48</sup> In particular, it relied on the following statement by the European Court of Justice (ECJ) in *Kadi v. Council (Kadi I)*:

It is necessary for the [EU] to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.<sup>49</sup>

The Council also drew reference to the Advocate General Bot's opinion in *Kadi II* and his emphasis on the need for "confidence and collaboration . . . rather than mistrust" between the EU and the United Nations, institutions which share the same

---

<sup>45</sup> *Id.* at ¶ 19.

<sup>46</sup> Devika Hovell, *Kadi: King-Slayer or King-Maker? The Shifting Allocation of Decision-Making Power between the UN Security Council and Courts*, 79 MOD. L. REV. 147, 161 (2016).

<sup>47</sup> See Grainne De Burca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L. J. 1, 44 (2010).

<sup>48</sup> See *Bank Mellat CJEU*, *supra* note 1, ¶ 98.

<sup>49</sup> *Kadi I*, *supra* note 5, at ¶ 6.



values concerning respect for fundamental rights.”<sup>50</sup> The Council argued that the General Court had wrongly dismissed “the Security Council’s statement concerning Bank Mellat’s facilitation of transactions for Iranian nuclear, missile and defense programs as a mere allegation.”<sup>51</sup> In a similar vein, the EU Commission also argued that the rationale behind listing the Iranian banks was to cut the supply of financial services that Iran needed to finance the import of nuclear technology and material.<sup>52</sup> Excluding a bank such as Bank Mellat from a principal financial market was in line with the international community’s goal to stop Iran’s nuclear proliferation.<sup>53</sup>

These arguments failed to impress the CJEU. The court held that the effectiveness of judicial review as guaranteed by Article 47 of the EU Charter of Rights required the EU courts to examine whether the contested decision was based on a sufficiently solid factual basis.<sup>54</sup> In order to carry out such examination, the EU courts could request the EU authorities to produce the relevant information and evidence.<sup>55</sup> If the competent EU authority could not comply with such a request, the EU courts were then obliged to base their decision on the material disclosed to them.<sup>56</sup> The Security Council’s statement that “Bank Mellat has facilitated hundreds of millions of dollars in transactions for Iranian nuclear, missile, and defence entities” could not constitute sufficient justification for its listing at the EU level.<sup>57</sup>

Similar to *Kadi*, *Bank Mellat* conceived of the EU as an autonomous and self-contained legal order, where restrictive measures must comply with its constitutional values. It made no difference if these measures were consistent with the UNSC’s listings or were intended to promote international peace and security as envisioned by the UN charter. Arguably, *Bank Mellat* represents a stronger judicial revolt against the UNSC’s resolutions than *Kadi*. In *Bank Mellat*, the Court of Justice openly refused to defer to the UNSC’s judgment. The Court did not insist, as it had in *Kadi*, that its judgment was not intended to challenge the primacy of the UNSC’s resolution or that the court was not substituting its own view on Iran’s nuclear program for that of the UNSC. The Advocate General Sharpston was also significantly less sympathetic to the Council’s arguments than her predecessor in *Kadi*, considering it as “pure speculation to say that the Security Council must have had good reason to consider that the banks were contributing to Iran’s nuclear activities.”<sup>58</sup> In her view, whether Bank Mellat or its subsidiary was actually contributing to Iran’s nuclear program was “a question of fact, which the Council must prove by evidence.”<sup>59</sup> As the next section

---

<sup>50</sup> Opinion of Advocate General Sharpston, Case C-176/13 P, Council of the European Union v. Bank Mellat & Case C-200/13 P, Council of the European Union v. Bank Saderat Iran, ¶ 112 (Feb. 26, 2015) [hereinafter Sharpston Opinion]; Opinion of Advocate General Bot, Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, ¶ 85 (Mar. 9, 2013).

<sup>51</sup> Sharpston Opinion, *supra* note 50, ¶ 114.

<sup>52</sup> *See id.* at ¶ 118.

<sup>53</sup> *See id.*

<sup>54</sup> *See Bank Mellat CJEU*, *supra* note 1, at ¶ 109.

<sup>55</sup> *See id.* at ¶ 109.

<sup>56</sup> *See id.* at ¶ 111.

<sup>57</sup> *Id.* at ¶ 114.

<sup>58</sup> *Id.* at ¶ 136.

<sup>59</sup> Sharpston Opinion, *supra* note 50, ¶ 136.

argues, the stronger interventionist approach in *Bank Mellat* can be explained by the greater accountability gaps that were evident in the Iran sanctions regime.

### III. THE IRAN SANCTIONS REGIME: A SYSTEM FRAUGHT WITH ACCOUNTABILITY AND DUE PROCESS DEFICITS

The UN sanctions regime suffers from important accountability gaps, which in turn fuel the tension between the UN and EU legal orders as discussed above. First and foremost, the decisions of the UNSC lack any judicial oversight. The UN Charter does not conceive of the UNSC as an institution above the rule of law.<sup>60</sup> As a principal organ of the UN, the UNSC is bound by its constituent instrument and needs to act in accordance with the principles and purposes of the Charter.<sup>61</sup> At the same time, however, the Charter bestows upon the UNSC the primary responsibility for the maintenance of international peace and security. A great margin of discretion comes with this responsibility, and given how broad the principles and purposes of the Charter are, it is quite difficult to conceive of any real restraints on the UNSC's power when it is acting under Chapter VII.<sup>62</sup> Importantly, the Charter does not provide for any oversight mechanism to keep the power of the UNSC in check. Nor does it address the possibility of reversing the UNSC's decision if it oversteps its mandate. In particular, the International Court of Justice (ICJ), the principle judicial organ of the UN, has not been granted the power of judicial review over the UNSC's decisions. Indeed, a proposal by Belgium to grant such power to the ICJ was rejected at the San Francisco Conference.<sup>63</sup> Although the ICJ can issue an opinion over the legality of the UNSC resolution, such an opinion can come only at the request of the UNSC itself or the General Assembly.<sup>64</sup> Further, the opinion is merely advisory and cannot bind the requesting organ. The ICJ can also incidentally consider the legality of a UNSC decision if an inter-state dispute raises such an issue. There have been only two such contentious disputes, however, both of which were settled before the ICJ could determine the legality of UNCS's resolution at the merits stage.<sup>65</sup> More generally, there is no precedent where the ICJ has questioned or defied a decision of the UNSC.<sup>66</sup> Consequently, not only are there considerable obstacles if the ICJ seeks to

---

<sup>60</sup> See Erika de Wet & André Nollkaemper, *Review of the Security Decisions by National Courts*, 45 GERMAN Y.B. OF INT'L L. 166, 171–73 (2002).

<sup>61</sup> U.N. Charter, art. 25.

<sup>62</sup> See Dagmar Richter, *Judicial Review of Security Council Decisions – A Modern Vision of the Administration of Justice?*, 32 POLISH Y.B. OF INT'L L. 271, 276–77 (2012).

<sup>63</sup> See *id.* at 272.

<sup>64</sup> U.N. Charter art. 96.

<sup>65</sup> See Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), Request for the indication of Provisional Measures, 1992 I.C.J., 114 (April 14); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, 1998 I.C.J., 9 (Feb. 27).

<sup>66</sup> See *e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 16, 115 (June 21).

review the legality of UNSC resolutions, but the court also has not shown any enthusiasm to overcome such obstacles.<sup>67</sup>

The lack of international scrutiny over the decisions of the UNSC seems problematic, particularly in the context of sanctions which often have dire consequences for the civilian population of the affected country. For example, the economic and social conditions in Iran significantly deteriorated with the introduction and ramping up of nuclear sanctions: the price of staple goods such as bread, rice, and vegetables skyrocketed; unemployment rose to more than 35%; the rial plummeted in value; and hundreds of thousands of individuals with serious illnesses were put at serious risk due to the dire shortage of life-saving medicines.<sup>68</sup> Of course, the Iranian government's unsound policies and mismanagement contributed to this situation, but economic sanctions, particularly those on vital sectors such as oil, gas, and finance, greatly contributed to the social and economic chaos.

The question then arises whether such mass suffering by the civilians in Iran was really legitimate under international law. The lawfulness of the sanctions imposed on Iran ultimately rests on the reality of Iran's alleged violations of its international obligations, including those under the Safeguard Agreement with the IAEA and the Nuclear Non-proliferation Treaty (NPT).<sup>69</sup> In this respect, various scholars such as Alexander Orakhelashvili and Daniel Joyner have questioned the legitimacy of the UNSC's actions against Iran.<sup>70</sup> They observe that the UNSC did not adopt the proper standard of proof and relied on presumptive concerns instead of established facts in ascertaining a wrongful act by Iran.<sup>71</sup> Yet, whether Iran breached any of its obligations under international law was never decided by an independent judicial or arbitral body. In fact, there was never any legal avenue available for challenging or testing the lawfulness of the sanctions against Iran.

The legitimacy of sanctions against Iran can be further questioned based on transparency and inclusiveness concerns. The UNSC's decision to sanction Iran was heavily influenced by the permanent members, with the elected members being largely excluded from the decision-making process. Astrid Ryan, for example, notes

---

<sup>67</sup> See Matthew Happold, *Reviewing the Security Council: The Role of Other International Organisations* 7 (University of Luxembourg Law Working Paper No. 2011-04, 2011).

<sup>68</sup> See *Iran's Nuclear Programme: A Red Line and a Reeling Rial*, THE ECONOMIST (Oct. 6, 2012), <http://www.economist.com/node/21564229>; Julian Borger & Saeed K. Dehghan, *Iran Unable to Get Life-Saving Drugs Due to International Sanctions*, THE GUARDIAN (Jan. 13, 2013), <https://www.theguardian.com/world/2013/jan/13/iran-lifesaving-drugs-international-sanctions>; Glenn Greenwald, *Iran Sanctions Now Causing Food Insecurity, Mass Suffering*, THE GUARDIAN (Oct. 7, 2012), <https://www.theguardian.com/commentisfree/2012/oct/07/iran-sanctions-suffering>.

<sup>69</sup> See Treaty on the Non-Proliferation of Nuclear Weapons art. IV(1), *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Agreement Between Iran and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons arts. 8–10, June 19, 1973, IAEA Doc. INFCIRC/214 (Dec. 13, 1974). See also Pierre-Emmanuel Dupont, *Unilateral European Sanctions as Countermeasures: The Case of the EU Measures Against Iran*, in RESEARCH HANDBOOK ON U.N. SANCTIONS AND INTERNATIONAL LAW 37, 56 (Larissa van den Herik ed., forthcoming).

<sup>70</sup> See ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY 24–25 (2011); DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY 126 (2011).

<sup>71</sup> See *id.*

that the resolutions on Iran were drafted by the permanent members and circulated to elected members with little advance notice before a scheduled vote, and with the understanding that the text of the resolution could not be changed.<sup>72</sup> The Iran Sanction Committee was similarly dominated by the permanent members who controlled the selection process for the chair of the committee. The Committee's operations were surrounded by great opacity, hardly allowing any non-council members to attend its meetings and refusing to engage in basic outreach activities, such as holding press conferences or issuing press releases.<sup>73</sup>

In addition to the general accountability concerns surrounding the UNSC's decision making, the sanctions regime on Iran suffered from significant due process deficiencies. For example, as noted above, the Resolution 1929's statement on Bank Mellat was not based on any sufficiently detailed factual basis.<sup>74</sup> No evidence was communicated to the bank to substantiate the assertion that the bank was actually involved in Iran's nuclear program. More generally, the Iranian individuals and entities listed by the Iran Sanctions Committee, including Bank Mellat, did not have access to any independent review process whereby they could challenge the merit or procedure of the listings.

Although some due process reforms have been made with the establishment of the Office of Ombudsman, they have been limited to the Islamic State in Iraq and the Levant (ISIL) (Da'esh)/Al-Qaida Sanctions. The Ombudsman does not have any jurisdiction to hear complaints under any other sanctions regime.<sup>75</sup> In the case of Iran sanctions, the only available safeguard was the Focal Point, which was established by the UNSC in 2006 to serve as a mechanism to receive de-listing requests relating to all other sanctions regime.<sup>76</sup> Yet the Focal Point has rarely been used, with the office receiving only two de-listing requests under the Iran sanctions regime.<sup>77</sup> More problematically, the Focal Point's role is purely procedural. The office only receives the de-listing request and then forwards it to the reviewing government. It is the reviewing government that makes a recommendation to de-list or maintain the listing. The Focal Point then communicates the recommendation to the relevant sanctions committee and informs the petitioner of the outcome of the request.<sup>78</sup> Accordingly, the Focal Point acts only as an intermediary between the petitioner and the actors that have the authority to make decisions on de-listing requests. The procedural role of the

---

<sup>72</sup> See Astrid F. Ryan, *Sanctions Implementation and the UN Security Council: The Case for Greater Transparency* 4 (International Peace Institute Issue Brief, Mar. 2014), [https://www.ipinst.org/wp-content/uploads/publications/ipi\\_e\\_pub\\_thecasefortransparency.pdf](https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_thecasefortransparency.pdf).

<sup>73</sup> See *id.*

<sup>74</sup> See Resolution 1929, *supra* note 2, at Annex I.

<sup>75</sup> See Office of the Ombudsman, *Procedure for Requests for Delisting Submitted to the Office of the Ombudsperson* (Aug. 27, 2016, 5:51 pm), <https://www.un.org/sc/suborg/en/ombudsperson/procedure>; S.C. Res. 2253, Annex II, S/RES/2253 (Dec. 17, 2015) [hereinafter Resolution 2253].

<sup>76</sup> S.C. Res. 1730, S/RES/1730 (Dec. 19, 2006).

<sup>77</sup> See Focal Point for De-listing, *De-listing Requests* (Dec. 21, 2016), <https://www.un.org/sc/suborg/en/sanctions/delisting/de-listing-request-stats>.

<sup>78</sup> See Focal Point for De-listing, *Work and Mandate of the Focal Point*, <https://www.un.org/sc/suborg/en/sanctions/delisting/> (last visited Aug. 27, 2016).

Focal Point stands in contrast to the more substantive mandate of the Ombudsman, which allows it to independently review a de-listing request and make recommendations to the relevant sanctions committees.<sup>79</sup> If the Ombudsman recommends de-listing, the petitioner will be removed from the list within 60 days unless the sanctions committee decides by consensus to retain the listing.<sup>80</sup>

It is thus unsurprising that the European Council did not make any attempt before the CJEU to demonstrate the available due process safeguards to Bank Mellat at the UN level when referring to the importance of implementing the listing decisions of the UNSC. The absence of an ombudsman or any other independent review mechanism has significantly diluted the legitimacy of the Iran sanctions regime. Similarly, it was inevitable that both the General Court and the CJEU would refuse to defer to the UNSC's judgment when it had not made any attempt to inform Bank Mellat of the basis for freezing the Bank's assets or to provide the Bank with a meaningful opportunity to challenge its listing.

#### IV. CONCLUSION

*Bank Mellat* raised the issue of the relationship between the EU and international legal orders. There are a number of parallels between *Bank Mellat* and *Kadi*, in particular the CJEU's basic approach to international law: The Court still conceives of the EU as an autonomous legal system where international sanctions should conform to EU constitutional values. In this respect, the *Bank Mellat* judgment can be critiqued for focusing exclusively on EU law and not engaging international law when dealing with a UNSC resolution. The question of how fundamental rights should be understood and applied in a UN collective security context remains unsettled.

This critique does not mean that the UNSC's sanctions on Iran would have met the basic fundamental rights requirements even if the CJEU had adopted a more international perspective in its reasoning. As demonstrated, the UN-listed individuals and entities were not given sufficiently detailed reasons for their designation. They had no access to the evidence against them and could not challenge their listing before an independent body. Although *Kadi* resulted in some modest due process improvements at the UN, such as the establishment of the Office of Ombudsman, the Iran sanctions regime has remained insulated from such reforms. Therefore, although it is arguable that the content and scope of fundamental rights differ across jurisdictions and international instruments, the Iran sanctions regime would still fail to meet the lowest common denominator found across different regimes. This failure also explains why the *Bank Mellat* decision represents a stronger judicial revolt against the UNSC's exercise of powers than the *Kadi* decision.

From an accountability perspective, therefore, *Bank Mellat* is a positive development that could potentially serve as a catalyst for the reform of the UNSC's administered sanctions regimes. It serves as a reminder to the UNSC that while its decisions are unchecked at the UN level and enjoy *prima facie* primacy under

---

<sup>79</sup> See Resolution 2253, *supra* note 75, ¶ 54.

<sup>80</sup> See *id.* at ¶ 56.

international law, they cannot escape the scrutiny of EU courts. The case is also a reminder to the EU authorities that they cannot shirk their responsibility to respect fundamental rights by simply deferring to the judgment of the UNSC or arguing the primacy of urgent international peace and security concerns.