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17TH ANNUAL ANZSIL CONFERENCE: THE FUTURE OF MULTILATERALISM IN A PLURAL WORLD

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THE SECURITY COUNCIL'S PRACTICE OF BLACKLISTING ALLEGED TERRORISTS AND ASSOCIATES: RULE OF LAW CONCERNS AND PROSPECTS FOR REFORM

Christopher Michaelsen*

This article examines the United Nations (UN) Security Council's practice of blacklisting alleged terrorists and their associates. This practice raises several concerns in relation to internationally recognised due process guarantees. Reviewing recent developments, including a landmark decision by the European Court of Justice, the article addresses the need for additional safeguards and discusses reform options available to the Security Council. It concludes that a lack of political will among UN Member States in the Security Council has so far prevented comprehensive reform. Nonetheless, the article argues that such reform is becoming increasingly urgent and that it should extend to addressing questions about the legal context within which the Council operates, including the extent to which the Council itself must adhere to the rule of law and international human rights law.

I Introduction

Targeted economic sanctions are widely accepted as a suitable tool to address conflict. In the post-9/11 era they have also been regarded as appropriate means of combating terrorism and remain a key component of the current United Nations (UN) counter-terrorism efforts.[1] The UN Security Council considers such sanctions "an important tool under the Charter of the United Nations in the

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1 The International Commission of Jurists, Eminent Panel on Terrorism, Counter-Terrorism and Human Rights acknowledged in its recent report, *Assessing Damage, Urging Action*, that freezing the assets of those involved in terrorism is "clearly an acceptable, and indeed necessary, tactic in effectively combating terrorism". See International Commission of Jurists *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (International Commission of Jurists, Geneva, 2009) at 113.

maintenance and restoration of international peace and security".[2] Indeed, the Security Council's Al-Qaida and Taliban sanction regime (1267 regime) remains a cornerstone of the UN's counter-terrorism efforts. This was recognised most recently in Security Council resolution 1904 (2009) which stressed the need for "robust implementation" of the 1267 regime as a "significant tool in combating terrorist activity".[3]

The 1267 regime was first established by the Security Council in Resolution 1267 (1999) which was partly adopted in response to the 1998 bombings on the United States embassies in Kenya and Tanzania.[4] It required all states to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any individual or entity associated with Al-Qaida, Osama bin Laden or the Taliban as designated by the 1267 Committee, a sub-committee of the Security Council. In spite of the centrality of the 1267 regime to UN counter-terrorism efforts, the sanctions regime and its mechanism for the listing and de-listing of individuals and entities known or believed to be associated with Al-Qaida or the Taliban have not been without controversy. As Richard Barrett, the Coordinator of the 1267 Committee's Al-Qaida and Taliban Monitoring Team, pointed out at a press conference on 12 February 2009, the controversies mainly stem from the fact that the sanctions regime, although preventive by design, is punitive by impact.[5] Indeed, measures such as the freezing of assets constitute serious criminal sanctions which traditionally warrant proper safeguards. The 1267 listing and de-listing procedure, however, does not provide for any judicial or quasi-judicial protection. As a consequence, the regime continues to be criticised for its lack of respect for internationally recognised standards of due process including the right to a fair hearing, the right to judicial review and the right to an effective remedy.[6]

This article will first introduce briefly the regime's controversial listing and de-listing procedure. It will then review legal challenges to the 1267 regime focusing particularly on the September 2008 decision by the European Court of Justice (ECJ) in the case of *Kadi and Al Barakaat* concerning the

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2 *Security Counsel Resolution on Continuation of Measures Imposed Against the Taliban and Al-Qaida* SC Res 1822 at 2, S/Res/1822 (2008).

3 Ibid.

4 United States Department of State "Bombings in Nairobi, Kenya and Dar es Salaam, Tanzania, August 7, 1998" (1998) <www.state.gov>.

5 United Nations "Press Conference on Security Council Al-Qaida and Taliban Sanctions Committee" (press release, 12 February 2009) <www.un.org>.

6 Ian Johnstone "The UN Security Council, Counter-Terrorism and Human Rights" in Andrea Bianchi and Alexis Keller (eds) *Counterterrorism: Democracy's Challenge* (Hart, Oxford, 2008) at 335-353.

implementation of the 1267 regime within the European Union (EU).[7] It is argued that a number of legal cases including the *Kadi and Al Barakaat* decision compellingly demonstrated the need to reform the existing listing and de-listing procedure with a view to ensuring due process guarantees. The article will subsequently discuss options available to the Security Council as far as forms and modalities of an effective review mechanism are concerned. It concludes that proposals that would fulfil the due process requirements of international human rights law appear to be politically infeasible, whereas proposals that may gain support from the Security Council contain shortcomings in relation to guaranteed due process rights. It is suggested that the option of pursuing incremental change offers the greatest possibility for achieving concrete improvements in listing and de-listing procedures. At the same time, the article argues that the evident shortcomings of the 1267 mechanisms make it imperative to examine more broadly whether the regime is in fact essential, effective and sustainable.

II The UN Security Council's 1267 Listing and De-listing Procedure

The UN Security Council's 1267 sanctions regime was first introduced in October 1999. It has since been modified and strengthened by subsequent resolutions.[8] What sets the 1267 regime apart from other UN sanctions regime is the fact that it targets entities and individuals who do not necessarily have any links to states, governments or even "traditional" non-state actors like rebel groups or civil war factions. Also, while the 1267 regime's initial geographic target focussed on entities and individuals operating within the territory of Afghanistan, it was subsequently expanded to incorporate individuals wherever they were, without the necessity of any geographical nexus to Afghanistan. In its current form of operation, the regime effectively amounts to a system of executive proscription of individuals by the Security Council. As such, the 1267 regime goes beyond the scope of other counter-terrorism resolutions like Resolution 1373 (2001) which require Member States to legislate but which leave the details of implementation to each individual state.[9]

A key feature of the 1267 regime is a "Consolidated List" (list) maintained by the Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the

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7 Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 [*Kadi and Al Barakaat*].

8 See for example SC Res 1333; S/RES/1373 (2000); SC Res 1363 S/RES/1363 (2001); SC Res 1373 S/RES/1373 (2001); SC Res 1390 S/RES/1390 (2002); SC Res 1452 S/RES/1452 (2002); SC Res 1455 (2003); SC Res 1526 S/RES/1526 (2004); SC Res 1566 S/RES/1566 (2004); SC Res 1617 S/RES/1617 (2005); SC Res 1624 S/RES/1624 (2005); SC Res 1699 S/RES/1699 (2006); SC Res 1730 S/RES/1730 (2006); SC Res 1735 S/RES/1735 (2006); SC Res 1822; S/RES/1822 (2008); and SC Res 1904 S/RES/1904 (2009).

9 SC Res 1373, S/RES/1373 (2001).

Taliban and Associated Individuals and Entities (1267 Committee). As of 4 June 2010, 497 individuals or entities were included in the list which consists of the following four sections:[10]

(a) individuals associated with the Taliban (137 individuals);

(b) entities and other groups and undertakings associated with the Taliban (none);

(c) individuals associated with Al-Qaida (257 individuals); and

(d) entities and other groups and undertakings associated with Al-Qaida (103 entities).

States may request that the 1267 Committee add names to this list and the Committee also considers submissions by states to delete names from it. The listing and de-listing procedure, however, has been problematic from the beginning, in particular with regard to a lack of due process guarantees. Concerns have arisen particularly from the fact that individuals and entities were initially not allowed to petition the Committee for de-listing; nor were they granted a hearing. Petitions for de-listing could only be submitted to governments, which in turn could bring the issue to the attention of the Committee. However, any decision concerning de-listing was still being left to the discretion of the Committee or the Security Council.

In November 2002, the 1267 Committee then adopted guidelines for inclusion in, and removal from, the list. These guidelines provided, inter alia, that submission of names should, to the extent possible, include a statement of the basis for the designation, generally focusing on the connection between the individual and Al-Qaida, the Taliban, or Osama bin Laden, together with identifying information for use by the national authorities implementing the sanctions. The guidelines were subsequently updated in April 2003, December 2005, November 2006 and February 2007 and now also provide for a review mechanism for names that have been on the list for at least four years without update. Accordingly, the UN Secretariat circulated to the Committee in March 2007 a list of 115 names that had not been updated in four or more years. However, very few were selected for review and the review ended without any changes to the list.[11]

Targeted individuals or entities are not informed prior to their being listed and thus do not have any opportunity to prevent the listing by demonstrating that their inclusion in the list is unjustified. Even *after* an individual or entity is listed, Member States do not have an obligation to provide detailed information to the person or entity concerned about reasons for their inclusion. States are merely encouraged "to inform, to *the extent possible*, and *in writing where possible*, individuals and

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10 1267 Committee "The Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Osama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them" (2010) United Nations <www.un.org>.

11 *Seventh Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities* at [40], S/2007/677 (2007).

entities included on the Consolidated List of the measures imposed on them, the Committee's Guidelines, and, in particular, the listing and de-listing procedures contained herein and the provisions of resolution 1452 (2002)".[12] On 30 June 2008, the Security Council, in Resolution 1822 (2008), introduced several improvements in this regard directing the Committee, inter alia, to make accessible on its website a narrative summary of reasons for listing for the corresponding entry or entries on the list. Nonetheless, targeted individuals and entities remain unable to access detailed information regarding their listing.

Further concerns stem from the fact that targeted individuals and entities are not granted any hearing and cannot have the listing decision reviewed by an independent body or organ. Initially, they were not even allowed to petition the Committee for de-listing. Such petitions could only be submitted to governments, which in turn could bring the issue to the attention of the Committee. However, following on from proposals made by France and the United States (and other countries) and by the Analytical Support and Sanctions Monitoring Team, Security Council Resolution 1730 (2006) created a "focal point" within the UN Secretariat responsible for processing submissions by listed persons requesting the lifting of sanctions. Although this now enables affected persons to submit petitions directly and independently of diplomatic protection through their governments, it does not give them the right to participate or to be heard in the review process, nor does it constitute an independent review mechanism. No legal or quasi-legal rules exist that would oblige the Committee to grant a request if specific conditions are met. On the contrary, removal from the list is still left to the discretion of the Committee and possible only with the consent of all of its members. The impact of the establishment of the "focal point" has thus been relatively limited both as far as due process guarantees and actual number of petitions are concerned. Since the "focal point" became operative in March 2007, the Committee has received a mere 18 de-listing requests. It appears that one individual and 12 associated entities have so far been de-listed after petitioning the Committee through the "focal point".[13]

Equally concerning, listed individuals and entities have very limited possibilities to challenge a listing before national courts and tribunals. This is mainly due to the obligations of UN Member States as stipulated by Articles 25, 103 and 105 of the Charter of the United Nations (UN Charter). Article 25 obliges Member States to comply with Chapter VII resolutions (like Resolution 1267 and

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12 1267 Committee "Guidelines of the Committee for the Conduct of its Work" (2008) United Nations at [6(h)] <www.un.org> (emphasis added).

13 See *Briefings by Chairman of Subsidiary Bodies of the Security Council - Terrorism* at 5; S/PV.5779 (2008); *Briefings by the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999), 1373 (2001) and 1540 (2004)* at 1-2, S/PV.5886 (2008). See also UN Security Council Sanctions Committees "Focal point for de-listing established pursuant to Security Council resolution 1730 (2006)" (2006) United Nations <www.un.org>.

subsequent resolutions).[14] Article 103 clarifies that obligations under the UN Charter – including binding obligations under Article 25 – prevail over "any other international agreement" unless obligations contained therein constitute general principles of international law.[15] This also includes national law implementing international obligations under international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR).[16] In addition, even in the event that recourse to national courts is available, the UN enjoys absolute immunity from every form of domestic legal proceedings as stipulated by Article 105(1) of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations and other agreements.[17]

Notwithstanding the improvements made to the listing and de-listing mechanism over the years, the procedure continues to raise serious concerns in relation to fundamental human rights. It has also been criticised by human rights groups as well as by leading legal scholars and practitioners.[18] In particular, it has been argued that the procedure raises serious concerns in relation to fundamental human rights including the right to judicial review, the right to procedural fairness, the right to a hearing and the right to an effective remedy.[19] A number of studies and reports by eminent

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14 Article 25 of the Charter of the United Nations (UN Charter) reads: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

15 Article 103 of the UN Charter reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

16 International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976); European Convention on Human Rights (opened for signature 4 November 1950, entered into force 20 March 1952).

17 See Bardo Fassbender "Targeted Sanctions and Due Process" (study commissioned by the United Nations, Office of Legal Affairs, Humboldt-Universität zu Berlin, 2006) at 5 <www.un.org>. This point has also been made by Dick Marty of the Parliamentary Assembly of the Council of Europe, who cited a Swiss case in which an individual was acquitted of terrorism-related charges in a domestic criminal proceeding and the Swiss State ordered to pay compensation. Nonetheless the person in question still remained on the 1267 list with his assets frozen: Dick Marty (Rapporteur) *UN Security Council Black Lists: Introductory Memorandum* (AS/Jur (2007) 14, Committee on Legal Affairs and Human Rights, 19 March 2007) at 1.

18 See for example Jessica Almqvist "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions" (2008) 57 ICLQ 303; Iain Cameron "The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions" (2006) Council of Europe <www.coe.int>; Martin Scheinin *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism* A/61/267 (2006).

19 For an in-depth legal analysis of these rights as they are engaged by the 1267 Listing and De-Listing Procedure, see Larissa van den Herik and Nico Schrijver "Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law" in *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (White Paper prepared by the Watson Institute for International Studies at Brown University 2006) 9 <www.watsoninstitute.org>.

international scholars have thus called for clear, fair and transparent procedures.[20] This includes, in particular, that individuals or entities included on the list are informed promptly about their inclusion and that they are heard by a relevant decision-making body.

III Legal Challenges to the 1267 Regime

In spite of the limited possibilities to challenge 1267 listings, legal cases have been presented to national courts in Belgium, Italy, Switzerland, The Netherlands, Pakistan, Turkey, the United Kingdom, Germany and the United States.[21] Several cases have also been brought before the ECJ in Luxembourg. In the cases of *Kadi*, *Yusuf and Al Barakaat* and *Ayadi* and *Hassan*, the Court of First Instance (CFI) upheld the legality of the EC regulations implementing the 1267 counter-terrorism sanctions regime and found that it generally lacked the power to judicially review resolutions by the UN Security Council.[22] However, these findings were rejected in an opinion issued in January 2008 by Miguel Poiares Maduro, one of the eight Advocates General assisting the Court.[23] Similarly, the ECJ, in the appeal case of *Kadi and Al Barakaat*, found that it had jurisdiction to review the implementation of UN Security Council resolutions, and further, that the contested EC regulation violated fundamental rights as recognised by Community law.[24] As the ECJ decision has major implications for several pending CFI cases as well as the whole 1267 counter-terrorism sanctions

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20 See for example Iain Cameron and Kenneth Nordback "EU Blacklisting: the Renaissance of Imperial Power, but on a Global Scale" (2003) 14 European Business L Rev 111; Iain Cameron "European Union Anti-Terrorist Blacklisting"(2003) 3 Human Rights L Rev 225; Scheinin, above n 18; *Final Report of the Expert Workshop on Human Rights and International Cooperation in Counter-Terrorism organized by the OSCE-ODIHR and the OHCHR in Triesenberg, Liechtenstein*, *15-17 November 2006* (ODIHR.GAL/14/07, Organisation for Security and Cooperation in Europe, 21 February 2007) <www.osce.org>; *Report of the UN Secretary-General* S/PV.5474 (2006).

21 For an overview, see for example *Ninth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, annex I, S/2009/245 (2009) [*Ninth Report of the Analytical Support and Sanctions Monitoring Team*].

22 Case T-306/01 *Yusuf and Al Barakaat v Council of the EU* [2005] ECR II-3533; Case T-315/01 *Kadi v Council of the EU* [2005] ECR II-3649; Case T-253/02 *Ayadi v Council of the EU* [2006] ECR II-2139; Case T-49/04 *Hassan v Council of the EU* [2006] ECR II-52.

23 Advocate General's Opinion of 16 January 2008, Case C-402/05 P *Kadi v Council and Commission* [2008] ECR I-06351; Advocate General's Opinion of 23 January 2008, Case C-415/05 P *Al Barakaat International Foundation v Council and Commission*. The ECJ is assisted by eight Advocates General who are responsible for presenting a legal opinion on the cases assigned to them. They can question the parties involved and then give their opinion on a legal solution to the case before the judges deliberate and deliver their judgement. The intention behind having Advocates General attached is to provide independent and impartial opinions concerning the Court's cases. The opinions of Advocates General are advisory only and do not bind the Court, but they are nonetheless very influential and are followed in the majority of cases.

24 *Kadi and Al Barakaat*, above n 7.

regime as implemented within the EU, the judgment will be briefly discussed in the following part.[25]

The ECJ handed down its decision in *Kadi and Al Barakaat* on 3 September 2008 and confirmed that the Council of the EU was competent to adopt the regulation on the basis of the articles of the EC Treaty that it chose. Even if the CFI made certain errors in its reasoning, its final conclusion that the Council was competent to adopt that regulation was not incorrect.[26] However, the ECJ found that the CFI erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation.[27] It held that the review by the Court of the validity of any Community measure in the light of fundamental rights needed to be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which may not be prejudiced by an international agreement.[28] The ECJ clarified that the review of lawfulness ensured by the Community courts applied to the Community act intended to give effect to the international agreement at issue, and not to the international agreement itself. A judgment given by the Community courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.[29] On the contrary, it found that the Community courts needed to ensure the review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law. This included review of Community measures which, like the contested regulation, were designed to give effect to resolutions adopted by the Security Council.[30]

The ECJ then undertook this analysis and examined whether the regulation(s) of the Council of the EU implementing the UN Security Council's 1267 sanctions regime violated Mr Kadi's and Al Barakaat's fundamental rights as protected by Community law. It found 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".[31] The Court pointed out that the effectiveness of judicial review

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25 For an in-depth analysis of the decision, see for example Christopher Michaelsen "Kadi and Al Barakaat v Council of the EU – The Incompatibility of the UN Security Council's 1267 Sanctions Regime with European Due Process Guarantees" (2009) 10 Melbourne J Int'l L 329. See also Peter Fromuth "The European Court of Justice Kadi Decision and the Future of the UN Counterterrorism Sanctions" *ASIL Insight* (30 October 2009) <www.asil.org>.

26 *Kadi and Al Barakaat* , above n 7, at [234]-[236].

27 Ibid, at [327]-[328].

28 Ibid, at [316].

29 Ibid, at [327].

30 Ibid, at [326].

31 Ibid, at [334].

meant that the Community authority in question was required to communicate to the person or entity concerned the grounds on which the measure at issue was based, so far as possible, either when that measure was decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action. However, the regulation at issue provided no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion. At no time did the Council of the EU inform Mr Kadi and Al Barakaat of the evidence adduced against them in order to justify the initial inclusion of their names in the list.[32]

In this context, the ECJ also took into account the improvements made to the listing and de-listing procedure at the UN level. It acknowledged that any person or entity may now approach the Sanctions Committee directly through the "focal point". However, the Court found that the procedure before that 1267 Committee continues to be essentially diplomatic and intergovernmental with the persons or entities concerned having no real opportunity of asserting their rights. According to the Court:[33]

> The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request.

Also, the Court pointed out that these Guidelines do not require the 1267 Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information.[34]

In addition, the ECJ held that the infringement of Mr Kadi and Al Barakaat's rights of defence also gave rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights in satisfactory conditions before the Community courts.[35] Furthermore, the Court found that the freezing of funds constituted an unjustified restriction of Mr Kadi's right to property.[36] According to the Court, the restrictive measures imposed by the regulation(s) of the Council of the EU amounted to restrictions of that right which could, in principle, be justified.[37] However, the regulation in question was adopted without furnishing any guarantee enabling Mr

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32 Ibid, at [345]-[348].

33 Ibid, at [324].

34 Ibid, at [325].

35 Ibid, at [349]-[352].

36 Ibid, at [354]-[371].

37 Ibid, at [354]-[366].

Kadi to put his case to the competent authorities.[38] Such a guarantee would have been necessary in order to ensure respect for his right to property, having regard to the general application and continuation of the freezing measures affecting him.

Interestingly, the High Court of England and Wales, in the case of *A K M Q and G v HM Treasury* delivered on 24 April 2008, concerning a challenge to the national implementation of the 1267 regime, had already had regard to the opinions of the Advocate General before the ECJ handed down its decision in September 2008.[39] In this case the High Court quashed the Terrorism Order (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 (AQO 2006) which gave domestic effect to UN asset-freezing obligations in relation to terrorism, Al-Qaida and the Taliban. The case was overturned on appeal.[40] However, the Court of Appeal only let the AQO 2006 stand because it was able to read it as not depriving a listed person of access to a court. In order to do that, the Court understood the AQO 2006 as allowing full merits-based review of a designation under the Order, even though this designation is automatic as a result of being listed by the 1267 Committee. This was possible in the particular case, because the claimant was listed by the 1267 Committee on recommendation by the British government. This meant that the Foreign and Commonwealth Office was privy to the record that led to the claimant's designation. If the domestic court, upon review, found this record not to be sufficient in justifying the severe restrictions resulting from the designation, the United Kingdom would be bound to support de-listing, with reasonable prospects of success (the Court thought), as the United Kingdom was indeed the designating State at the UN level.

In contrast, the Queen's Bench of the High Court, in the case of *Hay v HM Treasury* delivered on 10 July 2009, held that the AQO 2006 needed to be quashed.[41] This ruling followed the Court's assessment that a merits-based review, as required by the Court of Appeal in the case of *A K M Q and G v HM Treasury*, was precluded because the petitioner could not know the full basis for his listing. The British government subsequently informed the Court that it would submit a de-listing request on behalf of the petitioner, as the listing was "no longer appropriate".[42]

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38 Ibid, at [369].

39 *A K M Q and G v HM Treasury*, [2008] EWHC 869 (Admin) [2008] 3 All ER 361 at [30]-[33].

40 *A K M Q and G v HM Treasury* [2008] EWCA Civ 1187 [2009] 3 WLR 25.

41 *Hay v HM Treasury* [2009] EWHC 1177 (Admin) [2009] Lloyd's Rep FC 547.

42 Quoted in *Tenth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities* at [38], S/2009/502 (2009).

IV Reform Options and Initiatives

The ECJ's decision in *Kadi and Al Barakaat* demonstrated that the 1267 regime's listing and de-listing mechanism had serious shortcomings, in particular in relation to guarantees of due process. Among the due process rights, it is specifically the right to a hearing and the right to judicial review (including the right to an effective remedy) which are engaged by the listing and de-listing procedure. Over the years, the 1267 Committee has made a series of improvements to its procedures which have addressed some of the concerns expressed about the fairness of the sanctions. These include the establishment of a "focal point" as well as several technical amendments. Nevertheless, an urgent need remains to adopt new or additional procedures and safeguards in order to ensure that due process rights are respected.

Security Council Resolution 1822 (2008) contained some important changes in relation to the review of listings of individuals and entities. For example, it required the 1267 Committee to conduct a review of all names on the list by 30 June 2010 in which the relevant names are circulated to the designating states and states of residence or citizenship, where known, pursuant to the procedures set forth in the Committee guidelines, in order to ensure the list is as updated and accurate as possible.[43] However, despite these notable improvements, the procedure remained inadequate and did not amount to a genuine and effective mechanism of judicial control by an independent tribunal as required by internationally recognised standards of due process.

A number of scholars have identified options available to the Security Council as far as forms and modalities of an effective review mechanism are concerned.[44] The proposals include the establishment of:

(a) an independent international arbitral panel, court or tribunal;

(b) an ombudsman office;

(c) an inspection panel following the model of the World Bank Inspection Panel;

(d) a commission of inquiry; and,

(e) a committee of experts serving in their personal capacity (as it exists, for instance, in accordance with Article 28 of the International Covenant on Civil and Political Rights).

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43 Security Council Resolution 1822 further directs the 1267 Committee, upon completion of the general review, to conduct an annual review of all names on the list that have not been reviewed in three or more years: SC Res 1822, S/RES/1822 (2008).

44 Fassbender, above n 17, at 30-31; Van den Herik and Schrijver, above n 19, at 43-48; Iain Cameron "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights"(2003) 72 Nordic J Int'l L 159 at 208.

In general, the proposals can be classified into two categories: the first category includes those mechanisms that would operate in full independence of the Security Council; the second category includes review mechanisms that would be set up under the auspices of the Security Council. The advantages of proposals in the first category are obvious. Instruments such as an independent arbitral panel, court or tribunal would arguably fulfil the requirements of effective judicial review as required by international human rights law and by general principles of due process. However, given the political and practical sensitivities involved, in practice, the establishment of an independent arbitral panel, court or tribunal appears almost impossible to achieve. In fact, it is highly unlikely that the Security Council would be prepared to accept a fully independent judicial authority that scrutinises its actions. This was also noted by the 1267 Committee's Analytical Support and Sanctions Monitoring Team which has pointed out that:[45]

> It is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action 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 retaining authority to select or approve the membership of a review body.

As regards review mechanisms, proposals include the creation of a review panel under the authority of the Security Council and the establishment of an ombudsperson.[46] With regard to the first option, a group of like-minded states – Denmark, Germany, Liechtenstein, The Netherlands, Sweden and Switzerland – put forward a proposal in May 2008.[47] This proposal was inspired by the example of the World Bank inspection panels to establish a review panel of three to five independent, impartial and judicially qualified persons to review listing decisions.[48] The panel would be governed by "general principles of international law concern[ing] fair procedure" and composed of persons with experience in handling confidential information.[49] The review panel members would be appointed by the Security Council upon proposal by the Secretary-General.[50] The panel would review de-

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45 *Eighth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, at [41], S/2008/324 (2008) [*Eighth Report of the Analytical Support and Sanctions Monitoring Team*].

46 See for example Van den Herik and Schrijver, above n 19, at 44-46.

47 "Improving the Implementation of Sanctions Regimes through Ensuring 'Fair and Clear Procedures'"(discussion paper, May 2008) (on file with the author) [2008 Discussion Paper].

48 Ibid. See also "Supplementary Guidelines for the Review of Sanctions Committees' Listing Decisions" (discussion paper, 8 November 2007) <www.liechtenstein.li>.

49 2008 Discussion Paper. above n 47, at 2.

50 Ibid.

listing requests and make a decision within a certain timeframe (three months).[51] Petitioners would be able to request a de-listing decision through the "focal point". The proposal also stipulates that the Committee, all Member States and all relevant international organisations co-operate with the panel "to the fullest extent possible, in particular by providing any relevant information or evidence".[52] The review panel would report its findings and recommend to the 1267 Committee either de-listing or the rejection of the petition. The recommendations of the panel are to be published as soon as they are submitted to the Committee.[53] The final decision, however, rests with the Committee.[54] In addition, the proposal stipulates that the Committee:[55]

> … shall *ex officio* keep the listing decisions under constant review, re-evaluating them on a regular basis, the intervals to be decided by the Committee, in particular in the light of new information submitted by Member States.

The proposal of the group of like-minded states did not find any resonance with the Security Council at its review meeting in June 2008. However, much to the surprise of most observers, the Council considered the establishment of an ombudsperson in its recent review meeting on 17 December 2009. Adopting Resolution 1904 (2009), the Council decided that, when considering de-listing requests, the 1267 Committee:[56]

> … shall be assisted by an Office of the Ombudsperson, to be established for an initial period of 18 months from the date of adoption of this resolution, and requests the Secretary-General, in close consultation with the Committee, to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson, with the mandate outlined in Annex II of this resolution, and further decides that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.

In particular, Resolution 1904 (2009) abolished the 1267 regime's "focal point" procedure (adopted in 2006) and introduced a three-step mechanism to deal with de-listing requests from targeted entities and individuals. In a first step – the so-called information gathering period (two months) – the Ombudsperson is mandated to acknowledge the receipt of the de-listing request; inform the petitioner of the general procedure for processing de-listing requests; answer specific questions from

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51 Ibid, at 3.

52 Ibid.

53 Ibid.

54 See also Michael Bothe *Explanatory Memorandum to the Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees' Listing Decisions* (2007) <www.liechtenstein.li>.

55 2008 Discussion Paper. above n 47, at 1.

56 SC Res 1904 at [20], S/RES/1904 (2009).

the petitioner about 1267 Committee procedures; and forward the de-listing request to the 1267 Monitoring Team for additional information.[57] At the end of this two-month period of information gathering, the Ombudsperson is required to present a written update to the 1267 Committee on progress to date, including details regarding which states have supplied information. The Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for information gathering, giving due consideration to requests by UN Member States for additional time to provide information.[58]

Upon completion of the information gathering period, the new arrangements require the Ombudsperson to facilitate a two-month period of engagement, which may include dialogue with the petitioner, the 1267 Committee and UN Member States (the so-called dialogue period). At the end of this period, the Ombudsperson, with the help of the 1267 Monitoring Team, drafts and circulates to the 1267 Committee a comprehensive report that summarises, and specifies the sources of, all information available to the Ombudsperson that is relevant to the de-listing request. Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations, this report then lays out for the Committee the principal arguments concerning the de-listing request. However, it must respect confidential elements of UN Member States' communications with the Ombudsperson. In the third and final step – the Committee discussion and decision period (two months) – the 1267 Committee has 30 days to review the Ombudsperson's comprehensive report. It is then the responsibility of the chair of the Committee to place the de-listing request on the Committee's agenda for consideration.[59]

The establishment of the Ombudsperson office constitutes a significant improvement to the existing listing and de-listing procedure. Nevertheless, it is unlikely that this mechanism fulfils international legal requirements of effective due process. In particular, the Ombudsperson does not have the power to grant appropriate relief as the final decision on whether to de-list or not would rest with the 1267 Committee. This stands in contrast to the requirements as set out in the 2008 *Kadi and Al Barakaat* ECJ judgment. It is also unclear to what extent the Ombudsperson has access to all relevant information. The current arrangements do not compel UN Member States to submit evidence in support of listing decisions. It is difficult to see how the Ombudsperson may submit a listing decision or de-listing request to thorough scrutiny when he or she is dependant on states providing access to information in a quasi-voluntary manner. This, in turn, has serious implications for the guarantees of the right to a hearing and the right to effective judicial review. Finally, the new arrangements are silent on the question of effective remedies. Those individuals and entities who have been wrongly placed on the Consolidated List, either because the intelligence on which the

57 Ibid, annex II at [1]-[4].

58 Ibid, annex II at [5]-[7].

59 Ibid, annex II at [8]-[14].

placement was based was incorrect or because the name on the list is an acronym or wrongly spelt, do not have access to any compensation or restitution as stipulated by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[60] This Declaration provides that states should provide redress for victims of crimes and abuse of power.

V Obstacles to Comprehensive Reform and the Lack of Political Will

Notwithstanding the significance of establishing an Ombudsperson office, there appears to be a lack of political will among Security Council members, in particular among the permanent members, to initiate comprehensive reform. The apparent lack of political will may have several reasons. One of them is possibly based on the perception that the due process shortcomings of the 1267 regime are negligible as they affect only a relatively small number of alleged terrorists and their associates. What is more, there are much more serious human rights violations being committed each day, so why not focus on other, more urgent, policy questions?

This perception, however, is flawed. The shortcomings of the 1267 regime affect not only listed individuals and entities, but have much broader implications. First, they highlight fundamental problems of accountability of the Security Council as an organ of the UN. In any legal system, even the international legal system, a body exercising power should bear the responsibility for the exercise of this power. Yet, the discretionary powers of UN sanction committees – sub-committees of the Security Council – are virtually unrestrained and uncontrolled. Secondly, the shortcomings of the 1267 regime demonstrate that the development of "individualization" of Security Council measures in terms of targeting individuals directly has not been accompanied by the creation of a means for the new targets to appeal the measures imposed on them. As such, the debate on the due process concerns of the 1267 regime is not only about individual justice for Mr Kadi, the Al Barakaat Foundation or other listed individuals and entities. Rather, as Larissa van den Herik has noted, it is also:[61]

> … about the system that we want to build: if we want to go beyond the State and target the individual, we should also give the individual standing to defend himself.

The issue is thus closely related to the Security Council's credibility. As the Council is becoming more and more concerned with human rights violations, it should practice what it preaches and operate in line with decent procedures.

The lack of political will to initiate comprehensive reform, however, is just part of the story. Practical obstacles and political sensitivities have also prevented progress. These include the

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60 GA Res 40/34 annex, A/Res/40/34 (1985). See also Scheinin, above n 18, at [40], A/61/267 (2006).

61 Larissa van den Herik "From Comprehensive to Smart Sanctions and Ensuring their Proper Application and Implementation" (paper presented at the Seminar on Improving the Effectivity and Legitimacy of UN Targeted Sanctions, Dutch Ministry of Foreign Affairs, Kurhaus, The Hague, 25 May 2009) at 6.

problem of independent review of Security Council decisions (as discussed above) as well as evidentiary problems. The latter allegedly arise as many listing decisions are based on intelligence information which States are reluctant or unwilling to share or to submit to scrutiny. As the 1267 Committee's Monitoring Team noted:[62]

> Although [a review] 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 through bilateral exchanges, which could not easily be made available to reviewers.

This problem is part of a classical challenge faced in the context of judicial review and counter-terrorism, that is, whether and to what extent classified intelligence information can be used or disclosed in court.[63] It is beyond question that the protection of sensitive sources and of important intelligence information is a legitimate State interest. However, there are mechanisms available to address this issue in a way that also maximises concern for fair trial rights and due process guarantees. These include, in particular, closed court proceedings and vetted or security-cleared counsel. The latter option was also emphasised by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism in his 2006 report to the UN General Assembly, in which he recommended that "consideration should be given to means through which a listed entity can still challenge the evidence against it".[64] As far as a review panel is concerned, closed court proceedings appear to be a particularly viable option. Such proceedings would protect intelligence and law-enforcement information as well as guarantee fundamental aspects of the right to a hearing (which includes the right to be informed) and of the right to judicial review.

In addition, the 1267 Committee's Monitoring Team has recently argued that the *Kadi and Al Barakaat* decision "has changed the terms of this debate" on the review of listings.[65] In its ninth report of 13 May 2009, the Monitoring Team took the view that the action by national and regional courts such as the ECJ had pre-empted the discussion on an independent review mechanism to be established by the Security Council. Apparently arguing that such mechanism was no longer necessary, the Monitoring Team noted that:[66]

> The fact that European courts have joined American courts in asserting their jurisdiction over national implementation procedures means that in this context they will in effect offer an independent review of

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62 *Eighth Report of the Analytical Support and Sanctions Monitoring Team*, above n 45, at [41].

63 *Liversidge v Anderson* [1942] AC 206; *R v Secretary of State for the Home Dept*, ex p Hosenball [1977] 3 All ER 452.

64 Scheinin, above n 18.

65 *Ninth Report of the Analytical Support and Sanctions Monitoring Team*, above n 21, at [27].

66 Ibid, at [27].

> listing decisions by the Committee when these are challenged before them. Other national and regional courts may decide to take similar action.

The Monitoring Team's view is problematic as it ignores some significant pitfalls of exclusive reliance on domestic systems for review.[67] First, not all UN Member States have equally strong judiciaries. This means that exclusive reliance on domestic review mechanisms may lead to selectiveness. Moreover, there is a risk of fragmentation where different national courts come to opposing conclusions on the propriety of a specific listing. Also, this approach has significant normative flaws. For example, there is the question of what the consequence of an adverse national decision should be. The Security Council is not bound by domestic decisions, nor are its subsidiary organs. According to the Monitoring Team, the 1267 Committee should give a national decision "due weight".[68] But this may not be enough. The credibility of the 1267 Committee may be seriously hampered if it maintains persons listed when national courts, after reviewing all available evidence, have decided that a listing is unjustified. Such situations may also bring governments in untenable situations.[69]

VI Conclusion

The Security Council considers Al-Qaida and the Taliban to be serious threats to international peace and security and regards the 1267 regime an essential tool for the prevention of terrorist acts. Nevertheless, the fallibility of the 1267 regime and its problematic listing and de-listing procedures have undermined support. In spite of several improvements to the listing and de-listing mechanism – the notification of sanctioned individuals and entities, the posting of narrative summaries of reasons for listing on the Committee's website and the review of all names on the list by 30 June 2010 – the procedure continues to raise serious concerns in relation to internationally recognised requirements of due process. These concerns specifically stem from the insufficient protection of the right to a fair hearing, the right to judicial review and the right to an effective remedy as contained in the constitutions of UN Member States as well as in leading international human rights instruments.

It is clear that the establishment of an independent review mechanism would ease such concerns to a significant extent. However, while some UN Member States, including non-permanent members of the Security Council, seem to be somewhat receptive to such changes, some of the Council's permanent members remain cautious about accepting any procedure or an outside independent panel that would, as they see it, erode the authority of the 1267 Committee. The discourse on appropriate review mechanisms of the listing and de-listing procedure thus appears to be trapped in the quandary. Proposals that would fulfil the due process requirements of international

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67 See also van den Herik, above n 61, at 14-16.

68 *Ninth Report of the Analytical Support and Sanctions Monitoring Team*, above n 21, at [29].

69 Van den Herik, above n 61, at 16.

human rights law are politically infeasible, whereas proposals that may gain support from the Security Council contain shortcomings as far as internationally guaranteed due process rights are concerned.

The recent establishment of an Ombudsperson office in Resolution 1904 (2009) undoubtedly strengthens the de-listing procedure, at least in theory. It is reasonable to assert that this improvement was at least partly made possible by the Obama administration's readiness to re-engage with the UN. In addition, legal challenges to the implementation of the 1267 sanctions regime in the EU appears to have made the European members of the Security Council more receptive to strengthening the existing de-listing procedures for targeted entities and individuals. Domestic court cases in the United Kingdom, in particular, seem to have prompted the British government to pursue reform of the 1267 sanctions regime at the Council with greater intensity. However, much will depend on the actual operation of the Ombudsperson mechanism in practice.[70] The Ombudsperson can only perform her tasks effectively to the extent UN Member States are willing to cooperate with her and provide relevant information. Yet, the reluctance of States to share any (allegedly) intelligence-based information about listed individuals and entities has been problematic in the past.

Recent developments certainly suggest that pursuing incremental change currently offers the greatest possibility for achieving concrete improvements in the listing and de-listing procedure.[71] This scenario recognises that the Security Council listing system is on an evolutionary path toward modestly improved due process procedures. The incremental approach acknowledges that the Council has entered a period of system response and adjustment.[72] After an initial period in the immediate aftermath of 9/11, in which listing decisions were made hastily and with little regard for human rights, the Security Council appears to have adopted an approach of greater responsibility and sensitivity to due process rights.

The short-term focus of incremental reform efforts involves working with Security Council members to build upon the changes established in Security Council Resolutions 1822 (2008) and 1904 (2009). In particular, efforts should focus on ensuring an effective and meaningful operation of the Ombudsperson mechanism in practice. The opportunity to make further formal changes emerges when the mandate for the 1267 Monitoring Team comes up before the Council for renewal in June 2011. However, rather than limiting the discourse on the legal, political and technical

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70 On 7 June 2010, Kimberley Prost, a former ad litem judge of the International Criminal Tribunal for the former Yugoslavia, was appointed as the first Ombudsperson; see *Al-Qaida and Taliban Sanctions Committee Welcomes Appointment of Judge Kimberly Prost to Serve as Ombudsperson* SC/9947 (2010).

71 See also George A Lopez, David Cortright, Alistair Millar and Linda Gerber-Stellingwerf *Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists* (report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies, University of Notre Dame, 2009) at 9.

72 Ibid.

challenges of the listing and de-listing mechanism per se, it is essential to address the value, effectiveness and sustainability of the 1267 regime more broadly. The international community as a whole, and the permanent members of the Security Council in particular, need to consider what they are prepared to give up in order to maintain the 1267 regime as an effective UN sanctions regime, or whether they are prepared to give up the regime in order to maintain the authority that they interpret to have from the UN Charter.

Tough questions need to be asked in this context, questions that have implications beyond the operation of the 1267 regime. These include an assessment of whether the 1267 regime is, in fact, an "essential tool" in the fight against terrorism, and further, whether this tool is actually effective. A thorough review of the 1267 regime must further include an analysis of its strategic impact. To what extent does it damage the credibility and acceptance of other UN targeted sanctions regimes? Also, does the 1267 regime impede the ability of the Security Council, and more broadly of the UN, to play a role in identifying national human rights shortcomings in counter-terrorism law and policy of UN Member States? These questions need to be addressed as a matter of urgency. Otherwise the 1267 sanction regime will continue to lose support. This, in turn, may have serious consequences for the credibility and effectiveness of other UN targeted sanctions regimes – a development which has the potential to weaken one of the few tools that the Security Council has at its disposal to maintain international peace and security.