

# ADDRESSING CHALLENGES TO TARGETED SANCTIONS

AN UPDATE OF THE “WATSON REPORT”



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# **Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”**

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## INTRODUCTION

Targeted sanctions are an important, and at times, effective tool of the UN Security Council. Whether they are employed to try to change behavior, constrain proscribed activities, or send a powerful signal, they play a central role in UN efforts to maintain international peace and security. Targeted sanctions are currently used to counter terrorism, consolidate the implementation of peace agreements, defend human rights norms, pursue investigations, and prevent the proliferation of weapons of mass destruction. All UN sanctions today are targeted sanctions. Following the severe humanitarian consequences of comprehensive sanctions directed against Iraq during the 1990s, the UN has adopted only targeted measures. The UN currently has 11 targeted sanctions regimes in place, with more than 1000 designations worldwide (1015). Most targeted sanctions (628 of 1015 or about 62%) entail sanctions against individuals designated by the UN Security Council.

Yet, the very instrument of targeted sanctions is under significant and growing challenge today. National and regional courts have increasingly found fault with the procedures used for making designations of sanctions on individuals and entities, as well as with the adequacy of procedures for challenging designations.<sup>1</sup> Human rights advocates have been outspoken in their criticisms of the measures, contending that the prevailing UN procedures for making designations violate fundamental norms of due process. National legislative and parliamentary assemblies have begun to question the authority of their executive officials to implement UN targeted sanctions without their consent. As a result, a number of Member States have found themselves in the difficult position of being forced to choose between contravening the rulings of their domestic courts and decisions of their legislative bodies on the one hand, and their obligations to implement binding Chapter VII decisions of the UN Security Council, on the other.

Although the most potent challenges are coming from the courts, the issue is not exclusively a legal one. There is a real, and growing, political problem associated with the legitimacy, not only of the instrument of targeted sanctions, but increasingly of actions taken under Chapter VII by the UN Security Council itself. This is a fundamental challenge to an essential instrument of the international community to counter threats to international peace and security.

There is no inherent contradiction between the defense of fundamental human rights and the maintenance of international peace and security. The UN Charter accords primacy to both goals in Article 1, where it states the fundamental purposes of the organization. US President Barack Obama used his 2009 inaugural address to state explicitly “we reject as false the choice between our safety and our ideals”<sup>2</sup> The Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights came to a similar conclusion in its

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<sup>1</sup> See reports of the Monitoring Team of the 1267 Committee (the Al Qaida and Taliban Sanctions Committee) for lists of litigation, and Appendices A and B for information on legal challenges.

<sup>2</sup> <http://www.whitehouse.gov/blog/inaugural-address/>

February 2009 report, acknowledging the necessity of countering terrorism, but pointing out the need to do so by maintaining human rights standards. A broad international consensus on this point already exists, as manifested by the UN General Assembly's Global Counter-Terrorism strategy which calls upon all Member States not only to undertake measures to counter terrorism, but to do so "in accordance with the Charter of the UN and the relevant provisions of international law, including international standards of human rights."<sup>3</sup>

Yet more often than not, the issue of UN targeted sanctions designations continues to be framed by both policy practitioners and external observers in terms of a trade-off between security and human rights. It is time to move beyond this conceptualization, and this report is intended to facilitate that process with regard to targeted sanctions. This is a difficult, but not an insoluble problem, as security and human rights can be seen as mutually reinforcing. It is important to address this issue proactively, because a further erosion and diminution of Security Council legitimacy to address critical problems of terrorism and proliferation could have highly undesirable consequences. Every option should therefore be on the table for consideration.

In 2006, we co-authored a report titled "Strengthening Targeted Sanctions through Fair and Clear Procedures."<sup>4</sup> The drafting of the report, subsequently known as the "Watson Report," was supported by the governments of Switzerland, Sweden, and Germany and was later issued as a UN document of both the Security Council and the General Assembly in June 2006. We made a number of reform recommendations in the 2006 report, reflective of the debate underway and ideas in circulation in New York and national capitals worldwide at the time. We recommended improvements to four principal aspects of due process: to the processes of notification, access, fair hearing, and effective remedy.

The Security Council's procedures have undergone significant reform to improve the fairness and transparency of the regime since 2006, and this update will identify and analyze these measures. It is important to recognize the important changes already made and to give credit to the serious and painstaking efforts to address the problems. Nonetheless, legal challenges in national and regional courts, concerns in parliamentary assemblies, and criticism from the human rights community continue. The political problem has only grown worse, with criticism expanding beyond measures to counter terrorism to criticism of targeted sanctions in general. Should the current trajectory of court challenges continue without adequate response, the Security Council's ability to take action against threats to international peace and security could be severely compromised.

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<sup>3</sup> Resolution adopted by the UN General Assembly, Measures to eliminate international terrorism, A/RES/63/129, Distr. 15 January 2009. Available at: <http://www.un.org/ga/63/resolutions.shtml>

<sup>4</sup> *Strengthening Targeted Sanctions Through Fair and Clear Procedures* ("Watson Report"), March 2006, available online at [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf), The report was made an official document of the UN General Assembly and the UN Security Council, UN Doc. A/60/887-S/2006/331.

With the support of a Swiss academic consortium – UNO Academia<sup>5</sup> – this report has been drafted to contribute to the ongoing debate about how to maintain international peace and security without jeopardizing fundamental human rights. We present a full array of options – from incremental changes to the UNSCR 1822 review procedure currently underway, to measures taken at the national and regional level, and finally to proposals for the creation of a review mechanism at the UN Security Council level. We will weigh the pros and cons of the different options in an effort both to anticipate, and to advance, the debate.

The report is divided into six sections. The first provides background and a brief overview of the problem. The second describes the many improvements already made to the process of designations and review procedures at the UN level (with an emphasis on changes made since 2006). Prepared by our legal colleagues, Larissa van den Herik and Nico Schrijver the third section discusses challenges to targeted sanctions presented by recent litigation. The fourth evaluates the extent to which the reforms to date have addressed the problems of notification, access, fair hearing, and effective remedy. Section five presents a range of options for further reform, including a preliminary assessment of the pros and cons of each, in the spirit of contributing to the ongoing debate about the issue. The final section includes recommendations advanced by the authors to address the current human rights challenges to targeted sanctions.

## **SECTION ONE – BACKGROUND**

When targeted sanctions were first introduced in the early 1990s, the rights of individuals targeted – typically sovereign heads of state and/or their key political supporters – were not considered. Autocratic political leaders violating international norms by supporting acts of terrorism or overthrowing democratically elected leaders were generally not the subject of widespread sympathy. As long as the state sponsoring the resolution met the political standard of obtaining a veto-proof minimum number of nine votes on the Security Council, most Member States did not contemplate the potential violation of individual rights. As one member of the UN Secretariat observed a decade after targeted sanctions were first introduced, “the issue of individual human rights was not thought through at the outset.”<sup>6</sup>

Indeed, it has been the widespread application of targeted sanctions in support of counter-terrorism measures since 2001 that has raised the most questions about their potential violation of individual human rights. The UN Security Council passed UNSCR 1267 in October of 1999, a measure designed to put pressure on the Taliban regime to hand over Usama bin Laden for the attacks on two US embassies in East Africa in August of 1998. The resolution was unusual in the sense that it named an individual in the text of the resolution, Usama bin Laden, even though he was technically not initially the target of the sanctions.

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<sup>5</sup> Information about UNO Academia is available at <http://www.unoacademia.ch/>.

<sup>6</sup> Senior official of the UN Secretariat, speaking at a training workshop on the design of targeted sanctions organized for members of the UN Security Council, Watson Institute for International Studies, Brown University, May 2003.

It was not the application to bin Laden that has subsequently proven controversial, however, but the widespread extension of the asset freeze and travel ban to individuals designated as financial supporters of al Qaeda immediately following the attacks of 11 September 2001. At the time, the global outpouring of sympathy for the US was such that there was little scrutiny given to the proposed additions. The names the US proposed were added to the list. Even if the designation was based on classified intelligence not made available to the other members of the Council, as was the case with many of the US designations during this period, there was little or no questioning or opposition.

The relative lack of scrutiny in this extraordinary period (from late 2001 through the first half of 2002), laid the basis for many, though not all, of the legal challenges that have subsequently emerged, challenging the implementation of Security Council targeted sanctions by individual Member States.

By far, the largest number of designations has been made by the Al Qaida and Taliban Sanctions Committee (the 1267 Committee) which as of 23 October 2009 had 504 individual and entities designated – 397 individuals (255 associated with Al Qaida and 142 associated with the Taliban) and 107 entities associated with al Qaida. The issue is not restricted to the activities of the 1267 Committee, however. A majority of the cases handled by the UN Secretariat's focal point (created pursuant to UNSCR 1730 and discussed more fully below) has dealt with challenges to the implementation of the sanctions against individuals designated by the Liberia and DRC sanctions committees.

Targeted sanctions are principally intended to be political and preventive measures, rather than punitive ones. Inclusion on the list is not a legal determination, but rather a political finding of association with al Qaeda and the Taliban. The designations are also intended to be temporary, at least in theory. As such, they do not require the evidentiary standards associated with legal prosecutions. Nonetheless, the open-ended nature of their application by UN sanctions committees, combined with the potential violation of elements of due process in their application to individuals, have led to legal challenges about their punitive nature.

### *Legal challenges*

More than thirty legal challenges to UN Security Council targeted sanctions listings have been pursued in courts worldwide – in Europe, the US, Pakistan, Canada, and Turkey – over designations made either by the UN's 1267 Committee or in the context of the implementation of UNSCR 1373 (see Appendices A and B). Some of the cases have been dropped, after individuals were delisted by the 1267 Committee. Sixteen cases (involving 15 separate individuals or entities) are currently pending or remain under appeal.

The most highly visible and significant decision to date was made by the highest court in the European Union, the European Court of Justice (ECJ), which decided in favor of two legal challenges on 3 September 2008 and annulled the European Union regulation implementing UNSCR 1267 with specific reference to the two cases. In its judgments in the cases of *Kadi and Al Barakaat* (joined cases C-402/05 P and C-415/05 P), the Court

distinguished between the imposition of the sanctions by the 1267 Committee and the implementation of the sanctions at the EU level, holding that the latter are bound by fundamental rights when implementing the sanctions, and that therefore they must ensure that the persons affected have the right to be informed of the reasons for their listing and the right to contest those reasons before an independent body. The European Court of Justice granted a delay of three months during which time the EU Council was to remedy the shortcomings of the listing mechanism, or the EU Regulation implementing the UN listing would become null and void.

The Court specifically charged that “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.”<sup>7</sup> The EU subsequently applied the procedures it typically employs for EU autonomous sanctions, informing the two plaintiffs of the reasons for their designation and giving them an opportunity to respond. Following this procedure (and within the three month deadline established by the ECJ), the EU Commission decided to re-instate the designations of both Kadi and Al Barakaat. There was serious concern at the time, however that if Europe set a precedent by selectively implementing decisions taken by the UN Security Council acting under Chapter VII of the UN Charter, it would pave the way for other national and regional bodies to do the same, undermining the ability of the international community to impose and implement targeted measures with consistency across different jurisdictions.

In the Kadi case, as well as several others, human rights lawyers have charged that the implementation of UN targeted sanctions against individuals may violate the fundamental human rights of those individuals, as protected not only by the European Convention on Human Rights, but also by other regional or global conventions.<sup>8</sup> More specifically, they assert that rights to property, freedom of movement, a fair hearing, and effective judicial review are denied by the current use of the UN targeted sanctions instrument.

Because of the visibility, significance, and venue of the Kadi and Al Barakaat cases, many have characterized the legal challenges as “a European problem.” The problem is not uniquely a European one, however. As discussed in more detail in Appendix B, depending on precisely how one counts them, more than one-third of the legal challenges to the 1267 listing regime globally have been lodged outside of European courts. Cases directly challenging 1267 designations have been taken before national courts in the US, Pakistan, Turkey, and before the UN Human Rights Council. There have also been legal challenges, not to the 1267 designation *per se*, but to related decisions by governments to order deportation, impose house arrest, or prevent return to country of origin, of 1267 designees in Canada and Pakistan (see details in Appendices A and B). Courts have also increasingly begun to accept cases challenging national or regional autonomous designations associated with the implementation of UNSCR 1373.

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<sup>7</sup> European Court of Justice, Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P, Press Release No. 60/08, 3 September 2008, p. 2.

<sup>8</sup> Iain Cameron, “UN Targeted Sanctions, Legal Safeguards, and the ECHR,” *Nordic Journal of International Law* (2003): 1-56.

In terms of the outcome of court decisions to date, challenges to the competence and authority of the UN Security Council to make such designations have not succeeded. Rather, it is national or regional implementation of UNSC measures that have been the subject of court rulings. Although the sample is small, relatively more successful challenges have focused on due process concerns, on the proportionality of sanctions, or the denial of fundamental rights to property and freedom of movement. The most visible legal challenges stem from designations made in 2001 and 2002 (i.e. Kadi, Al Barakaat, the Al Haramain Foundation, and Nada), but legal challenges to designations have also come from more recent designations. The cases brought by Abd al-Rahman al-Faqih and Tahir Nasuf both stem from designations first made in 2006. The celebrated alphabet case in the UK also derives from recent designations of five individuals, as does the case of Hafiz Saeed in Pakistan. This suggests that the issue of legal challenges to targeted sanctions against individuals is not going to go away until it is dealt with by some of the policy reform options outlined in Section Four.

Legal challenges, particularly those that have international visibility and resonance such as the Kadi case, can have detrimental effects far beyond the counter terrorism regime. Their symbolic significance should not be underestimated, and their resonance in public opinion can do extensive damage both to the instrument of targeted sanctions and to the reputation of the UN Security Council. The total number of legal challenges to date does not do justice to this phenomenon, as the number of court cases is relatively small.

#### *A growing political problem for targeted sanctions*

The issue has gone beyond legal challenges and is now spilling over into parliamentary debates and motions to limit Member States' ability to implement UN sanctions under certain conditions. In Switzerland, a motion has been unanimously adopted by the upper chamber that would require the Federal Council, as of the beginning of next year (2010), to cease implementing sanctions against individuals included on the 1267 Consolidated List in cases where the individual: (1) has been on the list for more than 3 years and not been brought before the court, (2) has not had the possibility to resort to an independent institution for a remedy, (3) has had no indictment issued, and (4) has not had new incriminating evidence brought forward since listing.<sup>9</sup> The second house of Parliament is expected to discuss the motion in December. In the first case considered by the UK's new Supreme Court, the litigants have raised questions about the authority of the UK government to implement UN targeted sanctions against individuals without Parliamentary approval via primary legislation.<sup>10</sup> Finally, in the Netherlands, a Commission of State has been installed on 8 July 2009 to advise the Government on the need to amend the Dutch Constitution on a number of issues, including the influence of

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<sup>9</sup> Motion 09.3719 Submitted to the Council of States by Dick Marty (Liberal Party) 12 June 2009 and passed unanimously in the Upper Chamber, 8 September 2009. To become law, this requires acceptance by the National Council (Lower Chamber), which is expected to take up the motion by the end of 2009.

<sup>10</sup> Afua Hirsch, "State and the individual – supreme court takes on weighty first case" *The Guardian*, 5 October 2009. In the case of *A, K, M, Q & G*, the UK High Court of Justice held that Parliament had to be involved in the implementation process of the 1267 sanctions regimes. See High Court of Justice, *A, K, M, Q & G and H.M. Treasury*, [2007] EWHC 869 (Admin), 24 April 2008.

the international legal order on the Dutch legal order.<sup>11</sup> In the process leading up to the installation of the Commission, the Netherlands Council of State explicitly referred to the 1267 regime as an example of international rules that were drafted outside a proper rule of law context.<sup>12</sup>

In addition to the parliamentary challenges, the general perception of unfairness in the application of targeted sanctions has generated public opposition and the formation of support groups for selected designees on the 1267 list in Sweden and Saudi Arabia. Officials of the New Zealand government faced political embarrassment and public criticism over its authorization of a travel ban and asset freeze on the wrong individual. The application of targeted sanctions has been derided in Germany, where a data protection NGO bestowed the dubious honor of the 2008 Big Brother Award on the EU Council for its application of targeted sanctions to counter terrorism. Some UN Member States have indicated a growing reluctance to add names to the lists of individuals and entities targeted by Security Council sanctions because of these concerns, and more than 50 Member States have expressed concern about the lack of due process and absence of transparency associated with listing and delisting.

In February 2009, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, issued its report, “Assessing Damage, Urging Action.”<sup>13</sup> While acknowledging that the freezing of assets of those involved in terrorism “is clearly an acceptable and indeed necessary tactic in effectively combating terrorism,” it strongly criticized the listing system as “unworthy” of international institutions like the UN and EU. Other groups such as the Council of Europe and the European Parliament’s Subcommittee on Human Rights likewise have issued reports critical of the UN sanctions process for inadequate procedures for delisting.<sup>14</sup>

The consequences of not having thought through the targeting of sanctions against individuals are beginning to return to challenge the very legitimacy of the targeted sanctions instrument. This has spilled over into other aspects of UN operations. Members of the UN Secretariat staff responsible for assisting with sanctions implementation have occasionally felt estranged from their colleagues in other divisions (DPKO or OCHA), who indicate that they want to maintain their distance from the sanctions issue.

The legal issues and human rights concerns are significant, but need to be placed in a broader political context. Virtually all of the major legal challenges to date have stemmed

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<sup>11</sup> *Staatscourant* 10354, 9 July 2009.

<sup>12</sup> Advice Council of State, 14 April 2008, Parliamentary Records II 2007/08, 31 570, nr 3, para. 4.2.3.

<sup>13</sup> Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, International Commission of Jurists. 16 February 2009, Geneva. 113-117, available online at [http://ejp.icj.org/hearing2.php3?id\\_article=167&lang=en](http://ejp.icj.org/hearing2.php3?id_article=167&lang=en)

<sup>14</sup> Résolution 1597 (2008) Listes noires du Conseil de sécurité des Nations Unies et de l’Union européenne Parliamentary Assembly, Council of Europe, available online at <http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta08/fres1597.htm>

from designations associated with efforts to counter terrorism, not those associated with the enforcement of peace agreements, human rights violations, or nuclear proliferation. Global terrorism has been characterized by the UN Security Council as a threat to international peace and security, and targeted sanctions have been imposed on individuals and entities as both preventive and deterrent measures to counter that threat. *The growing negative reaction to targeted sanctions for counter terrorism purposes, however, risks the further erosion of the credibility and future utility of the instrument of multilateral sanctions in general.*

## **SECTION TWO – DEVELOPMENTS AND PROCEDURAL IMPROVEMENTS**

In the more than three and one-half years since the Watson report, significant changes have transpired in procedures of UN sanctions committees, as well as related political developments. This section provides a summary of the major developments since March 2006.<sup>15</sup>

As noted in the original Watson report, the movement for reform within the UN has been building for years. In December 2004, the *High Level Panel on Threats, Challenges and Change* appointed by former UN Secretary-General Kofi Annan noted:

“The way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.”<sup>16</sup>

Subsequently, the General Assembly in its September 2005 World Summit Outcome document called on the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions.”<sup>17</sup>

In response, the Secretary-General directed the Office of Legal Affairs (OLA) to begin an interdepartmental process within the UN to develop proposals and guidelines to address such concerns. OLA commissioned Professor Bardo Fassbender of Humboldt University in Berlin to conduct a study. His March 2006 report argued that the Security Council must strive to balance its principal duty of maintaining international peace and security

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<sup>15</sup> This section discusses the most prominent initiatives since 2006, but does not include all of the reports prepared on the subject. See Appendix A for a discussion of legal developments, which are not addressed here.

<sup>16</sup> *Report of the High-Level Panel on Threats, Challenges, and Change, A More Secure World, Our Shared Responsibility*, UN Document 1/59/656, para. 153, 2 December 2004 at: <http://www.un.org/secureworld/report.pdf>

<sup>17</sup> UN General Assembly Resolution 60/1, *2005 World Summit Outcome*, para. 109, at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf>

with respect for the human rights and fundamental freedoms of targeted individuals to the greatest extent possible.<sup>18</sup> He articulated basic elements of fair and clear procedures.

Based on the Fassbender analysis, Secretary General Annan in June 2006 conveyed to the Security Council an informal paper, “Targeted individual sanctions: fair and clear procedures for listing and delisting,” in which he enumerated basic elements to ensure fair and clear procedures. Accordingly, persons against whom measures have been taken by the Security Council have:

- the right to be informed of those measures and to know the case against him or her as soon as, and to the extent, possible;
- the right to be heard within a reasonable time by the relevant decision-making body (including ability to directly access the body possibly through a focal point, as well as a right to be assisted or represented by counsel);
- right to review by an effective review mechanism (the effectiveness which depends on impartiality, degree of independence, and ability to provide effective remedy).<sup>19</sup>

These elements, along with a regular review of targeted sanctions against individuals to mitigate risks of violating the right to property and related human rights, represent the first articulation by UN officials of minimum standards of procedural fairness.

#### *UNSCR 1730 –Establishment of Focal Point*

It is important to underscore that the Security Council has engaged in a continual process of self assessment and reform of its practices with regard to designations, exemptions, and delisting during the past three and a half years, as indeed it has since the first introduction of targeted sanctions in the early 1990s. While the significance of these improvements tend to be minimized by some outside critics, the Security Council has demonstrated an ability to alter its practices regarding targeted sanctions, albeit in an episodic and reactive manner

On 19 December 2006, the Security Council adopted resolution 1730 calling for the establishment within the Secretariat of a focal point to receive delisting requests. Proposed by France and supported by the US, UNSCR 1730 allows individuals to petition directly to the UN Secretariat for delisting. The focal point receives requests

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<sup>18</sup>Bardo Fassbender, “Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanction under Chapter VII of the UN Charter,” 20 March 2006, Study Commissioned by the United Nations Office of Legal Affairs, Office of Legal Counsel, 7-8, available online at [http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf). See also Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 International Organization Law Review 437, 449 (2006)

<sup>19</sup> Letter dated 15 June 2006 from the Secretary General to the President of the Security Council, informal paper entitled, “*Targeted individual sanctions: fair and clear procedures for listing and delisting*”. Proceedings of 5474<sup>th</sup> Meeting, S/PV.5474, New York 22 June 2006. Available online at <http://daccessdds.un.org/doc/UNDOC/PRO/N06/400/28/PDF/N0640028.pdf?OpenElement>

from petitioners, acknowledges receipt and informs the petitioner on procedures for processing delisting requests, forwards the requests to the designating states and states of citizenship and residence, and informs the petitioner of the sanctions committee's decision (as the focal point services all sanctions committees, not just 1267).

Creation of the focal point, which became operational as of 27 March 2007, allows petitioners seeking delisting to submit requests to the Secretariat, in addition to their State of residence or citizenship. Prior to the focal point, targeted parties generally could only access the UN system through their country of residence or nationality.<sup>20</sup> The focal point represents an improvement in providing *accessibility* for those listed. Security Council action did not, however, include authority for the focal point to handle exemption requests or provide for supplemental information and notification, as recommended in the original Watson report.

**Table I: Focal Point Statistics<sup>21</sup>**

<b>Focal Point Statistics</b>				
<b>Country - Committee: petitioner type</b>	<b>Total number of individuals/entities requesting delisting through Focal Point<sup>22</sup></b>	<b>Of these: petitioners pending with Focal Point</b>	<b>Of these: petitioners delisted</b>	<b>Of these: petitioners remaining listed</b>
AQ and T - 1267: individuals	11	1	4	6
AQ and T - 1267: entities	20	5	14 <sup>23</sup>	1
Iraq - 1518: individuals	1	0	0	1
Iraq - 1518: entities	1	0	0	1
Liberia - 1521: individuals	16	0	5	11
Liberia - 1521: entities	9	0	0	9
DRC - 1533: individuals	3	1	1	1
DRC - 1533: entities	4	0	0	4
<i>Subtotal individuals</i>	<i>31</i>	<i>2</i>	<i>10</i>	<i>19</i>
<i>Subtotal entities</i>	<i>34</i>	<i>5</i>	<i>14</i>	<i>15</i>
<b>Total</b>	<b>65</b>	<b>7</b>	<b>24</b>	<b>34</b>

By all accounts, the focal point has functioned effectively, and there seems to be a consensus that the focal point could and should do more. With the focal point's responsibilities defined in UNSCR 1730, however, the Security Council should consider expanding its functions. Suggestions for additional administrative (not decision-making)

<sup>20</sup> Owing to unique circumstances on the ground, the Liberia Committee's procedures allowed delisting requests through the Permanent Missions of listed individuals' nationality or through the nearest UN office, at least for a time.

<sup>21</sup> As of 26 October 2009. Based on data available at <http://www.un.org/sc/committees/dfp.shtml> and discussions with the Focal Point secretariat.

<sup>22</sup> Individuals and entities are only counted once.

<sup>23</sup> This figure also reflects the delisting of two entities and one individual through the 1822 Review process: their respective appeals were pending with the Focal Point when the 1822 Review decided to delist them.

responsibilities include: notifying targeted parties of their listing (in addition to states of residence and nationality) and serving as the entry point for exemption requests; permitting the focal point to provide general information regarding sanctions regimes and procedures to petitioners; and requirement for regular reports, including ideas for procedural enhancements. In addition, the timeframe for responses to delisting requests could be shortened (from the current three months to one) and responses back to petitioners could be required to include reasons for maintaining them on the list.

The Security Council should also consider enhancing the focal point's tasks by requiring it to gather available information about the activities of those applying for delisting, such as information from national or regional legal cases for the 1822 review process. This would assist the committee in developing a complete package for consideration of delisting petitions.

#### *UNSCR 1735 – Further Reform of 1267 Committee Procedures*

The Al Qaida / Taliban sanctions regime has demonstrated an impressive institutional development over the course of the past ten years. What began as a vaguely crafted resolution imposing financial sanctions against the Taliban and extended to individuals “associated with” al Qaeda, UNSCR 1267 contained no provision for delisting when it was first introduced in 1999. Today, it represents the most procedurally advanced of the sanctions committees with formalized procedures for delisting, a highly professional analytical staff (its Monitoring Team) issuing regular and detailed reports, elaborate and detailed procedures for designations on the basis of standardized statements of case, an ongoing internal review of all listings, routinized procedures for handling exemptions requests, and much greater transparency in its operations. The periodic review of the 1267 Monitoring Team's mandate and resulting resolutions has become the vehicle through which many of the fair and clear procedural reforms are effectuated.

Several reform recommendations advanced in the Watson report were taken up in UNSCR 1735, also passed in December 2006. It elaborated minimal standards for statements of case, created a provision for the public release of that information, and established a procedure to improve deficiencies in notification. Targets were to be provided with a redacted statement of case indicating the basis for listing. As such, 1735 is the first measure to require notification of those listed - an important element of fairness that strengthens legitimacy and also enhances effective implementation. It is difficult for a target to change behavior, if the target is not explicitly informed of its proscribed activity. Other changes to extend the No Objections Procedure timeframe from 48 hours to 5 working days were also made, allowing more time in capitals for a serious review of the case -- an important element of providing for a fair hearing in the listing process. Overall, the reforms contained in 1735 represented important efforts to improve the fairness and transparency of regime.

### *Like Minded States Initiatives*

On 5 May 2008, an informal group of “like minded states”<sup>24</sup> presented suggestions to the 1267 Committee, elaborating upon an option contained in the Watson Report regarding a review mechanism. Based on a paper by Prof. Michael Bothe (Goethe University Frankfurt), the like minded states recommended the creation of an expert panel to review delisting petitions, comprised of 3-5 eminent, judicially qualified persons with experience in dealing with sensitive information.<sup>25</sup> Inspired by the example of World Bank inspection panels, the proposal addressed elements of fairness through independence (appointment by Security Council upon recommendation of SG), hearing, time-limits (3 months) for action, and public disclosure of the results. Recommendations of the panel were to be advisory only, with ultimate decision-making authority residing with the Security Council. The proposal was made in anticipation of the Security Council’s consideration of a resolution in June 2008 extending the mandate of the Monitoring Team. While emphasizing the continued relevance of their previously-proposed panel on delisting requests, the group has since developed additional procedural enhancements to strengthen listing, delisting, review and exemption procedures, many of which are considered in section four.

### *Human Rights Concerns*

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, repeatedly has expressed concern about the impact of targeted sanctions on the rights to property and freedom of association, as well as potential denials in the listing process of the rights to notice and judicial review.<sup>26</sup> Among other recommendations, he emphasized that listings should be reviewed at least every year to “ensure that sanctions remain temporary and preventive, rather than permanent and akin to criminal punishment.”<sup>27</sup>

In 2008, he laid out a series of options to address due process concerns, including 1) the creation of a review mechanism, and 2) the abolition of the 1267 Committee and its listings. According to Mr. Scheinin, a review mechanism must include the right of an individual to be informed of the measures taken and to know the case against him; the right to be heard within a reasonable time by the relevant decision-making body; the right

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<sup>24</sup> The “Like Minded States” includes Denmark, Germany, Liechtenstein, the Netherlands, Switzerland and Sweden. Belgium and Costa Rica associated with the group in 2009.

<sup>25</sup> “Improving the Implementation of Sanctions Regimes Through Ensuring ‘Fair and Clear Procedures.’” 5 May 2008, at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Terrorism%20%20S%202008%20428.pdf>. The letter was made an official document of the UN General Assembly and the UN Security Council (A/62/861-S/2008/428). See also Michael Bothe, “*Explanatory Memorandum to the Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees’ Listing Decisions*,” 8 November 2007. Available online at <http://www.liechtenstein.li/en/pdf-fl-aussenstelle-neyyork-explanatory-memorandum-prof-bothe-delisting-workshop-2007-11-8.pdf>.

<sup>26</sup> Statements by Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, to the Human Rights Council and General Assembly, at <http://www2.ohchr.org/english/issues/terrorism/rapporteur/statements.htm>.

<sup>27</sup> UN General Assembly, Report of the Special Rapporteur, A61/27, 16 August 2006, par 39.

to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy. He asserted that a quasi-judicial review body of experts serving in their independent capacity “would be likely to be recognized by national courts, the EU court and regional human rights courts as sufficient analogous protection of due process, so that courts would exercise deference in respect of the outcome.”<sup>28</sup> With regard to abolishing the 1267 Committee and its terrorist listings, the Special Rapporteur stated that UNSCR 1373 would constitute a legal basis for national terrorist listing procedures, and the Secretariat would continue to provide information, expertise and assistance for the listing by national authorities.

### *UNSCR 1822 – Significant Changes in Committee Review*

In June 2008, the Security Council significantly expanded the 1267 committee’s role in addressing listing and delisting issues. UNSCR 1822 contained new requirements with the potential to change dramatically sanctions committee procedures. First, it required a review of all names on the 1267 consolidated list within two years (30 June 2010), and an ongoing annual review thereafter to ensure that every designation is reviewed at least every three years (including those deceased). Secondly, it required the development of narrative summaries (for all listings) which are published on the committee website and explain the basis for inclusion of names on the list. Although it took months of negotiations to establish standards and procedures for the review, the 1267 committee commenced the review process in late 2008.

The workload associated with the 1822 review has been extraordinary for 1267 committee members, staff, national governments, and especially those States responsible for the most designations or with the largest number of designees either as citizens or located in their territory. In order to review the 488 names on the list, a rigorous schedule was established in which each trimester, the committee circulates a batch of names to the designating State(s) and the State(s) of residence and/or nationality.<sup>29</sup> States then have up to three months to provide updated information on the reasons for listing, as well as any additional identifying or other information. Reviewing states are asked to indicate if the listing remains appropriate; if not, a delisting request is submitted according to the guidelines. After replies are received from the reviewing states, information is circulated to members of the committee and the monitoring team for one month to review and provide input, following which the names are placed on the committee’s agenda.

The 1822 review has been a serious, thorough and laborious process for which considerable effort has been expended by the committee members, staff, member states, and national governments. Initial progress was slower than hoped due to the significant workload and delays in getting necessary responses from member states, but the review seems to be proceeding at an adequate pace. Of the original 488 names to be reviewed,

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<sup>28</sup> See Statement to the 63<sup>rd</sup> session of the General Assembly, Third Committee, Item 64(b), 22 October 2008, New York, at

<http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/statementGA221008.doc>.

<sup>29</sup> The committee has sent four of the five batches of names to designating states – 422 of the 488 total, with the final batch expected in November.

the process has been initiated for 422, as of 26 October 2009.<sup>30</sup> The committee has received about 90 replies and 68 names have been placed on the 1267 committee's agenda.<sup>31</sup> As of the end of October, the committee had completed its substantive review of 50 names, eight of which have been delisted; 10 additional are pending. Of significant note, the 1822 review process seems to have changed the culture of the 1267 committee, with much greater discussion and deliberation during meetings rather than only reporting instructions from capitols. Narrative summaries of reasons for listing which are accessible on its website, also represent important improvements in the making the sanctions regime more transparent, fairer and clearer.<sup>32</sup>

Perhaps the most visible measure of progress concerns delistings. Since the adoption of UNSCR 1822 on 30 June 2008, eight individuals and four entities have been removed from the 1267 consolidated list. Notable delistings include several subject of litigation – Sayadi & Vinck, Himmat, Youssef Nada, as well as Al Barakaat International.<sup>33</sup>

Significant progress has been made in the 1822 review process, yet it is too soon to tell if it will succeed in resolving some of the more persistent challenges -- the continued listing of deceased persons, entries that do not contain sufficient identifiers/information to allow for the positive identification, and removal of individuals associated with the Taliban.

### **SECTION THREE – LITIGATION-RELATED CHALLENGES**

*Larissa van den Herik and Nico Schrijver\**

The 2006 Watson report concluded that the right to an effective remedy applied to targeted sanctions -- whether such sanctions are administrative or criminal in nature, or political measures adopted by the Security Council. Deriving from the fact that individuals are personally and directly affected, the right to an effective remedy entails elements of independence, impartiality and effectiveness.

The current lack of a delisting procedure that satisfies these elements of an effective remedy has generated legal challenges at multiple levels. This resistance comes from not only numerous national and regional courts (European Court of First Instance and the

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<sup>30</sup> Statement by the Chairman of the 1267 Committee to an Open Briefing to Member States, 1 July 2009 at <http://www.un.org/sc/committees/1267/docs/BriefingCMMS.pdf>. and additional information provided to authors.

<sup>31</sup> For a name to be placed on the 1267 committee agenda, replies must be received from designating state(s), states of nationality/residence, as well as a complete narrative summary.

<sup>32</sup> Ibid. The 1267 website posts the status of narrative summaries. As of 23 September 2009, the committee had approved 157 narrative summaries of which 123 had been posted on the website.

<sup>33</sup> See 1267 Committee website for updates of the consolidated list and notices on individual and entities removed from the list, such as 22 October 2009 statement at, <http://www.un.org/News/Press/docs/2009/sc9773.doc.htm>.

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European Court of Justice in the cases of *Kadi* and *Al Barakaat*), but also from the UN Human Rights Committee (in the case of *Sayadi and Vinck*). Moreover, parliaments and domestic legislators have responded to perceived illegitimate UN sanctions regimes. Two primary challenges surround the delisting debate, namely (1) the institutional challenges pertaining to Security Council review; and (2) the practical challenges relating to intelligence-sharing. A third aspect, interrelated with these two challenges and central to the review discussion, is the question on the standard of review.

### *The special position of the Security Council*

The overall jurisprudence to date demonstrates a great willingness on the part of regional and national courts to formally respect the special position of the Security Council and to refrain from direct review. At the same time, regional and national courts cannot overlook the gap in legal protection for individuals. This has created a situation in which courts are embarking on *de facto* review of the UN listings. The full implications of this situation for sanctions regimes are not yet entirely clear. The consequences of the current activity of regional and national courts, however, may reach beyond the sanctions regimes. Developments before these courts might well have spill-over effects to the general attitude of regional and national courts vis-à-vis the Security Council and its Chapter VII resolutions.

The ECJ's approach in the *Kadi* case may serve to illustrate the sketched contrast between a formal position vis-à-vis the Security Council and the *de facto* outcome of a case. In the *Kadi* case, the ECJ's starting point was that the Community judicature could *not* undertake a review of a Chapter VII resolution. Yet, it also held that the EC measures implementing the relevant resolutions could be subjected to review on their compatibility with fundamental rights. As the ECFI had already pointed out, this reasoning of the ECJ led to a *de facto* review of the UN listings as the EC institutions do not have any autonomous discretion in the implementation process. In the process of reviewing the UN sanctions regime, the ECJ found the existing re-examination procedure at UN level insufficient. The ECJ did not fully embrace the "equivalent protection"-doctrine, which implies that the European Courts would defer to a UN panel once this existed and offered acceptable protection. The ECJ left open if and under which circumstances it would defer to such a mechanism. This demonstrates that once regional and national courts engage with Security Council resolutions and regimes, their jurisprudence may get their own dynamic. Notably in this case, even though the ECJ formally respected the Security Council's special position, the reality of its reasoning entailed a disregard of the pre-eminence of the UN Charter and in particular of Article 103 which was not even mentioned in the judgment.

Domestic challenges show equal nominal respect of the Security Council's special position, even though they are straightforward and rather severe in their substantive criticism. In a recent Canadian challenge to 1267 sanctions that focused on the travel ban rather than the assets freeze, the Federal Court heavily criticized the sanctions regime comparing the situation of the complainant to Josef K in Kafka's *The Trial*. Moreover, it is notable that Swiss courts, in the cases of *Nada Ebada* and *Himmat* rendered after the

ECFI judgment in *Kadi* and *Al Barakaat* but before the ECJ judgment in these cases, followed the ECFI judgment very closely, even though there was no direct obligation to do so. **This emphasises the potential character of the *Kadi* judgment as a precedent rather than an incident.** In relevant cases in the UK, courts have respected the special status of the Security Council in that they have looked at the implementing legislation rather than directly at the UN listings. They emphasized, however, that designated persons should so far as possible be able to know the case against them *and* to challenge it on the merits in special procedures. If in these procedures, the Court would come to the conclusion that the listing was not justified, this would impose a duty on the national government to support delisting.

### *Security concerns and intelligence-sharing*

The 1267 sanctions are counter-terrorism measures and their application may involve classified information that cannot easily be shared with independent reviewers. In the *Kadi* case, the ECJ did not address the intricacies of this matter, but set out rather generally that the sole fact that measures were meant to address terrorism and concerned national security did not mean that they could escape judicial review. The ECJ put forward that in these instances the Community judicature would apply special techniques to accommodate legitimate security concerns regarding the nature and sources of the information.

The ECFI provided views on classified information in relation to national implementation of measures adopted pursuant to UNSCR 1373. In this context, the ECFI left the substantive review of files largely to national systems, which have special procedures in place to deal with classified information. To the extent that questions of review do arise at the level of EC Courts, the ECFI initially left the question open as to whether in the context of the right to effective judicial protection, confidential information had to be shared with the applicant or whether it could be provided only to the Court so as to safeguard public interests. In the so called *PMOI II* judgment, the ECFI elaborated on the issue of classified information. Three documents that supported the listing and that France had circulated in the EC Council of Ministers could not be provided to the ECFI as they were classified as confidential by France. The ECFI did not accept claims of confidentiality, refuting the contention that relevant information could be shared with the governments of the 26 other member states but not with the court. The ECFI held that “the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorize its communication to the Community judicature whose task is to review the lawfulness of that decision.”

The possibility that the information might be shared with the applicant might have informed France’s unwillingness to provide the requested information. This example illustrates that any advisory mechanism should have clear and specific regulations in place to deal with classified and other sensitive information. General declarations may not suffice in this respect. At the same time, listings cannot be done purely on the basis of

classified information in light of existing rights of targeted individuals to know the case against them and to have some insight into the evidence adduced against them.

Domestic courts might be better equipped to deal with classified information as often special procedures are already in place, as acknowledged by the UK Court in the case against *G*. In this case, the UK had proposed the listing of *G* to the 1267 Committee and therefore the evidence against *G* was in the possession of the UK government. The subsequent UK case against *Hay* illustrated that domestic courts of States other than the designating States, or regional courts, may not necessarily be viable avenues for a merits based review, given that a lack of information may exist if the designating State is unwilling to share its information.

### *Standard of review*

The security context as part of which the listing decisions are taken may also have an impact on the standard of review. In judgments pertaining to national listings pursuant to UNSCR 1373, the EC Council of Ministers asserted the broadest discretion as its listing decisions were taken in a sphere of “policy choices and political judgment”. According to the Council, any judicial review should thus be limited. The ECFI agreed to this. It confined its review to ensuring that an adequate national decision was the basis of the listing and verifying whether the Council had given reasons as to why it considered it necessary to adopt the measures. The ECFI emphasized that the decision to list was a discretionary one. In particular in relation to this exercise of the Council’s discretionary power and the validity of the reasons to list, the ECFI held that any review should be especially limited. As it emphasized,

“Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council’s assessment of the factors as to appropriateness on which such decisions are based.”

Hence, the ECFI was reluctant to engage in a full substantive review as to whether the evidence in the file supported the listing but rather respected the broad discretionary powers of the executive organ responsible for the listing.

## **SECTION FOUR – ASSESSMENT**

As noted in the 2006 Watson report, the establishment of fair and clear procedures requires both procedural fairness and an effective remedy. Procedural fairness entails notification, accessibility, and a fair hearing. Effective remedy requires independence,

impartiality, and an ability to grant relief. Three years ago, we remarked that adoption of procedural reforms to deal with concerns about the lack of fairness would likely go a long way in addressing concerns about unfair and non-transparent sanctions committee procedures. In fact, many of the changes made since 2006, discussed in section two, have addressed many, though by no means all, due process concerns. What has principally not been addressed, however, is the need for an effective remedy in the case of a potentially wrongful application of targeted sanctions.

The Security Council has taken significant steps to establish fair and clear procedures, through the adoption of UNSCRs 1730, 1735, and especially with the implementation of UNSCR 1822. Procedural changes to date generally address concerns about *notification* and improved *accessibility*, but there have also been improvements in providing elements for *fair hearing*.

First, the No Objection Period (NOP) was extended from 48 hours to 5 working days, allowing more time in capitals for a serious review of the case, an important element of providing for a fair hearing in the listing process.

Second, UNSCR 1730 created a focal point within the Secretariat to receive delisting requests. This is an improvement and addressed the most important, though not all, aspects of providing accessibility for those listed.

Third, UNSCR 1735 elaborated on what should be contained in the substantive content of the statements of case, provided for the public release of that information, and created a procedure to improve deficiencies in notification. This addressed our call to establish norms and general standards for the content of statements of case. This also helps ensure that application of targeted sanctions is fair and impartial (an important administrative standard) and ensure that statements of case include a narrative demonstrating the individual or entity's participation in proscribed activities, both important elements of providing for a fair hearing.

Fourth, UNSCR 1735 also determined that to the extent possible, targets should be provided with a redacted statement of case indicating the basis for their listing. Making public statements of case is an important element of notification and if persuasive, will strengthen public legitimacy and enhance effective implementation. Targets should be notified by a UN body of their listing, the measures being imposed, and information about procedures for exemptions and delisting. Notification is central to procedural fairness and although the UN Secretariat still is not directly involved, the more active role of the Secretariat in notifying the Permanent Mission of the likely location of individuals listed is an improvement. There is still no direct, supplemental notification provided by the Secretariat, as recommended in the original Watson Report.

Fifth, the Al Qaida / Taliban Sanctions (1267) Committee has made considerable progress under UNSCR 1822 in reviewing all names on the consolidated list as of 30 June 2008, and requires an annual review of those names that have not been updated in three (3) years or more. The reviews address, to some extent, concerns about open-ended

asset freezes becoming *de facto* confiscations of assets. They do not, however, require that designations lapse unless reaffirmed by the Sanctions Committee. Rather, by operating on the basis of consensus and with the no objection principle, the process tends to be biased against making changes to the list. Resolution 1822's requirement for ongoing annual review to ensure that every designation is reviewed at least every three years over time, will help to establish consistent (and higher) standards for statements of case. This would again contribute to provisional measures that could ensure that the application of sanctions follows norms and standards with regard to fairness under administrative law, contributing to improvements in providing for fair hearing.

Sixth, UNSCR 1822 made further improvements to the notification process and enhancing transparency of the process by releasing information to targets and the general public about the reasons for imposing the targeted sanctions and improvements to the committee website.

None of the three resolutions, nor any of the other administrative reforms of procedures or guidelines adopted at the end of 2008, however, has addressed the question of effective remedy or a review mechanism at the UN level.

### *The Balance Sheet*

The adoption and implementation of UNSCRs 1730, 1735, and 1822 constitute an important beginning. The procedural changes to date are generally fairly good on addressing concerns about notification and improved accessibility. Complete fair hearing in advance of a designation is virtually impossible, given the nature of targeted financial sanctions in particular, but there have also been improvements with regard to providing elements of a fair hearing, notably with regard to periodic review, extending the NOP, transparency (releasing redacted statements of case to those designated), and most significantly, efforts to improve the quality of statements of case (with the caveats identified above).

Some Members of the Security Council are generally satisfied that they have addressed the normative, legal, and political concerns of Member States, but more remains to be done.

To begin with, there are some important elements of fair hearing that have not yet been addressed. In addition to institutionalization of the periodic review of listings and the concerted effort on the part of UN Security Council Member States and the 1267 Monitoring Team to establish higher norms for the substantive content of statements of case, it would be useful to establish time limits for responding to listing, delisting, and exemption requests. This would address concerns about the problem of indefinite holds sometimes placed on exemption or delisting requests (or even a listing request) by a single Member of the Security Council.

An even more important way to increase the likelihood of receiving a fair hearing would be the introduction of a transparent, inclusive, and genuinely deliberative process for all

listing and delisting requests among sanctions committee members. Current committee guidelines and practice provide for bilateral consultations and a written silence procedure for delisting requests and do not routinely allow such requests to be placed on the agenda of committee meetings. Representatives either vote as instructed by their capital, or remain silent and make use of the no objection provision. Some form of deliberation, which has begun as a result of the 1822 review, might begin to address the concerns of the European Court of Justice about the absence of any review mechanisms at the UN level.

Because committee decisions are taken by consensus which has been interpreted as unanimity, committee action on delisting requests can and often has been blocked by a single negative vote. To overcome structural constraints in the sanctions committee's decision-making process, changes in committee procedures to place the onus on the dissenting member should be considered. This could include requiring a written justification of reasons for opposition to delisting requests, new procedures that require deceased individuals or those listings for whom there are inadequate identifiers to expire within a limited time, or ultimately a change in committee decision-making procedures that permits voting or a new understanding of consensus that does not equate to unanimity.

The largest failing of the existing regime, however, remains the virtual silence on provisions for providing an effective remedy. The reforms to date do not deal with the need for an effective remedy in the case of a wrongful application of a targeted sanction. This continues to be the most difficult and unresolved issue and options for consideration of ways of addressing it are presented in the following section.

## **SECTION FIVE – OPTIONS**

Broadly speaking, there are three principal approaches that could be pursued to address the remaining due process issues related to fair hearing and effective remedy and attempt to rescue the instrument of targeted sanctions from being undermined by challenges to its current use:

- A. Amend existing sanctions committee procedures to remove or address “problem” cases, strengthen the quality of the list, impose time-limits on designations, and approximate a fair hearing for designees;
- B. Rely on formal reviews of designations at the national or regional level; or
- C. Create a review mechanism at the UN level.

These are not entirely mutually exclusive and could potentially be used in combination.<sup>34</sup> We have suggested arguments for and against each option (pros and cons).

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<sup>34</sup> It is important to note that whatever changes are adopted in the 1267 context, they are likely (indeed should be) replicated across other sanctions regimes.

## A. Procedural Enhancements of Sanctions Committee Processes

(1) Use the ongoing 1822 review of previous designations to update the list to be reflective of current threats and **remove “toxic designations”** from the from the 1267 consolidated list. Just as financial institutions have removed toxic assets from their books, the 1267 committee should remove designations for which it cannot make a compelling case. The strongest possible public case in support of remaining designations should be made through the publication of comprehensive narrative summaries.

Pros: Improves integrity and relevance of list; addresses political problems associated with contentious cases; enhances legitimacy of UN Security Council imposition of targeted sanctions

Cons: Perceived as status quo and does not address perception of injustice associated with 1267 designations; some legal challenges likely to continue

(2) **Impose time limits on listings**, ensuring that they are not open-ended, *de facto* permanent designations. Designations will be valid for three years, after which agreement of the sanctions committee is necessary to continue listing (in effect, a sunset, in which designations expire unless reaffirmed by the committee).

Pros: Addresses argument that designations are punitive, not preventive, and entail unwarranted denial of fundamental rights to property and movement; periodic review of list enhances credibility, political will, and therefore, effective implementation; defaults to decision (rather than current system of indecision), as name comes off list without agreement to maintain the designation; strengthens the quality of the list overall.

Cons: Time limitations place pressure on committee and members to act; increases workload burden on secretariat staff and especially national governments; bias towards delisting rather than maintaining designation; unlikely to forestall further legal challenges on its own.

(3) Introduce **new procedures to increase transparency and approximate “fair hearing”** for consideration of delisting requests by the committee.

(a) Ensure that a complete package for committee review is prepared, including responses of petitioners and additional relevant information, such as copies of legal proceedings and judgments at the national and regional level to be considered as part of the review. (The monitoring team, expert group, or focal point could compile this information.)

(b) Provide a more transparent, inclusive, and genuinely deliberative process among committee members; enable the committee to deliberate, to compare cases, establish committee precedents, and a basis for institutional learning; delisting requests should be routinely placed on the agenda of, and discussed at, committee meetings.

(c) Designate the focal point as clearinghouse for: notification of listings (in addition to states of residence and nationality); receipt of exemption requests; general information regarding sanctions regimes and procedures to applicants; responses to applicants concerning the outcome of delisting and exemption requests, providing reasons for denial; and regular reports on activities, including suggestions for administrative improvements

Pros: Provides important elements of fair hearing at the UN level, without creating a formal review procedure or creating a new institution

Cons: Does not address need for effective remedy by an independent and impartial reviewer able to grant relief

**(4) Change committee procedures to overcome structural constraints** that inhibit progress on delisting (delays/blocking) and expedite decisions

(a) Adopt special procedures according privileged status to original designating state for delisting requests (shortened timeframe or semi-automaticity of request);

(b) Require holds to expire or be converted to formal block after a set timeframe, unless written justification for additional time is provided;

(c) Require committee members opposing a delisting request (i.e. hold or formal block) to provide reasons for their decision;

(d) Introduce “default-to-decision” procedures for deceased individuals or those listings in which there are inadequate identifiers (e.g. presumption that designations lacking identifiers expire in 3 months)

(e) Change committee decision-making procedures (consensus without unanimity or possible voting in committee);

Pros: Demonstrates continued procedural reform

Cons: Insufficient to address significant concerns about improving fair hearing and does not address need for effective remedy by an independent and impartial reviewer able to grant relief

## **B. National or Regional-level Review**

(1) **Defer to national measures** to ensure that listings meet domestic legal standards of each member states (e.g. conduct a national-level review before submitting/approving names for potential UN listing, allowing judicial review of classified information).

Pros: Consistent with traditional local remedies rule and the complementarity principle to defer to national procedures in the first instance; utilizes existing legal remedies and review procedures, including handling of classified intelligence, *in camera* procedures; enhances confidence that due process concerns are addressed.

Cons: Lack of common standards across different national jurisdictions could undermine effectiveness of UN counterterrorism framework, increase inconsistencies in member states' approaches, undermine committee's role in assisting with designations, and reduce transparency. Likely to lead to fewer listings, increased litigation, be unenforceable, and may not address challenges that arise after the listing.

(2) Conduct a **retrospective hearing at the national level** in state proposing the listing within a reasonable period of time, with a statement of case made available to designated individual and designee given opportunity to respond (deference to national procedures is modeled after existing EU procedures for autonomous listings pursuant to Resolution 1373). A decision by national courts of the designating states that proposal to list was unjustified would be binding on sanctions committee, or result in immediate 1822 review.

Pros: Relies on existing legal remedies and review procedures (e.g. handling of intelligence information, *in camera* processes) at the national/ regional level, without the need for Security Council review (decision that is reviewed is designating state's proposal to list rather than Sanctions Committee's decision to list); accords a privileged status to designating state by permitting it to withdraw listing following domestic court proceeding.

Cons: Quality of review is dependent on political context and legal culture, which varies across different national jurisdictions and time periods; attempts to address global threats through national measures; redacted statement of case may preclude substantive review; lack of adequate national listing/delisting mechanisms and procedures in many states; complications of multiple co-designating states.

(3) Rely on **national or regional-level designations in lieu of UN listings**. Abolish the 1267 Committee and list, utilizing instead UNSCR 1373 as the legal basis for making terrorist designations at the national/regional levels.

Pros: Utilizes existing procedures based on national decision of a law enforcement/judicial authority to list; defers to national/regional procedures for handling intelligence information, *in camera* processes, etc

Cons: Weakens multilateral counterterrorism regime through lack of parallel implementation across different jurisdictions (most of whom do not maintain lists independent of UN designations); attempts to address global threats through national measures; weakens role of UN Security Council in the maintaining international peace and security.

## C. UN Review Mechanism<sup>35</sup>

(1) Create an **advisory review mechanism under the Security Council's authority** to make recommendations regarding delisting requests.

Potential institutional forms of **non-binding** mechanisms include:

(a) Subgroup of Security Council members (not including original designating state) to consider sanctions committee denial of delisting requests. Subgroup of 3 members (current or former Security Council (SC) members) convened on *ad hoc* basis to consider delisting requests, and make a recommendation to the Security Council.

Pros: Group of Member States other than designating state reviewing sanctions committee decision, and with change in membership of the non-P-5; no new institutional structure and could be staffed by Secretariat

Cons: Unlikely to be considered impartial or adequately independent since other SC members would often have concurred in original listing decision; potentially administratively complicated if each delisting request necessitated a new subgroup

(b) Monitoring Team (MT) role expanded to include evaluation of delisting requests (including assessment of relationship of listed party to Al-Qaida / Taliban threat), analysis, and recommendation to sanctions committee as to the merits of delisting requests.

Pros: Administratively easy, as it builds on existing structure; represents limited degree of “independence” as Secretary General (SG) appoints MT members; demonstrates Council's commitment to further reform of delisting procedures to be more fair and clear;

Cons: Unlikely to be considered sufficiently analogous protection of due process so as to encourage courts to exercise deference; not sufficiently independent in decision-making authority or ability to grant relief; perception of conflict of interest and complications posed by MT becoming arbiter of delisting decisions; further distracts MT from core mission of assisting the 1267 Committee in enhancing effectiveness of measures and their implementation by Member States, and risks loss of MT's credibility and trust in performing review functions

(c) Ombudsperson (eminent person likely with diplomatic or judicial experience appointed by SG in consultation with SC) to make recommendations to Security Council on delisting requests (only) appealed from Sanction Committee decisions. Ombudsperson would ensure broad-based review of requests taking into account all factors

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<sup>35</sup> Within each institutional form of a non-binding appeal mechanism is a range of choices as to the specific elements of the mechanism – composition, authority, powers, transparency, etc. Variations of each option are possible.

(concerns of designating states, maintenance of international peace & security, and assurance of fair and clear procedures).

Pros: independently appointed and makes independent recommendation to Security Council; enhanced perception of fairness and demonstration of Council's commitment to fair and clear procedures; courts may consider ombudsperson as sufficient analogous protection of due process and exercise deference;

Cons: Limited ability to provide effective remedy, since although recommendations may be made public, they are non-binding; therefore may not fully satisfy court concerns

(d) Advisory panel (consisting of 3 eminent impartial persons appointed by the SG in consultation with the Security Council) to consider delisting requests and make recommendations to the Security Council. Available to the petitioner and transparent through public summary report

Pros: Most likely non-binding option to address legal concerns for independent and impartial review, thereby avoiding complications of courts imposing more stringent standards for listing

Cons: Potentially significant institutional and operational costs of establishing a quasi-judicial entity within Security Council structure, especially for relatively few cases; perceived infringement upon Security Council authority; complications of sharing classified intelligence information

(2) Establish an **independent judicial body** with competence to review decisions of sanctions committees denying delisting requests. Based on precedents of the Security Council creating subsidiary bodies for other priorities, such as the specially-constituted tribunals (International Criminal Tribunal for the former Yugoslavia - ICTY), a group of experts with appropriate experience would be appointed by the Secretary General to hear delisting appeals; decisions would be binding and public

Pros: Provides an effective remedy through the elements of independence, ability to grant relief, and accessibility; likely to avert court challenges to UN targeted sanctions as violations of international human rights standards due to relative complementarity. Enhance legitimacy, perceptions of fairness and allow SC to keep control of sanctions

Cons: Perceived to infringe upon Security Council's authority. Potentially significant institutional and operational costs for relatively few cases, and problems associated with access to classified information. Could weaken the authority of the Security Council if sanctions committees decisions are frequently challenged

**Table II: Comparison of Review Mechanism Options<sup>36</sup>**

<b>Comparison of Review Mechanism Options</b>					
	<b>Security Council Subgroup</b>	<b>Monitoring Team</b>	<b>Ombuds-person</b>	<b>Advisory Panel</b>	<b>Judicial Review</b>
<b>Composition</b>	3 Security Council members (past or current, but not designating state) on <i>ad hoc</i> , rotating basis, appointed by S-G	Existing 1267 Monitoring Team, appointed by S-G	One eminent person, appointed by S-G	Three eminent persons, appointed by S-G	New subsidiary body created by UNSC with delegated authority
<b>Independence</b> Independently appointed?	YES	YES	YES	YES	YES
<b>Impartiality</b> Independent to make decisions?	SOMEWHAT	NO	YES	YES	YES
<b>Authority</b> Competent to grant relief?	SOMEWHAT	NO	NO	NO	YES
<b>Accessibility</b> Accessible by individuals?	POSSIBLE	POSSIBLE	YES	YES	YES
<b>Investigatory power</b> Access to information?	SOME	YES	SOME	SOME	YES
<b>Hearing</b> Petitioner able to be heard?	NO	UNLIKELY	YES	YES	YES
<b>Transparency</b> Decisions made public?	POSSIBLE	POSSIBLE	YES	YES	YES

<sup>36</sup> A review mechanism would only be accessible after the petitioner has already gone through the existing delisting procedures and received a response from the sanctions committee. As such, the first four of these options are *ad hoc*, as there is no need for a standing body to handle the minimal number of appeals. With the exception of judicial review, the advice rendered by the other review mechanisms would be directed to the Security Council, a body separate from the sanctions committee that made the delisting decision which is being appealed.

## SECTION SIX – RECOMMENDATIONS

*Even if the total number is small and committee procedures have improved, the persistent perception of unfairness and potential violation of due process associated with targeted sanctions means there is a political problem that needs to be addressed. **Failure to make the sanctions process more transparent, accessible and subject to some form of review threatens to undermine the credibility and effectiveness of UN sanctions generally.***

The passage above, from the 2006 Watson Report, is as applicable today, as it was when it was written more than three and one-half years ago. Only now, the need for action is more urgent. The political problem has only grown worse, with criticism expanding beyond measures to counter terrorism to disparagement of the instrument of targeted sanctions more generally. Continued challenges without what is perceived as an adequate response, risks the Security Council's legitimacy and future ability to utilize such tools effectively to act against threats to international peace and security. Taking the initiative to address the issue proactively could help to avert future court challenges that may look beyond procedural requirements to examine the substantive (intelligence) reasons for making the designations.

### *Sanctions committee procedural reforms*

Improvements in sanctions committee procedures as presented in Option A in the preceding section, are helpful in demonstrating further resolve by the Security Council to make sanctions more fair and clear. The 1267 Committee has repeatedly adapted its procedures, and the options in Section 4(a) would continue this progress, though taken alone, would by no means be sufficient to address the larger political and legal challenges facing targeted sanctions.

Removing a *significant* number of designations (especially certain *causes célèbres*) through the 1822 review process will help to strengthen and restore credibility to the list. Progress on delisting deceased individuals and Taliban members willing to work with the Afghan government also will enhance confidence in the continuing relevance of the sanctions. Narrative summaries for those remaining on the list should be thorough and publicly compelling, with strong arguments as to why particular individuals remain listed.

Likewise, modest procedural adjustments, such as an expanded administrative role for the focal point and /or enhanced information-gathering and assessment responsibilities for the monitoring team in delisting requests would make important improvements to the current process. Reforming committee procedures to be more transparent and deliberative (i.e. requiring explanations for holds, expedited procedures, and periodic reviews) are also helpful and should be implemented. Even the difficult matter of changing committee decision-making procedures (possible voting in committee) could result in overcoming structural constraints endemic to sanctions committees and breaking some of the logjams that have stymied progress on delisting in the past.

Incremental or marginal improvements of committee procedures alone, however, will not address effectively the larger political problem or regain control of the debate over fair and clear procedures. Bold, proactive measures to address the fundamental issue of effective remedy are needed.

#### *National level measures*

The second category of options – to rely on national or regional-level review – is appealing because of its potential to address problems of fair hearing, access to sensitive information, and consistency with established legal procedures (with precedence given to national measures). The first two options, relying on national measures at the listing stage, would provide a basis for fair hearing and effective remedy, but assume that fair judicial hearings could be conducted similarly across widely varying national jurisdictions and in highly charged political contexts (such as those immediately following a major act of terrorism). The third option, relying on national or regional-level designations, taken on its own, would seriously undermine the effectiveness of a global counterterrorism regime. For example, very few Member States maintain autonomous lists. If there were no UN list, countries that lack their own autonomous lists or procedures to create them would not participate in the global counter-terrorism regime. The possibility for regulatory arbitrage would be high, and parallel implementation would disappear. This would severely weaken the utility of the targeted sanctions instrument in promoting international peace and security.

#### *Measures at the UN level*

Establishing a review mechanism at the UN level represents the best prospect of effectively addressing the legal and political challenges to targeted sanctions. Creative thinking on the full range of issues – procedural, legal, and political – is called for to meet contemporary challenges of global governance in this issue domain. It is time to move beyond traditional arguments about Security Council prerogatives. While there are, without question, practical difficulties in establishing any kind of advisory or review body, they appear, to be far outweighed by the *real and current dilemmas* Member States face in being able carry out their obligations under the UN Charter without violating domestic laws.

Although the legal and political challenges represent a serious threat to the efficacy of targeted sanction, they also present opportunities to regain control of the due process issue before courts go beyond procedural review and begin to examine underlying substance. To date, courts have demonstrated great willingness to respect the special position of the Security Council and refrain from direct review. Because of persistent challenges *without a perceived adequate response*, however, the current trajectory implies greater court intervention in the substantive aspects of UN listing decisions. In the words of the 1267 Monitoring Team, “one reason to create a panel or other review mechanism is simply to get ahead of the law in this area, to establish it, rather than allow national and regional courts or Member State practice to do so... the Committee might be well advised to establish the desired standard of review, rather than effectively cede this role to others.”<sup>37</sup>

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<sup>37</sup> Tenth report of the Analytical Support and Sanctions Implementation Monitoring Team, 31 July 2009, UN Doc.S/2009/502, para. 42, available at <http://www.un.org/sc/committees/1267/monitoringteam.shtml>

Beyond the imperative to deal preemptively with the issue before courts adversely rule on the subject, the distracting nature and inordinate resources associated with delisting issues is cause for concern. As noted previously, extraordinary effort has been devoted to the 1822 review at all levels, and the positive results are important. With finite time and resources, however, the fact remains that less progress is being made in addressing the core preventive goals of the counterterrorism sanctions. Concerted initiatives to focus on implementation by Member States, capacity building assistance, and understanding the ever-changing threat from Al Qaida and the Taliban have been limited. Notwithstanding the considerable resources devoted to delisting issues, *perceptions regarding the lack of appropriate protection of individual rights persist*, and attention continues to be diverted from enhancing the effectiveness of measures to counter the threat.<sup>38</sup> From a practical standpoint, it is extremely unlikely that fundamental objectives of strengthening targeted sanctions will advance without adequately addressing the delisting issue.

Critics of UN-level review mechanisms have characterized Option C alternatives as costly and a potentially significant increase in workload. Yet, with the exception of judicial review, the other institutional alternatives would only be utilized on an *ad hoc* basis, and after existing committee procedures to appeal listing decisions have been exhausted. Similar arguments about costs were made during deliberations surrounding the creation of the focal point in 2006, but as the chart on page 13 indicates, the workload has been manageable, and fairly minimal.

There are a variety of different institutional forms a review mechanism could take, but they are distinguished primarily by whether it is an advisory body, or whether its decisions – even if strictly limited to delisting appeals and based on a delegated authority by the Security Council itself – are binding. The latter would meet the standard of effective remedy more readily than an advisory body, but depending on the specific institutional form, even an advisory body could approximate important elements of effective remedy, as long as its decisions were made public. Among the various options for an advisory mechanism outlined in the table on page 29, the appointment of an Ombudsperson would be simplest and easiest to implement. It would also meet minimum standards of independence with the smallest institutional infrastructure. An advisory panel of eminent, impartial persons would likely be perceived as more independent, however.

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<sup>38</sup> Ibid, para. 35.

## *Conclusion*

The goal of further reform should not be to minimize the probability of future legal challenges to specific targeted sanctions designations. It is impossible to know with certainty if any of these measures, taken singly or in combination, would ever be sufficient to prevent or forestall future legal challenges to the targeted sanctions regime. This argument has been advanced by some as a reason not to consider more ambitious options, such as the creation of a review mechanism at the UN level. Such thinking, in our view, is a prescription for inaction, perpetuates the cycle of reactive measures by the UNSC, weakens the instrument of targeted sanctions, and risks the credibility of the Security Council.

In the final analysis, we hope that the Council will consider a broad range of options, and ultimately opt for a creative combination of proposals to address the remaining issues associated with fair hearing and effective remedy. Rather than choosing among the different options at the sanctions committee level, the national level, or the UN level, we think it would be best to combine elements drawn from several of them. A more robust 1822 review process, incorporating many of the changes recommended above, in combination with the establishment of a review mechanism at the Security Council level would be the most effective way to address the continuing and deepening challenges to the legitimacy of UN targeted sanctions. These steps should be undertaken not only because they are pragmatic and prudent, but also because protecting fundamental human rights is the best way to strengthen targeted sanctions.

## APPENDIX A: Delisting Challenges in the Context of UN Targeted Sanctions Regimes: A Legal Perspective

Larissa van den Herik and Nico Schrijver<sup>39</sup>

### Introduction

In this section, recent litigation regarding the 1267 sanctions regime is analysed. The *Kadi* and *Al Barakaat* judgements of the European Court of Justice (ECJ) take a central place. By way of comparison, EU case law pertaining to the parallel sanctions based on Security Council Resolution 1373 (2001) is examined. In addition, relevant domestic case law is scrutinized, as well as a legal view from within the UN human rights system, namely of the Human Rights Committee in the *Sayadi and Vinck* case. In the analysis, specific attention is paid to the two main challenges that surround the delisting debate, as identified by the Analytical Support and Sanctions Monitoring Team, namely (i) the institutional challenges pertaining to Security Council review; and (ii) the practical challenges relating to intelligence-sharing.<sup>40</sup>

### 1. The Kadi and Al Barakaat Judgements

In the previous Watson report, the judgements of the European Court of First Instance (ECFI) in the cases of Kadi and Yusuf and Al Barakaat were examined.<sup>41</sup> In these cases, the claimants argued that the sanctions imposed on them pursuant to Security Council Resolution 1267 and implementing EC legislation infringed on their human rights.<sup>42</sup> In its judgements, delivered on 21 September 2005, the ECFI dismissed the challenges.<sup>43</sup> On 3 September 2008, the European Court of Justice (ECJ) delivered its long awaited appeal judgement in the cases of Kadi and Al Barakaat.<sup>44</sup> The ECJ upheld the appeal. It

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<sup>40</sup> Cf. para. 41 of the eight report of the Analytical Support and Sanctions Monitoring Team, 31 March 2008, *UN Doc. S/2008/324*: “It is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take actions on matters affecting international peace and security, as enshrined in the Charter. This argues against any panel having more than an advisory role, and against publication of its opinions to avoid undercutting Council decisions. It would argue too for the Council to retain authority to select or approve the membership of a review body. Finally, solutions also would have to be found to the many evidentiary problems associated with a review panel. Although the panel might be allowed access to the confidential statements of case presented to justify listings, Committee members also draw on intelligence and law-enforcement information available to them nationally or through other sources, including information obtained by bilateral exchanges, which could not easily be made available to reviewers.”

<sup>41</sup> *UN Doc. A/60/887* and *S/2006/331*, 14 June 2006, in particular section 2.

<sup>42</sup> Similar claims have been made in the cases of ECFI, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Judgement, Case No. T-49/04, 12 June 2006 and ECFI, *Chafiq Ayadi v. Council of the European Union*, Judgement, Case No. T-253/02, 12 July 2006.

<sup>43</sup> ECFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgement, Case No. T-306/01, 21 September 2005; *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgement, Case No. T-315/01, 21 September 2005 (further referred to as “ECFI, Kadi judgement”).

<sup>44</sup> ECJ, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, judgement, Case Nos. C-402/05 P and C-415/05 P, 3 September 2008 (further referred to as “ECJ, Kadi judgement”). Pending his appeal, Yusuf was delisted by the Sanctions Committee and his case was discontinued. On 22 October, Al Barakaat was also delisted. The ECFI has followed the ECJ reasoning in, *Omar Mohammed Othman v Council and Commission*, Judgment, case no. T-318/01, 11 June 2009.

set aside the ECFI judgements and annulled the relevant EC Regulations to the extent that they concerned the claimants.

### **1.1. The challenge of Security Council Review**

In their judgements, both the ECFI and the ECJ started their reasoning from the finding that they did not have the power to review Security Council resolutions.<sup>45</sup> However, both institutions formulated exceptions to this rule. The ECFI held that it could indirectly review whether the relevant Security Council resolutions respected *jus cogens* norms, *i.e.*, norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character.<sup>46</sup> The ECFI viewed *jus cogens* as a higher body of norms binding on all subjects of international law, including United Nations organs, and from which no derogation was allowed.<sup>47</sup> The ECJ dismissed this position and held that the Community judicature could in fact *not* undertake such a review of a resolution adopted by an international body.<sup>48</sup> The ECJ made a distinction between the international resolution and the implementing EC measure. It argued that in contrast to the Security Council resolution, this latter implementing measure could be subjected to review given that all community acts could be reviewed by the community judicature on their compatibility with fundamental rights.<sup>49</sup> For human rights are viewed as part and parcel of the European Community's legal order.

Even though the ECJ did not admit this explicitly, its line of reasoning gave in effect rise to an indirect review of the relevant Security Council resolution. In its judgement, the ECFI had already acknowledged that reviewing the implementing community measure would amount to an indirect review of the underlying Security Council resolutions, as these resolutions left the EC institutions no autonomous discretion in the implementation process.<sup>50</sup> In contrast, the ECJ maintained that the UN Charter left a "free choice among the various possible models for transposition of these resolutions into their domestic legal order"<sup>51</sup> The ECJ thus concluded in a somewhat enigmatic paragraph,

"It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the United Nations."<sup>52</sup>

In all, the ECJ held that it was empowered, even obliged, to undertake a full review of the EC measures that implemented the 1267 sanctions regime.<sup>53</sup>

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<sup>45</sup> ECFI, Kadi judgement, para. 225 and ECJ, Kadi judgement, para. 287.

<sup>46</sup> Article 53 of the 1969 Vienna Convention on the Law of Treaties.

<sup>47</sup> ECFI, Kadi judgement, para. 226.

<sup>48</sup> ECJ, para Kadi judgement, 287.

<sup>49</sup> ECJ, Kadi judgement, paras. 281-288, and para. 314.

<sup>50</sup> ECFI, Kadi judgement, paras. 214-216.

<sup>51</sup> ECJ, Kadi judgement, para. 298.

<sup>52</sup> ECJ, Kadi judgement, para. 299.

<sup>53</sup> ECJ, Kadi judgement, para. 326.

In undertaking this review, In the process of reviewing the UN sanctions regime, the ECJ found the existing re-examination procedure at UN level insufficient. The ECJ did not fully embrace the “equivalent protection”-doctrine,<sup>54</sup> which implies that the European Courts would defer to a UN panel once this would exist and would offer acceptable protection. The ECJ left it open if and under which circumstances it would defer to such a mechanism. This demonstrates that once regional and national courts engage with Security Council resolutions and regimes, their jurisprudence may get their own dynamics. Notably in this case, even though the ECJ formally respected the Security Council’s special position, the reality of its reasoning entailed a disregard of the pre-eminence of the UN Charter and in particular of Article 103 which was not even mentioned in the judgement.

More concretely, the ECJ came to the conclusion that the principle of effective judicial protection had been violated, as well as the human right of defence and the right to be heard.<sup>55</sup> The ECJ came to this finding on the basis of the fact that the EC measures did not include a procedure for communicating the evidence on the basis of which persons had been listed, nor a procedure for hearing the persons at the time of their inclusion or later. In addition, at no point in time had the Council informed Kadi and Al Barakaat of the evidence used against them. By lack of any information, the ECJ concluded it could not itself review whether the regulation was lawful in so far as it pertained to Kadi and Al Barakaat. It thus annulled the regulation on the basis that procedural rights had been violated.<sup>56</sup> In response to the judgement and in order to stay within the three months time limit, the EC Commission announced a new Regulation 1109/2008 on 6 November 2008 which provided for the obligation to indicate to individuals the grounds on which they had been listed and the opportunity for individuals to comment on these grounds.<sup>57</sup> Consistent with that Regulation, Kadi and Al Barakaat remained listed and have been provided with reasons for their listing. These narrative summaries had been transmitted by the Sanctions Committee on 21 October 2008, on a “non-precedent basis”.<sup>58</sup> While Al Barakaat has been delisted, Kadi’s challenge to the decision to maintain his name on the list is still before the European Courts.<sup>59</sup>

## **1.2. The challenge of intelligence-sharing**

In its line of reasoning, the ECJ ignored that the Council might not have possessed all or sufficient evidence that justified the listing of Kadi and Al Barakaat or it might not have been in a position to transmit this evidence.<sup>60</sup> The ECJ did acknowledge that the

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<sup>54</sup> The “equivalent protection – doctrine” was set out by the European Court of Human Rights, ECtHR, Case of *Bosphorus Hava Yollari Turzüm ve Ticaret Anonim Şirketi v. Ireland*, Application no. 45036/98, Grand Chamber, 30 June 2005, para. 155-156. Advocate-General Maduro also left some more room for such deference in his opinion, Advocate General’s Opinion in Case C-402/05, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, 16 January 2008, para. 54.

<sup>55</sup> ECJ, Kadi judgement, para. 353. In para. 351, the ECJ also held that the right to an effective legal remedy had been violated.

<sup>56</sup> ECJ, Kadi judgement, paras. 345-353.

<sup>57</sup> OJ L 299/23.

<sup>58</sup> *UN Doc. SC/9498*, 12 November 2008.

<sup>59</sup> ECFI, *Kadi v. Commission*, Application, Case No. T-85/09, 26 February 2009 and ECFI, *Al Barakaat v. Commission*, Application, Case No. T-45/09.

<sup>60</sup> This was acknowledged by the ECFI, Kadi judgement, para. 258.

imposition of the sanctions on Kadi and Al Barakaat could well be justified and it was for this reason that it granted the Council a three month period to remedy the infringements.<sup>61</sup> The ECJ did not give any more specific guidance as to how the procedure could be remedied, or more specifically how the Council could ensure that the information justifying the listing at UN level and often at the initiative of non-EU members would be accessible to the listed person or to the Court. It only set out rather generally that the sole fact that measures were meant to address terrorism and concerned national security did not mean that they could escape judicial review and that in these instances the Community judicature would apply special techniques to accommodate legitimate security concerns regarding the nature and sources of the information.<sup>62</sup> In its proposal for a new EC Regulation, the Commission mentions the issue of classified information, but does not tackle it decisively. It proposes that a provision should be made to deal with classified information that may be provided by the United Nations or a by a third State.<sup>63</sup>

## **2. EU judgements in the context of the 1373 sanctions**

Parallel to the 1267 sanctions, more general anti-terrorism sanctions are applied pursuant to Resolution 1373. This Resolution obliges States to freeze funds,<sup>64</sup> but it decentralises the identification process of persons against whom the sanctions should be applied. In the context of the EU, listing is done at EU level by the Council on the basis of national decisions. More specifically, Resolution 1373 was implemented in the EU by Common Positions 2001/930/CFSP and 2001/931/CFSP.<sup>65</sup> According to Article 1(4) of Common Position 2001/931/CFSP, persons can be listed on the basis of “precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.” A competent authority is a judicial authority or an equivalent competent authority if judicial authorities have no competence in the relevant area. Following Article 1(6) of Common Position 2001/931/CFSP, the list is to be reviewed at least once every six months.<sup>66</sup> The list is established in specific Council Decisions and has regularly been updated after its first establishment on 27 December 2001.<sup>67</sup> Several listed persons, both natural persons and legal entities, have challenged their inclusion in the list. A leading case concerns the *Organisation des Modjahedines du peuple d’Iran (OMPI)* or *People’s Mojahedin Organization of Iran (PMOI)*. This organization was eventually removed by the Council from the list in January 2009. The ECFI had annulled the decision to list and maintain the entity on the list in three

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<sup>61</sup> ECJ, Kadi Judgement, para. 374.

<sup>62</sup> ECJ, Kadi Judgement, para. 344.

<sup>63</sup> COM (2009) 187, 22 April 2009, para. 9.

<sup>64</sup> Para. 1 (c) of Resolution 1373.

<sup>65</sup> Resp. OJ 2001 L 344, p. 90 and OJ 2001 L 344, p. 93.

<sup>66</sup> For more on the notion of what does and does not constitute a decision taken by a competent authority, see ECFI, *Jose Maria Sison v. Council of the European Union*, Judgement, Case No. T-341/07, 30 September 2009.

<sup>67</sup> Council Decision 2001/927/EC, OJ 2001 L 344, p. 83, pursuant to Council Regulation (EC) No. 2580/2001, OJ 2001 L 344, p. 70.

subsequent judgements on 12 December 2006, 23 October 2008 and 4 December 2008. Subsequent case law of the ECFI on EU 1373-freezing measures has followed the OMPI precedent, therefore the analysis below centres on this case.<sup>68</sup>

Just as in the case of *Kadi* and *Al Barakaat*, the invoked rights in *OMPI* were the right to a fair hearing, the obligation to state reasons, and the right to effective judicial protection.<sup>69</sup> However, as the ECFI emphasised in the *OMPI* judgement, unlike the measures taken against *Kadi* and *Al Barakaat*, the decision to list *OMPI* was not taken at UN level and therefore did not “benefit from the primacy effect”.<sup>70</sup> The question of Security Council review thus did not present a challenge in this context. Still, the Council argued that it enjoyed the broadest discretion as its listing decisions were taken in a sphere of “policy choices and political judgement”. According to the Council, any judicial review should thus be limited.<sup>71</sup> The ECFI agreed to this. Yet, in the *OMPI* case, even this limited review led to annulment. Specifically in relation to the obligation to state reasons, the Council held that the statement of reasons should “indicate the actual and specific reasons why the Council consider[ed] that the relevant rules were applicable to the party concerned.”<sup>72</sup> This entailed notification of the national decision which lied at the basis of the listing.<sup>73</sup> The failure to inform listed persons of the relevant national decision which was at the basis of their listing at EU level led to annulment of the listing decision in *OMPI*, as well as in most other cases before the ECFI.<sup>74</sup>

In addition to the requirement of indicating which national decision lie at the basis of the listing, the ECFI also required the Council to give reasons as to why it considered it necessary to adopt the measure in respect of the person concerned. The ECFI emphasised that the decision to list was a discretionary one, and that there was no duty to list.<sup>75</sup> In particular in relation to this exercise of the Council’s discretionary power, the ECFI held that any review should be especially limited.

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<sup>68</sup> ECFI, *Organisation des Modjahedines du peuple d’ Iran v. Council of the European Union*, Judgement, Case No. T-228/02, 12 December 2006 (further referred to as “ECFI, OMPI judgement”), ECFI, *People’s Mojahedin Organization of Iran v. Council of the European Union*, Judgement, Case No. T-256/07, 23 October 2008 further referred to as “ECFI, PMOI I judgement”); *People’s Mojahedin Organization of Iran v. Council of the European Union*, Judgement, Case No. T-284/08, 4 December 2008 further referred to as “ECFI, PMOI II judgement”). The analysis is complemented with analysis relating to other relevant ECFI judgements, ECFI, *Jose Maria Sison v. Council of the European Union*, Judgement, Case No. T-47/03, 11 July 2007 (further referred to as “ECFI, Sison judgement”); ECFI, *Stichting Al-Aqsa v. Council of the European Union*, Judgement, Case No. T-327/03, 11 July 2007, ECFI, *Osman Ocalan on behalf of the Kurdish Worker’s Party (PKK) v. Council of the European Union*, Judgement, Case No. T-299/02, 3 April 2008, and ECFI, *KONGRA-GEL v. Council of the European Union*, Judgement, Case No. T-253/04, 4 april 2008.

<sup>69</sup> As indicated by the ECFI in para. 89 of the *OMPI* judgement, those rights are closely linked.

<sup>70</sup> ECFI, *OMPI* judgement, paras. 99-107.

<sup>71</sup> ECFI, *Sison* judgement, para. 135.

<sup>72</sup> ECFI, *OMPI* judgement, para. 143.

<sup>73</sup> ECFI, *OMPI* judgement, para. 144, jo. 116, 125 and 126.

<sup>74</sup> Given that this was a procedural rather than a substantive fault, it could quite easily be remedied so that the applicants remained on the list. This results in new applications, such as in the case of *Sison*, ECFI, *Jose Maria Sison v. Council of the European Union*, Application, Case No. T-341/07, 10 September 2007.

<sup>75</sup> ECFI, *OMPI* judgement, para. 145-146. It might be argued that this position is incoherent with the binding obligation under article 1 (c) of Resolution 1373, which uses the wording “shall”.

As it emphasised,

“Because the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council, the review carried out by the Court of the lawfulness of decisions to freeze funds must be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the Council’s assessment of the factors as to appropriateness on which such decisions are based.”<sup>76</sup>

Hence, the ECFI was reluctant to engage in a full substantive review as to whether the evidence in the file supported the listing. In fact, in relation to the right to a fair hearing, the ECFI held that this right “must be effectively safeguarded in the first place as part of the national procedure which led to the adoption, by the competent national authority, of the decision referred to in Article 1(4) of Common Position 2001/931.”<sup>77</sup> The ECFI held it would be inappropriate for the Court to review whether the national decision was based on “serious and credible evidence or clues,”<sup>78</sup> and deferred as far as possible to the assessment conducted by the competent national authority.<sup>79</sup> The right to a fair hearing at Community level would only apply to newly adduced evidence, i.e. information or evidence adduced by Member States which had not been assessed by a competent national authority.<sup>80</sup>

In the specific case of *OMPI*, the decision was first annulled because the applicant had not been informed of the national decision on which the contested decision had been based.<sup>81</sup> This failure was subsequently remedied by the Council which maintained *OMPI* on its list. The applicant was informed that the relevant national decision was an order of the Secretary of State for the Home Department of the United Kingdom of 29 March 2001 proscribing *OMPI* as a terrorist organization on the basis of the UK Terrorism Act 2000. However, on 30 November 2007, the Proscribed Organisations Appeal Commission (POAC)<sup>82</sup> ordered the Home Secretary to present to the UK Parliament the draft of an Order removing the applicant.<sup>83</sup> The Home Secretary’s application for leave to appeal was dismissed by the Court of Appeal on 7 May 2008.

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<sup>76</sup> ECFI, *OMPI* judgement, para. 159.

<sup>77</sup> ECFI, *OMPI* judgement, para. 119.

<sup>78</sup> ECFI, *OMPI* judgement, para. 122.

<sup>79</sup> ECFI, *OMPI* judgement, para. 124.

<sup>80</sup> ECFI, *OMPI* judgement, para. 125.

<sup>81</sup> ECFI, *OMPI* judgement, paras. 160-174.

<sup>82</sup> POAC is a special commission established by the Terrorism Act 2000, precisely to deal with these kind of appeals. Before the POAC special procedures are in place to deal with information that the Home Secretary wishes not to disclose for reasons of national security or public interest, The Proscribed Organisations Appeal Commission (Procedure) Rules 2007 No. 1286.

<sup>83</sup> POAC, *Lord Alton of Liverpool and others in the matter of The People’s Mojahadeen Organisation of Iran and Secretary of State for the Home Department*, Judgement, Appeal No. PC/02/2006, 30 November 2007 (further referred to as “POAC, Mojahadeen judgement”). After intense scrutiny of all the information that was or could have been available to the Secretary of State (para. 347), the POAC came to the conclusion that “the only belief that a reasonable decision maker could have honestly entertained, whether as at September 2006 or thereafter, is that the PMOI no longer satisfies any of the criteria necessary for the

Yet, at EU level, OMPI remained on the list. In the *PMOI I* judgement, the ECFI declared the decision to keep the organization on the list after the POAC decision as unlawful, as the Council had not provided proper and sufficient reasons for its decision to continue the freezing.<sup>84</sup> In particular, the ECFI recalled the considerable importance of national decisions in this context and the obligation to defer as much as possible to national assessments.<sup>85</sup>

With this reasoning, the ECFI left the substantive review of files largely to national systems, which have special procedures in place to deal with classified information. In its first *OMPI* judgement, the ECFI left the question open as to whether in the context of the right to effective judicial protection, confidential information had to be shared with the applicant or whether it could be provided only to the Court so as to safeguard public interests.<sup>86</sup>

In its third judgement, *PMOI II*, the ECFI elaborated on the issue of classified information. This judgement concerned the contested continued listing of the organisation, not any longer on the basis of the POAC decision, but instead on the basis of decisions of a French prosecutor to open investigations against alleged members of the organisation.<sup>87</sup> The decisions dated back to April 2001 and were complemented by charges brought in 2007. The question that the ECFI had to answer was whether these decisions qualified as a decision of a national authority as required by Article 1(4) of Common Position 2001/931. The ECFI could not answer this question as it did not have access to the complete file. Three documents that supported the listing and that France had circulated in the Council could not be provided to the ECFI as they were classified as confidential by France.<sup>88</sup> The ECFI did not accept this and held,

“As regards the Council’s contention that it is bound by the French authorities’ claim for confidentiality, this does not explain why the production of the relevant information or material in the file to the Court would violate the principle of confidentiality, whereas their production to the members of the Council, and thus to the governments of the 26 other Member States, did not.”<sup>89</sup>

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maintenance of their proscription.” (para. 349) Subsequently, the POAC ordered the Home Secretary to initiate the procedure to de-proscribe PMOI (para. 362). In addition, the POAC characterised the refusal to de-proscribe as “perverse”, while recognising that such a qualification was uncommon (para. 360).

<sup>84</sup> ECFI, *PMOI I* judgement, paras. 167-185.

<sup>85</sup> ECFI *PMOI I* judgement, para. 170 jo. 130-139.

<sup>86</sup> ECFI, *OMPI* judgement, para. 158.

<sup>87</sup> The ECFI observed that a literal reading of Article 1(4) of Common Position 2001/931 required a decision taken in respect of the person *concerned*, and that a decision against alleged members of an organisation rather than the organisation itself was inconsistent with that requirement, ECFI, *PMOI II* judgement, para. 64.

<sup>88</sup> In the case of *Sison*, intelligence information had also played a role in the decision to list, according to the designating state, the Netherlands. This information had not been made public and was not even kept by the Council, and was not transmitted to the Court, ECFI, *Sison* judgement, paras. 222-223.

<sup>89</sup> ECFI, *PMOI II* judgement, para. 72.

It continued,

“the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorise its communication to the Community judicature whose task is to review the lawfulness of that decision.”<sup>90</sup>

A significant difference between the 1267 UN listing procedure and the 1373 EU listing procedure is that in the latter procedure, listing hinges upon the existence of a national decision that a person has been or is suspected to have been involved in terrorism. In this context, the ECFI could defer to some extent to the legal protection offered in the procedure leading to the national decision. In the context of the 1267 listing, there is no requirement that listing be done on the basis of national (judicial) decisions, but can also be done purely on the basis of intelligence information. Such relative deference to national legal procedures can thus not take place in precisely the same manner, but may still be feasible in an adapted fashion. In the next section, the potential of national courts is explored in some more detail.

### **3. Recent domestic cases and other developments**

At the domestic level, challenges have also been made against freezing measures in the context of UN counter-terrorism strategies. For instance in Switzerland, which is not a member of the EU, the implementation of the 1267 sanctions was challenged. The Swiss judgements in the cases of *Nada Ebada* and *Himmat* were rendered after the ECFI judgement in *Kadi* and *Al Barakaat*, but before the ECJ judgement in these cases. It is notable that the Swiss courts followed the ECFI judgement very closely, even though there was direct obligation to do so.<sup>91</sup> In a recent Canadian challenge to implemented 1267 sanctions that focused on the travel ban rather than the assets freeze, the Federal Court expressed severe criticism to the regime comparing the situation of the complainant to Josef K in Kafka's *The Trial*.<sup>92</sup> More generally, it is noteworthy that several States with a monist tradition in their reception of international law, are reconsidering the openness of their legal system in direct response to the perceived illegitimacy of the 1267 sanctions regime. In Switzerland, the Ständerat (First Chamber) has instructed the government to inform the Security Council that it will not apply the sanctions anymore as of 2010 to natural persons (i) that are on the list for more than 3 years and who have not been brought before court, (ii) if these persons have not had the possibility to resort to an independent institution for a remedy, (iii) if no indictment against these persons have been issued, and (iv) if there has been no new incriminating evidence brought forward against these persons since their listing. This instruction still has to pass the Nationalrat

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<sup>90</sup> ECFI, PMOI II judgement, para. 73.

<sup>91</sup> Decision of the Federal Tribunal in Lausanne, Case 1A.48/2007, 22 April 2008, and Decision of the Federal Tribunal in Lausanne, Case 1A.45/2007, 14 November 2007, available on the website of the Federal Tribunal at [www.bger.ch/fr/index/jurisdiction/jurisdiction-inherittemplate/jurisdiction-recht/jurisdiction-recht-urteile2000.htm](http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherittemplate/jurisdiction-recht/jurisdiction-recht-urteile2000.htm). *Nada Ebada* and *Himmat* were delisted on 10 August 2009 and 23 September 2009 respectively.

<sup>92</sup> Federal Court, *Abousfian Abdelrazik and the Minister of Foreign Affairs and the Attorney General of Canada*, 2009 FC 580, 4 June 2009, paras. 45-54.

(Second Chamber) before it becomes binding on the Swiss government.<sup>93</sup> In the Netherlands a Commission of State has been installed on 8 July 2009 to advise the Government on the need to amend the Dutch Constitution on a number of issues, including the influence of the international legal order on the Dutch legal order, Stcrt. 10354, 9 July 2009. In the process leading up to the installation of the Commission, the Council of State explicitly referred to the 1267 regime as an example of international rules that were drafted outside a proper rule of law context.<sup>94</sup>

Two concrete cases of interest are ongoing in the United Kingdom, namely the case of *A, K, M, Q and G and H.M. Treasury*, in which the Court of Appeal rendered judgement on 30 October 2008<sup>95</sup> and *Hay and H.M. Treasury* of 10 July 2009.<sup>96</sup> In the case of *A, K, M, Q and G*, the Court of Appeal was called upon to decide on the legality of two UK orders implementing Security Council 1373 and 1267, respectively. Of particular interest is the case against G, who was designated on the basis of apparently the same evidence under both the Order implementing Resolution 1373 (Terrorism Order, or TO) as well as the Order implementing Resolution 1267 (Al Qaeda Order, or AQO). In the context of TO where the designation of G had been done at UK level, the Court of Appeal held in its judgement, that appropriate procedures could and should be put in place to enable a proper review of the listing and to safeguard the interests of listed individuals. In the context of AQO, such review was more complicated as the designation had been done at the level of the Sanctions Committee, and the 1267 list was subsequently reproduced in the AQO. Therefore, it was argued by the State that a challenge to AQO was in reality a challenge to the listing by the 1267 Committee. An intricate factor to this legal panorama was that it had been the UK which had initially proposed G's name for listing to the 1267 Sanctions Committee. In this context, the Court of Appeal found it hard to accept that G would not have any possibility to have the underlying case against him reviewed. This was even more so, given that the Court had just argued that proper review should be in place under the TO. As G had been listed under the TO and the AQO on apparently the same evidence, the Court argued that also in the context of AQO a designated person should so far as possible be enabled to know the case against him and to challenge it on the merits. If in such a procedure, the Court would come to the conclusion that the listing was not justified, this would not mean that the AQO was unlawful, but it would rather impose a duty on the Government to support delisting. In the case of G, the line of reasoning of the Court and its own empowerment to review the basis of the listing was possible given that it was the UK that had proposed the listing to the 1267 Sanctions Committee. The evidence against G was thus in the hands of the UK government.<sup>97</sup> However, as the Court conceded,

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<sup>93</sup> See: [www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch\\_id=20093719](http://www.parlament.ch/D/Suche/Seiten/geschaefte.aspx?gesch_id=20093719).

<sup>94</sup> Advice Council of State, 14 April 2008, Parliamentary Records II 2007/08, 31 570, nr 3, para. 4.2.3.

<sup>95</sup> Court of Appeal, *A, K, M, Q & G and H.M. Treasury*, Judgement, Case No. T1/2008/1080, 30 October 2008 (further referred to as "Court of Appeal, A, K, M, Q & G judgement").

<sup>96</sup> High Court of Justice (Queen's Bench Division, Administrative Court), *Hay and H.M. Treasury and Secretary of State for Foreign and Commonwealth Affairs*, Case No. CO/1200/2009, 10 July 2009 (further referred to as "High Court of Justice, Hay judgement").

<sup>97</sup> Court of Appeal, *A, K, M, Q & G judgement*, paras. 107-121.

“There may be greater difficulties in a case where HMT knows nothing of the facts upon which the designation was made by the Committee. I would leave the possible problems in such a case to be solved when they arise. Here there is no such problem because HMT knows all the facts relevant to the TO and must know either all or most of the facts which led to G’s designation by the Committee.”<sup>98</sup>

This observation alludes to the identified challenge of intelligence-sharing. Moreover, the case against G, and the quoted observation of the Court in particular, underline that it is important to know which State has proposed the listing. Generally, it is in that State where the most comprehensive file will exist. If legal protection would be sought in that State, the problem of intelligence sharing would not necessarily arise and normally special procedures may be in place to enable the applicant to have access to the file against him, or in any event to have the file against him being reviewed by an independent organ.

The later case of *Hay* can be distinguished from the case of G as in the *Hay* case the UK was not the designating State. The identity of the nominating State was not revealed to Hay, but the UK did try to have information disclosed by the nominating State or the 1267 Committee. These efforts failed.<sup>99</sup> By lack of information on all the facts that had led to designation, the Court was precluded from undertaking a merits based review. The Court held that the United Nations Act on which the AQO was based did not expressly or implicitly empower the Executive to remove the right to access to court.<sup>100</sup> Therefore, the AQO was quashed insofar as it concerned Hay as being ultra vires. The Court did note that enabling legislation by Parliament could remedy the situation and ensure compliance with UN resolutions.<sup>101</sup>

#### **4. The UN Human Rights Committee: Sayadi and Vinck**

The UN Human Rights Committee, the supervisory body of the International Covenant on Civil and Political Rights (ICCPR), was confronted with a claim related to the 1267 sanctions regime in the case of Sayadi and his wife Vinck versus Belgium. Sayadi and Vinck, two Belgian nationals, were placed on the 1267 list in early 2003 at the initiative of Belgium.<sup>102</sup> Around the same time domestic criminal investigations were initiated against them.<sup>103</sup> The reasons for the listing were the involvement of Sayadi and Vinck in the European branch of an organization that had been placed on the 1267 list. Pursuant to domestic efforts by Sayadi and Vinck to be delisted, the Brussels Court of First Instance ordered the Belgian State on 11 February 2005 to initiate the delisting procedure. In compliance, the Belgian State submitted a request to that effect to the Sanctions Committee on 25 February 2005, but this request was blocked by several members of the

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<sup>98</sup> Court of Appeal, A, K, M, Q & G judgement, para. 120.

<sup>99</sup> High Court of Justice, *Hay* judgement, para. 30.

<sup>100</sup> High Court of Justice, *Hay* judgement, para. 40.

<sup>101</sup> High Court of Justice, *Hay* judgement, para. 46.

<sup>102</sup> Even though it is generally not known which State is the designating State, Belgium admitted to have initiated these particular listing in the HRC proceedings, HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 4.2. Sayadi and Vinck were delisted on 20 July 2009.

<sup>103</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, paras. 2.1-2.3.

Sanctions Committee.<sup>104</sup> It should be noted that the Sanctions Committee decides by consensus only. In April 2006, Belgium reiterated its request after the criminal case had been formally terminated in Belgium.<sup>105</sup> Again, the request did not result in delisting. On 14 March 2006, Sayadi and Vinck submitted their communication to the Human Rights Committee. They argued that with its proposal to list the claimants without “relevant information” and through the subsequent imposition of sanctions, Belgium had violated several provisions of the ICCPR, including procedural provisions on fair trial and effective remedy (articles 2 and 14) as well as the right to free movement (article 12).

Belgium firstly argued that the case was inadmissible as it concerned measures taken to implement Charter obligations and the claimants thus did not fall within the jurisdiction of the State as required by Article 1 of the Optional Protocol. According to Belgium, the claims submitted “wrongly implie[d] that the Committee can pass judgement on the validity of Security Council Resolutions.”<sup>106</sup> Referring to Article 103 of the UN Charter, Belgium further submitted that it could “not be held responsible for failure to respect a lower-ranking obligation that runs counter to the Charter.”<sup>107</sup> More specifically, Belgium argued that the obligation under Resolution 1267 to “cooperate fully” with the Sanctions Committee had obliged it to furnish the Committee with the names of Sayadi and Vinck, since they were the director and secretary respectively of a listed entity. Furthermore, Belgium argued that it had done everything in its power to delist the two at a later stage, and that it could not be held responsible for the failure to succeed, as other members of the Sanctions Committee had blocked the delisting request.<sup>108</sup>

The Committee did not agree with these arguments. In a similar approach as the ECJ, it tried to distinguish between the Security Council resolution and specific actions of the State and held,

“While the Committee could not consider alleged violations of other instruments such as the Charter of the United Nations, or allegations that challenged United Nations rules concerning the fight against terrorism, the Committee was competent to admit a communication alleging that a State party had violated rights set forth in the Covenant, regardless of the source of the obligation implemented by the State party.”<sup>109</sup>

In its assessment as to whether the travel ban that had been effectively imposed as a result of the listing violated the freedom of movement, the Committee even went one step further and saw it as,

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<sup>104</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, paras. 2.5 and 4.3.

<sup>105</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 4.4.

<sup>106</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 6.1.

<sup>107</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 6.3.

<sup>108</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, paras. 8.2.-8.3.

<sup>109</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para.7.2.

“the duty of the Committee, as guarantor of the rights protected by the Covenant, to consider to what extent the obligations imposed on the State party by the Security Council resolutions may justify the infringement of the right to liberty of movement, which is protected by article 12 of the Covenant.”<sup>110</sup>

As indicated by Committee Member Shearer in a dissenting opinion, with this reasoning the Committee “appears to regard the Covenant as on a par with the United Nations Charter, and not as subordinate to it.”<sup>111</sup>

In several individual opinions appended to the view of the Committee, Committee Members disagreed on the question of admissibility and emphasised that the decision to list was taken by the Sanctions Committee and not by Belgium. Moreover, they stressed the priority of Security Council resolutions and the impossibility that the Committee would review such resolutions.<sup>112</sup>

The Committee, in its majority deciding otherwise, held Belgium responsible for the violation of the right to free movement and the right to respect for privacy since Belgium had initially proposed the listing. The Committee found Belgium’s defence that it was under an obligation to do so unconvincing given that other States had not done so either.<sup>113</sup> In relation to the travel ban specifically, the Committee held that Belgium had violated the freedom of movement. The Committee maintained that the fact that Belgium had submitted the delisting requests indicated that the restrictions imposed on Sayadi’s freedom of movement had not been necessary to protect national security or public order.<sup>114</sup>

### **Concluding remarks**

On the basis of the analysis above, it is apparent that at various levels and by various courts and other semi-legal bodies, UN sanctions regimes are under scrutiny -- not only by regional and domestic courts, but also by a UN organ, the Human Rights Committee. Moreover, national parliaments and legislators perceive UN targeted sanctions as lacking in legitimacy and coherence with domestic standards of the rule of law. Overall, the special and primordial position of the Security Council is formally respected by regional and national courts and the HRC. However, in light of the absence of any form of independent review at the level of the Security Council, all these bodies perceive a pressing need to act. It is reasonable to expect that more regional and domestic courts will follow the lead taken by the ECJ, and will offer targeted individuals some kind of redress. The persistent challenges to the targeted sanctions regime may well undermine their efficacy and legitimacy and, in the long run, the credibility of the Security Council.

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<sup>110</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 10.6.

<sup>111</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, Individual opinion of Committee member Mr. Ivan Shearer (dissenting).

<sup>112</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, Individual opinion (partly dissenting) by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc, individual opinion (dissenting) of Ms. Ruth Wedgwood, and individual opinion of Committee member Mr. Ivan Shearer (dissenting).

<sup>113</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 10.7.

<sup>114</sup> HRC, *Nabil Sayadi and Patricia Vinck v. Belgium*, View, Communication No. 1472/2006, 29 December 2008, para. 10.8.

## APPENDIX B: Summary of Litigation Related to Terrorism Designations

by Georg von Kalckreuth<sup>115</sup>

### 1. Scope and substance of this report

This report provides an overview of the current litigation relating to the designations of individuals and entities under UN Security Council Resolution (SCR) 1267, as well as a summary of past and related cases of this kind. It thus provides a comprehensive summary of all legal challenges that have been raised against such designations under SCR 1267 (henceforward “1267 designations”) since that resolution was passed.

The most recent official source listing such cases is contained in the 10<sup>th</sup> Report of the 1267 Monitoring Team of 2 October 2009 (henceforward “MT Report 10”).<sup>116</sup> Taking that document and its predecessor, the 9<sup>th</sup> report of the 1267 Monitoring Team of 13 May 2009 (henceforward “MT Report 9”)<sup>117</sup>, as its basis, the present report summarizes “current”, “past” and “related” cases of litigation related to 1267 designations.

For these purposes, “current” cases are defined as those litigation cases that

- a) challenge a 1267 designation of an individual or an entity, and
- b) are ongoing in the sense of being either pending before a court or, if already decided, not yet implemented or still open for appeal.

All other cases – cases that were decided, not appealed, and implemented, or that did not otherwise end – are defined as “past” cases. To these “current” and “past” cases, the present report adds a number of “related cases” for context information. These cases are defined - with two exceptions - as legal challenges by individuals or entities designated under 1267 to some counter-terrorism measure *other* than the 1267 designation, but for which that individual’s or entity’s 1267 designation was directly invoked as justification. The two exceptions concern the designation of individuals or entities *not* designated under SCR 1267 by the EU Council for its own autonomous sanctions list, which it maintains as a way of implementing SCR 1373 at the EU level.

This report is, to the best knowledge of the author, complete and exhaustive on “current” and “past” cases. Because the “related cases” are added mainly for context, the same claim can of course not be made for that group of cases.

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<sup>116</sup> United Nations Security Council, Tenth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities. 2 October 2009, S/2009/502, available at <http://www.un.org/sc/committees/1267/monitoringteam.shtml>.

<sup>117</sup> United Nations Security Council, Ninth report of the Analytical Support and Sanctions Implementation Monitoring Team submitted pursuant to resolution 1822 (2008) concerning Al-Qaida and the Taliban and associated individuals and entities. 13 May 2009, S/2009/245, available at <http://www.un.org/sc/committees/1267/monitoringteam.shtml>.

The report is organized as follows. The next section, Section 2, contains some numbers on all current and past 1267 litigation cases. The following Section 3 lists all current, past, and related cases, organized by country or international court where they are pending or were last decided upon, and provides some details and commentary. Section 4, finally, summarizes the basis of the different legal challenges in each current litigation case, broken down along the following categories and summarized in a table:

- notification of listing
- access to information
- fair hearing
- effective remedy, and
- material rights at stake.

## **2. The litigation cases in numbers**

### **2.1. Cumulative case numbers**

The counting of cumulative case numbers by the MT reports is somewhat inconsistent for two reasons: sometimes cases are included that are related to the 1267 listing problematique, but do not directly challenge a listing (these would be counted as “related” cases here), and also, appeals are sometimes counted as new cases in the MT reports, sometimes not.

A complete inventory of all litigation cases noted in the ten MT reports published so far, a review of all information contained in these reports, and additional research aiming to corroborate that information and unearth additional legal challenges to 1267 designations thus yields the following picture:

- Counting appeals as new cases and ignoring the joining of cases by courts, there have been **cumulatively 48 cases** of litigation against 1267 designations
- Taking into account that
  - appeals should be counted as the same case continuing elsewhere, and that
  - there were 17 appeals in all (the cases of Kadi and Al Barakaat before the ECJ were later merged into a single case, but had appealed separately),

this number is reduced to **cumulatively 31 cases**.

On the most stringent reading, there have therefore been 31 litigation cases against 1267 designations over the lifetime of the resolution. This figure is most immune from double-counting or other inflating biases and can therefore serve as a reference baseline for generalizations across all 1267 litigation cases. The coarser readings naturally invite legitimate objections of case inflation and double-counting.

## 2.2. Geographical distribution

Geographically, these 31 cases (on the stringent reading) break down as follows:

- 13 cases before the European Court of Justice 42%
- 5 cases before courts in European Union member states 16%
- 2 cases before courts in Switzerland 6%
- 2 cases before courts or appeal bodies in Turkey 6%
- 2 cases before courts in Pakistan 6%
- 7 cases before US courts 23%

For the 48 cases (on the coarse reading) the picture is different, but not substantively:

- 17 cases before the European Court of Justice 35%
- 1 case before the European Court of Human Rights 2%
- 1 case before the Human Rights Committee (body established by the International Covenant on Social and Political Rights) 2%
- 8 cases before courts in European Union member states 17%
- 4 cases before courts in Switzerland 8%
- 3 cases before courts or bodies in Turkey 6%
- 3 cases before courts in Pakistan 6%
- 11 cases before US courts 23%

Source: MT reports, own research.

Regardless of whether the coarse or the stringent reading of total case numbers is chosen,  $\frac{1}{4}$  of the legal challenges to 1267 designations are US cases and around  $\frac{1}{3}$  are non-European cases – independently of whether Turkey is counted as European or not. Conversely,  $\frac{2}{3}$  of the cases are, equally robustly, European cases, and 40% are before regional or international adjudication bodies. This shows that the problematique of legal challenges to 1267 designations is neither exclusively a “European” nor an “American” problem, because it is not specific to particular regions or legal cultures. Instead, it is globally relevant for the 1267 designation mechanism, even if the legal challenges are concentrated predominantly in Europe – and, secondly, in the US.

## 3. An overview of the litigation cases

As said above, the cases fall into “current” and “past” cases. The tables below give an overview of these, together with some commentary on the legal issues at stake in each. This is followed by a presentation of five related cases. Numerically, there are 15 current cases and accordingly 33 past cases. What is noteworthy in formal terms about the current cases is the following: less than half of them – 7 cases – are appeals; the other 8 cases are first instance cases (6 before the ECFI and one each before UK and Pakistani courts), and 6 cases concern individuals or entities listed in October or November 2001.

### 3.1. Current cases

Table 3.1: Current cases				
	Name of applicant	Court	Consolidated List ID	Status
1	<u>Ghuma Abd'rabbah (Abdrabbah)</u>	ECFI	QI.A.211.06	Pending
2	<u>Kadi (re-suit after Kadi ECJ case)</u>	ECFI	QI.Q.22.01, QE.A.24.01, and others	Pending
3	<u>Nasuf</u>	ECFI	QI.N.215.06	Pending
4	<u>Othman (a.k.a. Uthman / Abu Qatada)</u>	ECFI	QI.M.31.01	decided in favor, but not implemented by EU Commission
5	<u>Rahman al-Faqih (Al-Bashir M. Al-Faqih)</u>	ECFI	QI.A.212.06	Pending
6	<u>Sanabel Relief Agency</u>	ECFI	QE.S.124.06	Pending
7	<u>Youssef Nada</u>	ECHR	Delisted on 23 September 2009	Pending
8	<u>Ayadi</u>	ECJ	QI.A.25.01	Pending
9	<u>Faraj Hussein (or Hassan) (al-Saidi)</u>	ECJ	QI.A.127.03	Pending
10	<u>Al-Akhtar Trust</u>	Pakistan High Court of Sindh Province	QE.A.121.05	Pending
11	<u>Al-Rashid Trust</u>	Pakistan Supreme Court	QE.A.5.01	Pending
12	<u>A and others vs. HM Treasury</u>	England and Wales Court of Appeal	unknown	Pending
13	<u>Hay vs. HM Treasury</u>	England and Wales High Court	QI.A.198.05	decided in favour , but appealed to UK Supreme Court
14	<u>Kadi</u>	US District Court for District of Columbia	QI.Q.22.01	Pending
15	<u>Al-Haramain Foundation</u>	US District Court for Oregon	QE.A.117.04	Pending

Sources: MT reports 10 and 9; own research.

This list comprises essentially all the cases mentioned in MT report 10; further research did not unearth any other cases that would belong in this category.

The only exception is the case of Mr. Othman. This case has been decided in favor of the applicant since the time of the drafting of MT report 10. The ECFI, in its judgment of 11 June 2009 (T-318/01), ordered Mr. Othman unlisted and his assets unfrozen (see also EU Press Release 53/09). As no appeal was filed within the appeal period of two months plus two weeks, the judgment came into effect. However, on 10 August 2009, the EU Commission issued Commission Regulation 732/2009, which kept Mr. Othman listed and his assets frozen. This situation remains the case to this day.

The EU Commission gave the following reasons:

- a) that they had, before the ECFI judgment in his matter, committed themselves to making the 1267 Committee's reasons for listing Mr. Othman known to him
- b) that they had communicated these to Mr. Othman and given him an opportunity to state his view on these
- c) that Mr. Othman had not availed himself of that opportunity, and
- d) that since Mr. Othman was designated by the 1267 Committee, he should remain listed by the EU and his assets remain frozen.

This process parallels the one ordered by the ECJ in his judgment in the Kadi case (joint cases C-402/05 P and C-415/05 of 3 September 2008), where Mr. Kadi was ordered unlisted by the EU, his assets unfrozen and his travel restrictions lifted unless he were given an opportunity to be heard and inspect the evidence against him. Kadi had availed himself of this opportunity, after which he was relisted by the EU Commission in their Commission Regulation 1190/2008 of 28 November 2008, meaning that the listing, asset freeze, and travel restriction all remain in place. However, in Mr. Othman's case, the ECFI did not make his delisting and the unfreezing of his assets conditional on such an opportunity, but ordered these unconditionally, pending appeal. There having been no appeal, Mr. Othman remains listed and his assets frozen despite the ECFI judgment clearly ordering the contrary.

### 3.2. Past cases

Table 3.2: Past cases				
	Name of applicant	Court	Consolidated List ID	Status
1	<u>Sayadi and Vinck</u>	Belgium appeal court	Delisted on 20 July 2009	proceedings halted for lack of evidence
2	<u>Sayadi and Vinck</u>	Belgium first instance	Delisted on 20 July 2009	decided against, appealed
3	<u>Abdirisak Aden</u>	ECFI	Delisted on 26 August 2002	decided against
4	<u>Abdulaziz Ali</u>	ECFI	Delisted on 26 August 2002	decided against
5	<u>Ahmed Yusuf</u>	ECFI	Delisted on 24 August 2006	decided against, appealed to ECJ
6	<u>Al-Barakaat</u>	ECFI	Delisted on 22 October 2009	decided against, appealed to ECJ, eventually joined with Kadi
7	<u>Ayadi</u>	ECFI	QI.A.25.01	decided against, appealed to ECJ
8	<u>Faraj Hussein (or Hassan) (al-Saidi)</u>	ECFI	QI.A.127.03	decided against, appealed to ECJ
9	<u>Kadi</u>	ECFI	QI.Q.22.03	decided against, appealed to ECJ, eventually joined with Al Barakaat and Yusuf

10	<u>Al Barakaat</u>	ECJ	Delisted on 22 October 2009	decided in favor
11	<u>Kadi</u>	ECJ	QI.Q.22.02	decided in favor, joined with Al Barakaat, led to re-suit before ECFI (Kadi II)
12	<u>Sayadi and Vinck</u>	HRC	Delisted on 20 July 2009	decided in favor
13	<u>Nasco</u>	Italy first instance	Delisted on 14 November 2007	decided against
14	<u>Al-Haramain</u>	Netherlands appeal court	QE.A.114.04	decided against
15	<u>Al-Haramain</u>	Netherlands first instance	QE.A.114.04	decided against, appealed
16	<u>Al-Rashid Trust</u>	Pakistan High Court Sindh	QE.A.5.01	decided against, appealed to Pakistan Supreme Court
17	<u>Himmat</u>	Switzerland Criminal Federal Tribunal	Delisted on 10 August 2009	decided against, appealed to Swiss Federal Tribunal
18	<u>Nada</u>	Switzerland Criminal Federal Tribunal	Delisted on 23 September 2009	decided against, appealed to Swiss Federal Tribunal
19	<u>Himmat</u>	Switzerland Federal Tribunal	Delisted on 10 August 2009	decided against
20	<u>Nada</u>	Switzerland Federal Tribunal	Delisted on 23 September 2009	decided against, appealed to ECHR
21	<u>Kadi</u>	Turkey Administrative Cases Bureau	QI.Q.22.01	decided against
22	<u>Kadi</u>	Turkey Council of Ministers	QI.Q.22.00	decided against, appealed to Administrative Cases Bureau
23	<u>Nasco</u>	Turkey Council of Ministers	Delisted on 14 November 2007	decided against
24	<u>A and others vs. HM Treasury</u>	UK first instance	unknown	decided against, appealed to UK Court of Appeal
25	<u>Aqeel</u>	US District Court	QI.A.171.04	decided against
26	<u>Global Relief Foundation</u>	US District Court	QE.G.91.02	decided against
27	<u>Aaran Money</u>	US first instance	Delisted on 26 August 2002	decided against
28	<u>Al-Haramain</u>	US first instance	QE.A.117.04	decided against, appealed to US District Court
29	<u>Aqeel</u>	US first instance	QI.A.171.04	decided against, appealed to US District Court

30	<u>Benevolence International</u>	US first instance	QE.B.93.02	decided against
31	<u>Global Relief Foundation</u>	US first instance	QE.G.91.02	decided against
32	<u>Global Service</u>	US first instance	Delisted on 26 August 2002	decided against
33	<u>Kadi</u>	US first instance	QI.Q.22.01	decided against, appealed to US District Court

Sources: MT reports and own research

All these cases are taken from MT reports 10 back to MT report 2 (MT report 1 did not report on any 1267-related litigation). In this group, the vast majority of cases are first-instance cases (23); only 10 cases are appeals. However, 16 cases in total were appealed and therefore contribute to the high number of appeals in the set of current cases. What is also noteworthy is that of these 33 cases, only 3 were decided in favor - Kadi before the ECJ, Al Barakaat before the ECJ, and Sayadi and Vinck before the HRC; the first two remained listed and therefore re-sued before the ECFI, while Sayadi and Vinck were ultimately delisted – albeit without any explicit connection to this litigation case. On a related note, their case before a lower (Belgian) court is one of two cases in which proceedings were halted because of a lack of evidence. The other is the case of Nada before the Swiss Criminal Federal Tribunal, which was halted for the same reasons and which he appealed to the Swiss Federal Tribunal to demand his delisting, citing the halting of proceedings as support for this request. All other 29 past cases were decided against the respective applicants.

### 3.3. Related cases

Table 3.3: Related cases				
	Name of applicant	Court	Consolidated List ID	Status and information
1	Othman (a.k.a. Uthman / Abu Qatada)	ECHR	QI.M.31.01 (since 17 October 2001)	Ongoing; no recent developments. Application contesting his impending deportation from the EU to his native Jordan; has been stayed until completion of his ECFI case. No development since that decision.
2	Hafiz Saaed	Pakistan Courts (Supreme Court and others)	QI.S.263.08 (since 10 December 2008)	Presumably ongoing; unclear. Suspected head of Lashkar-e-Taiba, which is blamed for the 2008 Mumbai attacks. Was placed under house arrest, which was overturned by Supreme Court decision. Has been arrested by Pakistani authorities several times, and likewise been ordered released several times by Pakistani courts.
3	Abousfian Abdelrazik	Canada Federal Court	QI.A.220.06 (since 31 July 2006)	Case closed. Canadian national of Sudanese origin (refugee to Canada), was refused return to Canada from Sudan by Canadian authorities since 2003 because of Sudanese terrorism charges and, later, because of his

				listing. Canada Federal Court argued that this violated the right of return and several other due process rights and ordered him returned to Canada in June 2009; he has since returned.
4	Jose Maria Sison	ECFI	Not listed; listed by the EU Council	Judgment of 30 September 2009 (T-341/07), not yet effective. It orders the applicant unlisted, his assets unfrozen, and his travel restrictions lifted. Applicant is a Dutch national of Filipino origin (once a refugee) who is suspected (but denies) to be the head of the Philippine Communist Party. Since the armed branch of that party is accused of several terrorist attacks by Philippine authorities, the applicant stands so accused, which formed the basis for his listing by the EU. Since no “competent authority” (neither Philippine nor European nor Dutch nor international) could substantiate this accusation, the listing is illegal under EU provisions for listing and thus to be annulled.
5	OMPI (Organisation des Modjahedines du peuple d'Iran)	ECFI	Not listed; not listed by the EU Council anymore (delisted in January 2009)	Judgment of 12 December 2006 (T-228/02), ordering the applicant unlisted by the EU and its assets unfrozen. The applicant is an Iranian exile organization originally set up with the aim to overthrow first the Shah and then the Islamic Revolution rulers in favour of democracy. As such, the organization stands accused of having committed several acts of terrorism inside Iran, but claims to have renounced violence since 2001. It had been listed by the EU since late December 2001 on the basis of a “competent authority” – UK authorities – instituting counterterrorism measures against it. The court found that the rights to a fair hearing and the obligation to state reasons had all been violated, and therefore ordered the applicant unlisted and its assets unfrozen.

These five cases are added here for additional perspective. The following points are noteworthy:

- Abdelrazik case: what led the state of citizenship - Canada – to prevent the applicant’s return is its argument that first the Sudanese terrorism charges and then the subsequent UN 1267 designation (on the application of an unnamed third state) obliged it to implement an asset freeze and travel ban against the applicant, even if he was abroad (and for some time imprisoned abroad).
- Sison case: the state of citizenship – the Netherlands – and the EU argued that the applicant should be and remain listed a) on the basis of Philippine accusations of terrorism that surfaced during an asylum hearing of the applicant, not during criminal proceedings, b) in spite of the production, by the applicant, of

exonerating evidence by Philippine authorities for most of the time period under inquiry, c) in spite of the absence of any investigation by a EU law-conforming “competent authority” of the terrorism accusations against the applicant.

In other words, unless a EU listing is based on a 1267 designation, these much higher procedural conditions apply and bind the EU.

- OMPI case: a similar line of reasoning regarding due process.

#### **4. Overview of the legal challenges to the designation**

The following Table 4 provides an overview of the legal issues at stake in the current cases. Its last column lists any material rights invoked, and the first four columns show if any of the following due process rights were invoked:

- notification of listing
- access to information
- fair hearing
- effective remedy

The table shows the following results. In current cases of litigation against 1267 designations, lack of notification is of least concern and invoked in two cases only – in any event it is probably the weakest inconvenience occasioned by a designation, and one which can be avoided by checking the Consolidated List at that. In sharp contrast, access to information and fair hearing are, by far the most invoked deficiencies of the current 1267 designation regime, with ten invocations each. Effective remedy trails closely behind with seven invocations; this more limited recourse is understandable on the consideration that an effective remedy is entirely inconceivable without access to at least some of the incriminating information and the chance of a fair hearing.

In this context, it is noteworthy that in all judgments issued on current cases in the period covered in MT reports 9 and 10 (Othman, A and others, Hay, Kadi / Al Barakaat) the absence of a fair hearing and an effective remedy was at stake, with that absence either being explicitly criticized or continued listing made explicitly contingent on its provision.

Regarding material rights at issue, the appeals among the current cases also show that charges of a 1267 designation infringing proportionality or a material right are often sustained, while challenges to the competence of states to designate on the basis of SCR 1267 usually fail. Consequently, this warrants the conclusion that the time of formal discussions on the applicability of 1267 sanctions may be coming to an end and that the current and future challenges will have to address the due process and ultimately also the substantive basis for 1267 designations – along with the different ways in which they may jeopardize the four due process criteria, proportionality, and material rights. This brings the difference in the standards required of domestic and international criminal prevention and sanctioning again to the fore – and with it the latter’s more lax standards of process and evidence and their concomitant price in procedural and material rights.

Table 3.4: Synopsis of legal issues in current cases of 1267-related litigation						
Name	Court	Notifi- cation	Information access	Fair hearing	Effective remedy	Material issues
<u>Ghuma Abd'rabbah (Abdrabbah)</u> before ECFI	ECFI		x			Subsidiarity, SCR 1267 application, human rights
<u>Kadi</u> re-suit before European Court of First Instance (ECFI)	ECFI		x	x	X	SCR 1267 application, proportionality, property
<u>Nasuf</u> before ECFI	ECFI		x			Subsidiarity, SCR 1267 application, human rights
<u>Othman (a.k.a. Uthman / Abu Qatada)</u> before ECFI	ECFI		x	x	X	Property, proportionality, privacy
<u>Rahman al-Faqih (Al-Bashir M. Al-Faqih)</u> before ECFI	ECFI		x			Subsidiarity, SCR 1267 application, human rights
<u>Sanabel Relief Agency</u> before ECFI	ECFI		x			Subsidiarity, SCR 1267 application, human rights
<u>Nada</u> before ECHR	ECHR			x	x	Honor, property, liberty, privacy
<u>Ayadi</u> before European Court of Justice (ECJ)	ECJ	x	x			SCR 1267 application, subsidiarity, proportionality, property, subsistence
<u>Faraj Hussein (or Hassan) (al-Saidi)</u> before ECJ	ECJ			x	x	Subsidiarity, SCR 1267 application, human rights
<u>Al-Akhtar Trust</u> before Pakistan High Court of Sindh Province	Pakistan High Court Sindh		x	x		property (NB: lack of information)
<u>Al-Rashid Trust</u> before Pakistan Supreme Court	Pakistan Supreme Court		x	x		property (NB: lack of information)
<u>A and others vs. HM Treasury</u> before England & Wales Court of Appeal	UK Court of Appeal			x	x	SCR 1267 application
<u>Hay vs. HM Treasury</u> before England & Wales High Court	UK High Court			x	x	SCR 1267 application
<u>Kadi</u> before US District Court for the District of Columbia	US District Court for DC		x	x		SCR 1267 application, freedom of religion, property, privacy
<u>Al-Haramain Foundation</u> before US District Court for Dist. of Oregon	US District Court for Oregon	x		x	x	Property, proportionality

Sources: Information in the case summaries in MT reports 10 and 9, own research.

## APPENDIX C: Procedural Changes in UNSCR 1267 Regime

<b>Procedural Changes in UNSCR 1267 Regime</b>			
<b>Date</b>	<b>Listing</b>	<b>Delisting</b>	<b>Procedural</b>
<b>10/1999</b>	UNSCR 1267 imposes financial sanctions on Taliban		
<b>02/2000</b>			Committee approves exemptions on flight ban for the Hajj
<b>12/2000</b>	UNSCR 1333 imposes financial sanctions on Usama bin Laden and associates (including al Qaida)		UNSCR 1333 appoints committee of experts;
<b>01/2001</b>	Committee issues first list pursuant to UNSCR 1267 and 1333		Committee approves procedures for humanitarian aid exemptions.
<b>02/2001</b>			Committee approves procedures for humanitarian aid exemptions.
<b>01/2002</b>	UNSCR 1390 expands listing of Usama bin Laden, Al Qaida, the Taliban and other groups undertakings or entities associated with them		UNSCR 1390 introduces travel ban and exemptions contained therein; expansion of financial sanctions to cover “economic resources”
<b>08/2002</b>		Committee announces delisting procedures	
<b>11/2002</b>	Committee issues Guidelines 9 Nov 2002	Committee issues Guidelines	
<b>12/2002</b>			UNSCR 1452 introduces exemptions to financial sanctions; notification with 48 hrs. NOP for basic expenses; approval process for extraordinary expenses
<b>01/2003</b>	UNSCR 1455 emphasizes importance of identifying information		UNSCR 1455 requires Committee to communicate list to MS every three months

<b>04/2003</b>			Committee revises Guidelines; includes new section on updating lists.
<b>01/2004</b>	UNSCR 1526 requires MS to include detailed identifying information and background information		UNSCR 1526 calls for appointment of Analytical Support & Sanctions Monitoring Team (MT)
<b>07/2005</b>	UNSCR 1617 requires detailed statements of case; articulates what should be contained within them; clarifies those subject to targeted sanctions		UNSCR 1617 requires MS to inform target; permits release of information about listing
<b>12/2005</b>	Committee revises Guidelines, makes technical changes to listing procedures	Committee revises Guidelines, makes technical changes to delisting procedures.	Committee revises Guidelines; includes new section on exemptions.
<b>12/2006</b>		UNSCR 1730 creates a focal point within the Secretariat to receive delisting requests not sponsored by states	
<b>12/2006</b>	UNSCR 1735 elaborates substantive content for statements of case, allows public release of that information, and creates a procedure to improve deficiencies in notification		UNSCR 1735 extends NOP from 48 hours to 3 working days
<b>06/2008</b>	UNSCR 1822 makes further improvements to notification process, calls for a full review of all previous designations, and makes recommendations for improving the transparency of the process, releasing information to the targets and the public about the reasons for imposing targeted measures	Review process to consider whether listings remain appropriate, annual review of individuals reported to be deceased; all names to be reviewed every 3 years	Requires mandatory statements of case, narrative summaries for all listed individuals/entities, and notification of listing & delisting
<b>12/2008</b>		Standards and criteria for delisting promulgated in the Guidelines, including for deceased persons	Committee issues extensive and detailed new guidelines, including changes to exemption procedures