

# Kafka, Sisyphus, and Bin Laden: Challenging the Al Qaida and Taliban Sanctions Regime

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## Abstract

This article explores the Al Qaida and Taliban sanctions regime and the opportunities open to those who have been designated by the United Nations Security Council as associated with Osama Bin Laden, Al Qaida or the Taliban, to have their names removed from the Consolidated List and the sanctions imposed against them terminated. It also considers the implementation of the sanctions regime in the European Union and the United Kingdom and the challenges that have been raised before their courts. It adopts a critical approach to the regime, and its domestic implementation, as affording insufficient due process guarantees. Given the deficiencies in the regime, the author concludes that the present system is Kafka-esque in its authoritarian and arbitrary aspects, and Sisyphean in respect of the possibilities of never-ending legal action which it evokes.

Keywords: Al Qaida, the Taliban and Osama bin Laden, Court of Justice of the European Union, Terrorism, European Court of Human Rights, Human Rights Committee, restrictive measures, sanctions, Sanctions Committee, Security Council, United Kingdom Supreme Court

## 1. Introduction

To wake up one day and find oneself unable to access any funds or to travel abroad on allegations of being associated with terrorism, is the stuff of nightmares. Being stigmatised as a terrorist, a blacklisted person is effectively excluded from society, as nobody wants to be associated with a terrorist, not least for fear that it will result in them being blacklisted too. Similarly, blacklisting prevents persons blacklisted from finding a job, with the consequence that they become a burden to society, surviving often merely on social benefits and assistance. Clearly, sanctions have a devastating effect on the ability of designated persons to enjoy a normal private and family life. In order to escape this nightmare, they may have to embark on a long and excruciating legal journey, involving endless petitions to domestic and international bodies, requesting delisting and termination of the sanctions, which more often than not, have an unsuccessful outcome, or at best a pyrrhic victory.

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Based on an analysis of the relevant case-law, this article will explore the availability and effectiveness of different forums at the United Nations (UN), European Union (EU) and United Kingdom (UK) level to challenge the blacklisting of persons and the imposition of the Al Qaida and Taliban sanctions regime. It will critically assess whether these forums provide the requisite due process guarantees to those petitioners seeking their delisting. In particular, this article will identify the main deficiencies of the UN delisting procedure and examine the possibility of challenging the imposition of sanctions before the Human Rights Committee (HRC). It will discuss the implementation of the sanctions regime by the EU and critically assess the Commission's new review procedure in light of the *Kadi* jurisprudence. It will then look at the implementation of the sanctions regime by the UK and assess the scope for challenging the imposition of sanctions before its domestic courts and, further, before the European Court of Human Rights (ECtHR).<sup>1</sup>

## 2. The Al Qaida and Taliban Sanctions Regime

The Al Qaida and Taliban sanctions regime was created by the UN Security Council in the aftermath of the terrorist bombings of the United States of America's embassies in Nairobi (Kenya), and Dar Es Salaam (Tanzania), on 7 August 1998. In response to these bombings, the Security Council, acting under Chapter VII of the UN Charter, adopted resolution 1267 (1999), which imposed an air embargo and financial sanctions against the Taliban in the Taliban-controlled territory of Afghanistan.<sup>2</sup> The reason for subjecting the Taliban to sanctions was as a result of their support for Osama bin Laden, particularly in relation to providing him a safe haven, allowing him and his associates to operate a network of terrorist training camps from Taliban-controlled territory and allowing him to use Afghanistan as a base from which to sponsor international terrorist operations.<sup>3</sup> The imposition of sanctions, was, however, triggered by the failure of the Taliban authorities to surrender Osama bin Laden to the United States of America (USA) where he had been indicted for the embassies' bombings and for conspiring to kill American nationals outside the USA.<sup>4</sup>

The Al Qaida and Taliban sanctions regime was substantially modified by a number of subsequent resolutions adopted by the Security Council in order to strengthen and expand the original sanctions regime.<sup>5</sup> Determining that 'terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security',<sup>6</sup> the UN Security Council extended the sanctions regime so that the sanctions now apply not only to the Taliban

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<sup>1</sup> The author analyses the subject in light of her experience working on a number of cases involving individuals and entities seeking termination of the Al Qaida and Taliban sanctions imposed on them.

<sup>2</sup> Security Council, Resolution 1267, UN Doc. S/RES/1267, 15 October 1999, para. 4.

<sup>3</sup> Security Council Resolution 1267, Preamble. See fn. 2; Security Council Resolution 1214, UN Doc. S/RES/1214, 8 December 1998, para. 13.

<sup>4</sup> Security Council Resolution 1267, para. 2-3. See fn. 2; Security Council Resolution 1214, para. 13. See fn. 3; Press Release SC/6756, 15 November 1999.

<sup>5</sup> These resolutions include Security Council, Resolution 1267. See fn. 2; Security Council, Resolution 1333, UN Doc. S/RES/1333, 19 December 2000; Security Council Resolution 1390, UN Doc. S/RES/1390, 28 January 2002; Security Council, Resolution 1455, UN Doc. S/RES/1455, 17 January 2003; Security Council, Resolution 1526, UN Doc. S/RES/1526, 30 January 2004; Security Council, Resolution 1617, UN Doc. S/RES/1617, 29 July 2005; Security Council, Resolution 1735, UN Doc. S/RES/1735, 22 December 2006; Security Council, Resolution 1822, UN Doc. S/RES/1822, 30 June 2008; Security Council, Resolution 1904, UN Doc. S/RES/1904, 17 December 2009. The relevant Security Council resolutions are available on the official website of the Al Qaida and Taliban Sanctions Committee at <http://www.un.org/sc/committees/1267/resolutions.shtml>.

<sup>6</sup> Security Council, Resolution 1617, for example. See fn. 5.

but also to Osama bin Laden, Al Qaida and other individuals, groups, undertakings and entities associated with them. The sanctions, which have been reinforced over time, require States effectively to implement the following measures: (i) freeze the funds and other financial assets of, (ii) prevent the entry into or transit through their territories by, and (iii) prevent the direct or indirect supply, sale, and transfer of arms and military equipment to, any of the targeted individuals or entities.

These sanctions were adopted under Chapter VII of the UN Charter as preventive measures in the fight against terrorism and are thus binding upon States. It is also the States who bear the primary responsibility for their implementation. The Sanctions Committee (a subsidiary body of the Security Council) was established to oversee the implementation of these sanctions.<sup>7</sup> The Sanctions Committee, also known as the ‘1267 Committee’ or the ‘Al Qaida and Taliban Sanctions Committee’, is composed of all fifteen members of the Security Council.<sup>8</sup> The Sanctions Committee maintains a regularly updated list of individuals, groups, undertakings and entities who are identified or associated with Al Qaida, Osama bin Laden, and the Taliban. The list, which is called the ‘Consolidated List’,<sup>9</sup> serves as the foundation for the implementation and enforcement of sanctions against Al Qaida and the Taliban.

The Sanctions Committee is authorised to consider proposals from UN Member States to add the names of individuals, groups, undertakings, or entities to the Consolidated List.<sup>10</sup> When proposing names, States are required to provide a statement of case in support of the proposed listing, providing as much detail as possible regarding the grounds for listing. Once listed, the designated individuals, groups, undertakings, or entities may submit a request for delisting through the State of their residence or citizenship. Alternatively, they could request their delisting directly through the ‘Focal Point’ of the UN Secretariat, which was replaced in 2009 by the Ombudsperson. The listing and delisting procedures are regulated by the Guidelines of the Sanctions Committee.<sup>11</sup> The Sanctions Committee makes decisions by consensus in closed session. If the Sanctions Committee cannot reach a consensus, the matter may be submitted to the Security Council.<sup>12</sup>

### 3. The EU’s Implementation of the Al Qaida and Taliban Sanctions Regime

Using the Common Foreign and Security Policy framework, the EU has implemented Security Council resolutions adopted for the suppression of international terrorism and imposing sanctions against Al Qaida, Osama bin Laden, Taliban and individuals and entities associated

<sup>7</sup> The Security Council established the Sanctions Committee on 15 October 1999 by Security Council Resolution 1267; Security Council, Resolution 1267, para. 6. See fn. 2.

<sup>8</sup> The Al Qaida and Taliban Sanctions Committee is one of three subsidiary bodies established by the Security Council in its fight against terrorism. The other two are the Counter-Terrorism Committee established pursuant to Security Council Resolution 1373 (2001), which requested States to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home and abroad, and the ‘1540 Committee’, established pursuant to Security Council Resolution 1540 (2004), which obliges States, *inter alia*, to refrain from supporting by any means non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems. See Security Council, Resolution 1373, UN Doc. S/RES/1373, 28 September 2001; and Security Council, Resolution 1540, UN Doc. S/RES/1540, 28 April 2004.

<sup>9</sup> The Consolidated List is available at <http://www.un.org/sc/committees/1267/consolist.shtml>.

<sup>10</sup> See the Guidelines of the Sanctions Committee, available at [http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf).

<sup>11</sup> Guidelines of the Sanctions Committee. See fn. 10.

<sup>12</sup> Guidelines of the Sanctions Committee, section 3. See fn. 10.

with them. It should be noted that the EU also created its own, so-called, ‘EU Terrorism List’ of persons and entities involved in terrorist acts in order to implement UN Security Council resolution 1373 (2001).<sup>13</sup> Although the EU’s autonomous regime of imposing restrictive measures pursuant to the ‘EU Terrorism List’ is separate (and considerably different, from the EU regime implementing the Security Council’s Al Qaida and Taliban sanctions) the two regimes exist in parallel and they both impose asset freezes on designated individuals and entities.

For the purpose of implementation of the UN Al Qaida and Taliban sanctions regime, the Council of the European Union (the Council) adopted Common Position 2002/402/CFSP concerning restrictive measures against Osama bin Laden, Al Qaida, the Taliban and those associated with them. In line with the Common Position 2002/402/CFSP, the Council adopted, on 27 May 2002, Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al Qaida network and the Taliban.<sup>14</sup> This regulation, which is directly applicable in EU Member States, constitutes the main legal instrument giving effect to the asset freezing measures.<sup>15</sup> However, EU Member States are responsible for determining the sanctions to be imposed where the provisions of this regulation are infringed.<sup>16</sup> Article 2 of Council Regulation (EC) No 881/2002 provides the following restrictive measures:

- (1) All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I shall be frozen.
- (2) No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I.

<sup>13</sup> UN Security Council Resolution 1373 (2001), fn. 8, was adopted following the 9/11 terrorist attacks against the United States. The resolution does not impose sanctions against a State or targeted individuals or entities but it obliges all UN Member States to take a number of measures to prevent terrorist activities, including freezing the assets of individuals and entities involved in terrorist acts, and to criminalise various forms of terrorist actions, as well as to take measures that assist and promote cooperation among countries including adherence to international counter-terrorism instruments. To that end, the European Union (EU) adopted Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

<sup>14</sup> Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al Qaida and the Taliban, OJ 2002 L 139. Other legal instruments adopted with the purpose of giving effect to the Al Qaida and Taliban sanctions regime within the EU include: Council Common Position 1999/727/CFSP concerning restrictive measures against the Taliban, adopted on 15 November 1999, OJ 1999 L 294, p. 1; Council Regulation (EC) No 337/2000 concerning the flight ban and a freezing of funds, adopted on 14 February 2000, OJ 2000 L 43, p. 1; Council Common Position 2001/154/CFSP concerning additional restrictive measures against the Taliban and amending Common Position 96/746/CFSP, OJ 2001 L 57, p. 1; Council Regulation (EC) No 467/2001, extending the freezing of funds in respect of the Taliban in Afghanistan and repealing Council Regulation (EC) No 337/2000, adopted on 6 March 2001, OJ 2001 L 67, p. 1; Common Position 2003/140/CFSP concerning exceptions to the restrictive measures imposed by Common Position 2002/402/CFSP, OJ 2003 L 53, p. 62; Council Regulation (EC) No 561/2003 amending, as regards exceptions to the freezing of funds and economic resources, Council Regulation (EC) No 881/2002, adopted on 27 March 2003, OJ 2003 L 82, p. 1.

<sup>15</sup> The preamble of the regulation explains that these measures ‘fall under the scope of the Treaty and, therefore, notably with a view to avoiding distortion of competition, Community legislation is necessary to implement the relevant decisions by the Security Council.’ Council Regulation (EC) No 881/2002, Preamble (4). See fn. 14.

<sup>16</sup> Council Regulation (EC) 881/2002, Article 10. See fn. 14. See, for example, The Al Qaida and Taliban (Asset-Freezing) Regulations 2010, 2010 No 1197.

- (3) No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in Annex I, so as to enable that person, group or entity to obtain funds, goods or services.

Annex I to Regulation (EC) No 881/2002 contains a list of the persons, groups and entities made subject to the restrictive measures in Article 2. Under Article 7(1) of Council Regulation (EC) No 881/2002, the Commission is empowered to amend or supplement Annex I on the basis of determinations made by either the UN Security Council or the Sanctions Committee. Since then, Council Regulation (EC) No 881/2002 has been amended by a number of Commission regulations by which the Commission amended or supplemented Annex I following modifications of the Consolidated List. An individual, group, undertaking, or an entity is, therefore, automatically added to Annex I of Council Regulation (EC) No 881/2002 when the Sanctions Committee adds their names to the UN Consolidated List.

#### 4. The Sanctions Regime and Human Rights

The Al Qaida and Taliban sanctions regime has been criticised for its severe interference with the fundamental rights of targeted persons and entities. Freezing the assets of targeted individuals without allowing them access to funds necessary for basic expenses, such as food, housing and medicine, interferes with their right to life, right to health and right to an adequate standard of living.<sup>17</sup> Asset freezing is a clear infringement of the right to peaceful enjoyment of one's property. Given its continued and indefinite nature, it may even result in the permanent deprivation of property with the same effect as that of confiscation.<sup>18</sup>

Blacklisting is also likely to interfere with the right to private life, family life and reputation and to respect for dignity and honour.<sup>19</sup> Furthermore, the travel ban interferes with the individual's freedom of movement.<sup>20</sup> In addition, sanctions, although not formally preventing designated individuals from obtaining employment, in reality have that unfortunate result. Thereby sanctions also restrict the right to work.<sup>21</sup> Listed persons are often perceived to be criminals and thereby put at a disadvantage in the job market in comparison to other job seekers.

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<sup>17</sup> Universal Declaration of Human Rights (UDHR), Resolution 217 A(III), UN Doc. A/810 91, UN General Assembly, 10 December 1948, Articles 3 and 25; International Covenant on Civil and Political Rights (ICCPR), 999 United Nations Treaty Series 171, 16 December 1966, entered into force 23 March 1976, Article 6; International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 United Nations Treaty Series 3, 16 December 1966, entered into force 3 January 1976, Articles 11 and 12; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 United Nations Treaty Series 222, 4 November 1950, entered into force 3 September 1953, Article 2; African [Banjul] Charter on Human and People's Rights (African Charter), 21 *International Legal Materials* 58, adopted 27 June 1981, entered into force 21 October 1986, Articles 4 and 16; American Convention on Human Rights (ACHR), O.A.S. Treaty Series No. 36, 1144 United Nations Treaty Series 123, entered into force 18 July 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (1992) OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, Articles 4 and 26; Charter of Fundamental Rights of the European Union (EU Charter), Official Journal of the European Communities C346/1 (18.12.2000), Articles 2 and 35.

<sup>18</sup> UDHR, Article 17; ECHR, Article 1 of Protocol 1; African Charter, Article 14; ACHR, Article 21; EU Charter, Article 17. See fn. 17.

<sup>19</sup> UDHR, Article 12; ICCPR, Article 17; ECHR, Article 8; ACHR, Article 11; EU Charter, Articles 7 and 1. See fn. 17.

<sup>20</sup> UDHR, Article 13; ICCPR, Article 12; ECHR, Article 2 of Protocol 4; African Charter, Article 12; ACHR, Article 22. See fn. 17.

<sup>21</sup> UDHR, Article 23; ICESCR, Article 6; African Charter, Article 15; ACHR, Article 26; EU Charter, Article 15. See fn. 17.

Importantly, sanctions affect not only the targeted individuals, but also restrict the ability of their families to enjoy their rights, including, for example, the right to education.<sup>22</sup> The delisting procedure at the UN Sanctions Committee does not provide the petitioner with access to independent and impartial judicial review.<sup>23</sup>

The foregoing raises this question: is the UN Security Council authorised to limit these human rights when adopting sanctions under Chapter VII of the UN Charter?

Pursuant to Article 25 of the UN Charter, decisions adopted under Chapter VII are binding and, by virtue of Article 103 of the UN Charter, they prevail over any treaty or customary law, with the exception of *jus cogens*. However, the UN Security Council must operate within the framework of the UN Charter, and in discharging its duties, it must act in accordance with the principles and purposes of the UN, one of which is the promotion of respect for human rights.<sup>24</sup> Although there are different views on the question of whether the Security Council is obliged to comply with human rights norms, it seems to be accepted that the Security Council is at least bound by customary human rights norms.<sup>25</sup> However, with the exception of *jus cogens*, the Security Council may disregard, derogate, or limit certain human rights if that is necessary for the maintenance of international peace and security.<sup>26</sup> In accordance with the principle of proportionality, the Security Council must ensure that the adverse consequences resulting from the restrictions on human rights are necessary and proportionate to the aims pursued by the sanctions.<sup>27</sup>

<sup>22</sup> UDHR, Article 26; ICESCR, Article 13; ECHR, Article 2 of Protocol 1; African Charter, Article 17; ACHR, Article 26; EU Charter, Article 14. See fn. 17.

<sup>23</sup> UDHR, Articles 8 and 10; ICCPR, Articles 2(3) and Article 14(1); ECHR, Articles 6 and 13; African Charter, Article 7; ACHR, Articles 8 and 25; EU Charter, Article 47. See fn. 17.

<sup>24</sup> The Charter of the United Nations, 59 Stat 1031, 26 June 1945, entered into force 24 October 1945, Articles, 1, 2, 24(2) and 55.

<sup>25</sup> See Jose E. Alvarez, 'The Security Council's War on Terrorism: Problems and Policy Options' in Erika de Wet and A. Nollkaemper (ed.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003), pp. 125-127; D. Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?' (1997) *International and Comparative Law Quarterly* 46(309), p. 324; I. Cameroon, Report on the European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions (Council of Europe, 6 February 2006), p. 3, 21; Erika de Wet, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View', in Erika de Wet and A. Nollkaemper (ed.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003), pp. 13-14; Erika de Wet and A. Nollekaemper, 'Review of Security Council Decisions by National Courts' (2002), *German Yearbook of International Law* 45(166), p. 175.

<sup>26</sup> See Ted D. Gill, 'Legal and Some Political Limitations on the Power of the United Nations Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', (1995), *Netherlands Yearbook of International Law* 26(33), pp. 61-62; Jochen Frowein and Nico Krisch, 'Chapter VII: Action with Respect to Threats to the Peace, Breaches of Peace, and Acts of Aggression' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002) pp. 710-712; Anthony Aust, 'The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Practitioner's View', in Erika de Wet and A. Nollkaemper (ed.), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003), pp. 34-35.

<sup>27</sup> Judith G. Gardam, 'Legal Restraints on Security Council Military Enforcement Action', (1996) *Michigan Journal of International Law* 17(307) at 309; Nicolas Angelet, 'International Law Limits to the Security Council', in Vera Gowlland-Debas (ed.), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001), 72; Frederic L. Kirgis, 'The Security Council's First Fifty Years', (2003) *American Journal of International Law* 89(506), 517; Bardo Fassbender, Targeted Sanctions and Due Process, study commissioned by the UN Office of Legal Affairs, 20 March 2006, p. 7. Available at [http://untreaty.un.org/ola/media/info\\_from\\_lc/Fassbender\\_study.pdf](http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf). See also the Council of Europe Guidelines on Human Rights and the Fight against Terrorism (March 2005), p. 19. Available at [http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices_EN.pdf).

In order to alleviate the hardship of its far-reaching sanctions regime, the Security Council gradually introduced certain exemptions to the asset freeze and the travel ban. Accordingly, the asset freeze does not now apply to funds that are determined by the relevant State to be necessary for basic expenses (such as expenses for food). These funds can be released after the relevant State notifies the Committee of its intention to authorise access to such funds, assets or resources and in the absence of a negative decision by the Committee within 3 working days of such notification.<sup>28</sup> Exemption may also apply to necessary extraordinary expenses, provided that the relevant determination has been approved by the Committee.

As regards the travel ban, States are not obliged to deny entry or to require the departure from its territory of its own nationals. The travel ban also does not apply where entry or transit is necessary for the fulfilment of judicial procedures. Additionally, the Committee may authorise exemptions from the travel ban on a case-by-case basis for necessary travel needs, including medical treatment abroad and the performance of religious obligations.<sup>29</sup>

Despite these improvements, which cured some of the more intolerable aspects of the sanctions regime's interference with basic human rights (such as the right to life and the right to health), the sanctions regime continues to be subject to severe criticism.

Although the human rights commonly restricted by the Al Qaida and Taliban sanctions are not those of an absolute nature (such as the prohibition on torture) and do not qualify as non-derogable rights,<sup>30</sup> the question is whether the severe, indefinite and far-reaching interference with these rights continue to meet the requirements of necessity and proportionality given the current nature of the threat and the mechanism established to suppress terrorism.

At present the question remains, for the most part, unanswered given that the designated individuals and entities have limited opportunities to effectively contest the scope of interference of the sanctions with their human rights. It follows that due process rights are essential in determining the lawfulness of the Al Qaida and Taliban sanctions in individual cases.<sup>31</sup> For this reason, this paper focuses on a critical assessment of the possibilities for challenging the imposition of sanctions in light of due process guarantees at the UN level, before the EU and UK courts, as well as before the ECtHR.

## 5. Due Process Rights

Due process rights are guaranteed by a number of human rights instruments. These include Article 10 of the Universal Declaration of Human Rights (UDHR) which entitles everyone to 'a fair and public hearing by an independent and impartial tribunal, in the determination of his

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<sup>28</sup> Apart from payments for foodstuffs, necessary basic expenses include rent or mortgage payments, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources. Security Council, Resolution 1452, UN Doc. S/RES/1452, 20 December 2002, as amended by Security Council, Resolution 1735 and Security Council, Resolution 1904, para. 7. See fn. 5.

<sup>29</sup> Security Council Resolution 1904, para. 1(b) and 7. See fn. 5.

<sup>30</sup> ICCPR, Article 4; see also ECHR, Article 15; ACHR, Article 27. See fn. 17.

<sup>31</sup> See D. Cortright and Erika de Wet, Human Rights Standards for Targeted Sanctions, Sanctions and Security Research Program (January 2010), p. 1. Available at [http://www.fourthfreedom.org/pdf/10\\_01\\_HR\\_STANDARDS\\_FINAL\\_WEB.pdf](http://www.fourthfreedom.org/pdf/10_01_HR_STANDARDS_FINAL_WEB.pdf).

rights and obligations and of any criminal charge against him<sup>32</sup> and Article 8 of the UDHR which guarantees everyone ‘the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’<sup>33</sup> Furthermore, Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that ‘in determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’<sup>34</sup> In addition, Article 2(3) of the ICCPR requires that any person whose rights or freedoms are violated must have an effective remedy.<sup>35</sup> It further requires that a person claiming such a remedy must have his right determined by the competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and requires State parties ‘to develop the possibilities of judicial remedy.’<sup>36</sup>

Articles 2 and 14 of the ICCPR are not included in the list of non-derogable rights of Article 4 (2) of the ICCPR. However, if a State derogates from normal procedures required under Article 14 of the ICCPR in circumstances of a public emergency, it should ‘ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.’<sup>37</sup> The key to this requirement is the temporary nature of any derogation.<sup>38</sup> ‘Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation.’<sup>39</sup> Furthermore, the Human Rights Committee has held that it is prohibited to deviate from the fundamental principles of a fair trial, including the presumption of innocence.<sup>40</sup>

What is more, Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees a ‘fair hearing by an independent and impartial tribunal established by law’ to everyone ‘in the determination of his civil rights and obligations or of any criminal charge against him.’<sup>41</sup> And, according to Article 13 of the ECHR, ‘[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority...’<sup>42</sup> The question is whether the imposition of sanctions can be properly qualified as either civil or criminal in nature and therefore falling within the scope of Article 6 of the ECHR.

Sanctions are said to be preventive measures, but they are inevitably punitive in nature. For this reason it has been argued by some that the effects of blacklisting are serious enough to qualify as

<sup>32</sup> UDHR, Article 10. See fn. 17.

<sup>33</sup> UDHR, Article 8. See fn. 17.

<sup>34</sup> UDHR, Article 14(1). See fn. 17. See also General Comment No 32, Article 14, Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007.

<sup>35</sup> See further General Comment No 31, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, adopted 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13.

<sup>36</sup> UDHR, Article 2(3). See fn. 17.

<sup>37</sup> See fn. 34, General Comment No 32, para. 6.

<sup>38</sup> See Office of the United Nations Commissioner for Human Rights: Human Rights, Terrorism and Counter-terrorism, Fact Sheet No 32, p.28-29. Available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

<sup>39</sup> See Human Rights Committee, General Comment No 29, Article 4, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4.

<sup>40</sup> HRC, General Comment No 29, para. 11. See fn. 39.

<sup>41</sup> UDHR, Article 6(1). See fn. 17.

<sup>42</sup> UDHR, Article 13. See fn. 17.



the ‘determination of a criminal charge.’<sup>43</sup> In any event, it is accepted that Article 6 of the ECHR applies to the sanctions regime because the decision whether to impose the sanctions interferes with other ‘civil rights’ of the targeted individuals, such as the rights to private life, property, reputation and an effective remedy.<sup>44</sup>

Other regional human rights instruments also include provisions which guarantee due process rights. For example, Article XVIII of the American Declaration of the Rights and Duties of Man,<sup>45</sup> Article 8 and 25 of the American Convention on Human Rights,<sup>46</sup> Article 7 of the African [*Banjul*] Charter on Human and People’s Rights,<sup>47</sup> and Article 9 of the Arab Charter on Human Rights.<sup>48</sup> Not least, due process rights are commonly protected by domestic constitutions or other legislative acts.<sup>49</sup>

In the EU, the Charter of Fundamental Rights of the EU (EU Charter) guarantees due process rights in Articles 41 and 47.<sup>50</sup> Article 41 of the EU Charter proclaims a ‘right to good administration’ which lays down a person’s right to have his or her affairs handled impartially. Article 47 of the EU Charter guarantees ‘the right to an effective remedy and to a fair trial’ to everyone whose rights and freedoms guaranteed by the law of the EU are violated.

Comparative analysis of due process guarantees in international and regional human rights instruments and national laws carried out by various organisations and professional bodies (including the UN Office of Legal Affairs)<sup>51</sup> reveal that due process rights (also referred to as ‘rights of defence’ or ‘right to a fair hearing’ or ‘right to a fair trial’) encompass, at minimum, the following elements:

- (1) The Right to be Informed: the right of a person or entity against whom sanctions have been imposed to be informed about these sanctions and to know the case against them as soon as possible;
- (2) The Right to be Heard: the right of such persons to be heard by the relevant decision-making body (for example, the UN Sanctions Committee) within a reasonable time;
- (3) The Right to Judicial Review and an Effective Remedy: the right of such person or entity to an effective mechanism to challenge the imposition of sanctions before an independent and impartial body.

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<sup>43</sup> Erika de Wet and A. Nollekaemper, ‘Review of Security Council Decisions by National Courts’, (2002) *German Yearbook of International Law* 45(166), p. 177; See I. Cameron, Report on the European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, Council of Europe, 6 February 2006, p. 10.

<sup>44</sup> Iain Cameron, Report on the ECHR, pp. 2, 10-11. See fn. 43.

<sup>45</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* (1992) OEA/Ser.L.V/II.82 doc.6 rev.1, p. 17.

<sup>46</sup> American Charter of human Rights, Articles 8 and 25. See fn. 17.

<sup>47</sup> African Charter, Article 7. See fn. 17.

<sup>48</sup> Arab Charter on Human Rights, adopted by the League of Arab States, 22 May 2004, entered into force 15 March 2008, Article 9.

<sup>49</sup> For relevant extracts from domestic constitutions or laws see Fassbender’s Report on Targeted Sanctions and Due Process, pp. 49-59. See fn. 27.

<sup>50</sup> EU Charter, Articles 41 and 47. See fn. 17.

<sup>51</sup> Bardo Fassbender, Report on Targeted Sanctions and Due Process. See fn. 27; I. Cameron, Report on the ECHR. See fn. 43; Report by the Office of the UN High Commissioner for Human Rights. See fn. 38; Cortright and de Wet, See fn. 31; Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted Sanctions, Pre-emptive Security and Fundamental Rights*, European Center for Constitutional and Human Rights, pp. 27-34. Available at <http://www.ecchr.eu/>. International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurist Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva: International Commission of Jurists, 2009), p. 122.

In a ‘non-paper’ presented to the Security Council, the UN Secretary-General defined the minimum standards required to ensure that the listing and delisting procedures are ‘fair and transparent’ in almost identical terms.<sup>52</sup> These due process rights are considered as part of customary international law and are also said to be protected by general principles of law.<sup>53</sup>

Arguably, they also apply to UN organs, such as the Security Council when it exercises ‘governmental’ authority over individuals.<sup>54</sup> In any event, ‘the UN Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms to the greatest possible extent,’ including rights to due process.<sup>55</sup> If these minimum standards of due process are not guaranteed by the Security Council then the sanctions regime does not meet the requirements of necessity and proportionality.

## 6. Challenging Sanctions at the UN Level

The main question is whether, once individuals, groups, undertakings and entities are included in the Consolidated List, they have any effective remedies available to them to challenge their designation in the Consolidated List and to challenge the imposition of sanctions upon them.

The Al Qaida and Taliban sanctions regime has been widely criticised for the lack of minimum standards of fairness and transparency. However, since the adoption of resolution 1267 (1999), the Security Council introduced a number of procedural amendments in order to improve the fairness, transparency, and effectiveness of the sanctions regime. This paper examines the most significant changes to the level of transparency of the sanction regime and assess whether the current UN delisting procedure available to the designated individuals and entities provides for an effective mechanism to challenge the listings.

In the past, affected individuals and entities were not informed of the inclusion of their names in the Consolidated List or of the imposition of sanctions upon them. No notification of their designation was communicated to them by the Sanctions Committee or by any other State, either the designating State or the State of their nationality or residence. Typically, individuals would first discover that their assets had been frozen when they tried to withdraw money from a cash machine or at a bank.

The Security Council later established a basic notification procedure. This involved the Secretariat (after publication but within three working days after a name was added to the Consolidated List) notifying the Permanent Mission of the country or countries where the individual or entity was believed to be located and, in the case of individuals, the country of which the person is a national.<sup>56</sup> In turn, States are requested to notify or inform the listed person or entity of the designation in a timely manner.<sup>57</sup>

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<sup>52</sup> See Proceedings of 5474<sup>th</sup> Meeting of the UN Security Council, S/PV.5474, New York, 22 June 2006, p. 5.

<sup>53</sup> Bardo Fassbender, Report on Targeted Sanctions and Due Process, pp. 6, 15. See fn. 27; I. Cameron, Report on the ECHR, p. 2. See fn. 43.

<sup>54</sup> Bardo Fassbender, Report on Targeted Sanctions and Due Process, pp. 6, 19-24. See fn. 27.

<sup>55</sup> Bardo Fassbender, Report Targeted Sanctions and Due Process, pp. 7, 25-28. See fn. 27.

<sup>56</sup> Security Council Resolution 1735, para. 10; Security Council Resolution 1822, para. 15; Security Council Resolution 1904, para. 18. See fn. 5.

<sup>57</sup> Security Council Resolution 1735, para. 11; Security Council Resolution 1822, para. 17; Security Council Resolution 1904, para. 19. See fn. 5.

As regards the reasons and grounds for including the persons and entities in the Consolidated List, in contrast to past experience when listed persons did not know any of the reasons in support of their listings, States are now obliged to provide the Sanctions Committee with a statement of case describing the basis for the proposal.<sup>58</sup> In addition, States are required to identify those parts of the statement of case that may be publicly released.<sup>59</sup> After the person's or entity's name is added to the Consolidated List, the Committee prepares a narrative summary of reasons which is to be made accessible on the Committee's website.<sup>60</sup>

When notifying or informing the individuals and entities of their listing, states must include with a narrative summary of reasons for listing, a description of the effects of designation, the Committee's delisting procedures, and the provisions on exemptions.<sup>61</sup> The newly established Office of the Ombudsperson will also notify individuals and entities about the status of their listing (if their address is known).<sup>62</sup>

Due to the lack of standards for the identification of individuals, those having the same name as a person whose designation risk mistakenly being placed on the Consolidated List. In order to prevent such mistakes from occurring, the Security Council has established minimum evidentiary standards for the identification of individuals. Accordingly, States are required to provide the Committee with sufficient identifying information to allow for the accurate and positive identification of individuals and entities. In order to assist States in providing the relevant information, a standard form for listing has been created and is now available on the Committee's website.<sup>63</sup>

Until 2005, there was no definition of the 'associated with' standard, which constitutes a basis for listing proposals. Because the sanctions are of a preventive nature, a criminal charge or conviction is not a prerequisite for a person's inclusion in the Consolidated List. In Resolution 1617 (2005), the Security Council identifies which acts and activities indicate that an individual, group, undertaking, or entity is 'associated with' Al Qaida, Osama bin Laden or the Taliban, including:

- a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- b) supplying, selling or transferring arms and related materiel to;
- c) recruiting for;
- d) otherwise supporting acts or activities of;

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<sup>58</sup> Security Council Resolution 1617, para. 4; Security Council Resolution 1735, para. 5; Security Council Resolution 1822, para. 12; Security Council Resolution 1904, para. 11. See fn. 5.

<sup>59</sup> Security Council Resolution 1822, para. 12; Security Council Resolution 1904, para. 11. See fn. 5.

<sup>60</sup> Security Council Resolution 1822, para. 13; Security Council Resolution 1904, para. 14. See fn. 5. The narrative summaries are defined by the Sanctions Committee as follows: 'The narrative summaries are based on information available to the designating State(s) and/or members of the Committee at the time of the listing, including the statement of case, coversheet or any other official information provided to the Committee, or any relevant information available publicly from official sources, or any other information provided by the designating State(s) or Committee members.' Narrative summaries are to be available at <http://www.un.org/sc/committees/1267/narrative.shtml>.

<sup>61</sup> Security Council Resolution 1904, para. 19. See fn. 5.

<sup>62</sup> Security Council Resolution 1904, Annex II, para. 15(b). See fn. 5.

<sup>63</sup> The standard form for listings is available at <http://www.un.org/sc/committees/1267/listing.shtml>.

Al Qaida, Osama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.<sup>64</sup>

At the inception of the sanctions regime, there existed no formal procedure enabling listed individuals and entities to challenge their designations. In practice, some States, on behalf of their nationals or residents, engaged in bilateral negotiations with the object of convincing the designating State(s) to delist an individual or entity concerned if they believed that their listing was unfounded or unjustified. Listed individuals and entities who wished to challenge their listing were therefore dependent on the ‘good-will’ of the States of their nationality or residence, which enjoyed full discretion in deciding whether to intervene on behalf of the listed persons or entities concerned and pursue their delisting. However, the listed individuals and entities were not able to submit their delisting request directly to the UN Sanctions Committee. Information as to the number of times such negotiations took place and the substance of the negotiations is not publicly available.

In 2006, the Security Council created an official delisting procedure and established the Focal Point of the UN Secretariat to deal with delisting requests.<sup>65</sup> Since then, petitioners are entitled to submit their requests through the State of their residence or citizenship and by addressing their request to the Focal Point.<sup>66</sup>

The Focal Point’s role, however, was limited to acting as an intermediary between the petitioner and the States involved. In particular, the Focal Point’s tasks included:

- (1) receiving the delisting requests and forwarding the requests, for their information and comments, to the designating States and to the States of nationality and residence;
- (2) placing the States of nationality and residence in contact with the designating States, if the latter so agreed, for consultations;
- (3) informing the Sanctions Committee of the positions of the States involved on the delisting requests;
- (4) informing the Committee if any of the consulted States opposed the request and providing copies of delisting requests;
- (5) conveying all communications received from Member States to the Committee; and informing the petitioner of the Committee’s decision.<sup>67</sup>

The delisting procedure has been recently modified by the establishment of an Office of the Ombudsperson, which has replaced the Focal Point. The Ombudsperson thereby assumed the task of receiving requests from individuals and entities seeking to be removed from the Consolidated List.

In contrast to the Focal Point, the Ombudsperson will be more actively engaged in the delisting process. Upon receipt of a delisting request, the Ombudsperson will carry out a two-month period of information-gathering from all relevant States and UN bodies.<sup>68</sup> This is then followed by a two-month period of engagement, during which the Ombudsperson may ask the petitioner

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<sup>64</sup> Security Council Resolution 1617, para. 2-3, as reaffirmed in Security Council Resolution 1822, para. 2-3. See fn. 5.

<sup>65</sup> Security Council Resolution 1730, UN Doc. S/RES/1730, 19 December 2006; Security Council Resolution 1735, para. 13-14. See fn. 5.

<sup>66</sup> See fn. 10.

<sup>67</sup> Security Council Resolution 1730. See fn. 65.

<sup>68</sup> Security Council Resolution 1904, Annex II, para. 1-4. See fn. 5.

questions or request additional information or clarification.<sup>69</sup> Upon completion of the period of engagement, the Ombudsperson will draft and circulate to the Committee a Comprehensive Report summarising all the relevant information available to the Ombudsperson, describing the Ombudsperson's activities with regard to the delisting request in question, and laying out the principal arguments concerning the delisting request for the Committee.<sup>70</sup>

The Committee will have thirty days to review the Comprehensive Report before deciding on the delisting request. At the Committee's meeting, the Ombudsperson will present the Comprehensive Report in person and answer Committee members' questions regarding the request. The Committee will then consider the request and decide whether to approve the delisting request through its normal decision-making procedure. If the request is granted, the Ombudsperson will inform the petitioner of the decision and of the fact that the person's name will be removed from the Consolidated List. If the request is rejected, the Committee will convey to the Ombudsperson its decision, including any appropriate explanatory comments, and other relevant information about the Committee's decision, and an updated narrative summary of the reasons for listing.

The Ombudsperson must then send this information, alongside the notice of the Committee's decision, to the petitioner within fifteen days. The notification should also describe the process and publicly releasable factual information gathered by the Ombudsperson.<sup>71</sup>

A Monitoring Team, composed of independent experts<sup>72</sup> appointed by the UN Secretary-General, was established to assist the Sanctions Committee in evaluating the implementation of the sanctions regime by Member States and making appropriate recommendations for improved implementation.

The Monitoring Team is also tasked with reporting on developments that have an impact on the effectiveness of the sanctions regime, including an assessment of the most appropriate measures to confront the changing nature of the threat posed by Al Qaida and Taliban. The Monitoring Team assists the Sanctions Committee in gathering relevant information and preparation of narrative summaries and supports the Ombudsperson in carrying out his or her mandate.<sup>73</sup>

A welcome improvement to the delisting procedure is the introduction of timelines at various stages of the procedure. At the outset, there was no time frame prescribed to guide the Committee and States involved in considering delisting requests. Gradually, the Security Council began to impose basic deadlines in order to prevent the Sanctions Committee and the States involved from engaging in prolonged, if not indefinite, consideration of delisting requests.<sup>74</sup> Resolution 1904 (2009) introduced more specific timelines for each stage of the delisting procedure, namely two months for information gathering, two months for dialogue and two months for discussion and decision-making. Accordingly, the consideration of delisting requests before the Sanctions Committee may not exceed six months. However, extraordinary circumstances, determined by the Committee on a case-by-case basis, may require additional time.

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<sup>69</sup> Security Council Resolution 1904, Annex II, para. 6. See fn. 5.

<sup>70</sup> Security Council Resolution 1904, Annex II, para. 7. See fn. 5.

<sup>71</sup> Security Council Resolution 1904, Annex II, para. 13. See fn. 5.

<sup>72</sup> Their expertise includes counter-terrorism, financing of terrorism, arms embargoes, travel bans and related legal issues.

<sup>73</sup> Security Council Resolution 1904, Annex I. See fn. 5.

<sup>74</sup> Security Council Resolution 1730, para. 6(c). See fn. 65.

It should also be pointed out that no time limit has been imposed for the expiry of the listings of designated persons in the Consolidated List. Therefore, the listings, in the absence of a delisting request, could remain unchanged indefinitely. The Sanctions Committee was not authorised to review whether the listings in the Consolidated List remain accurate, updated and appropriate, except if delisting procedures were triggered.

To remedy this deficiency, resolution 1822 (2008) directed the Sanctions Committee to review all the names on the Consolidated List by 30 June 2010.<sup>75</sup> Hence, all States concerned were asked to respond to requests from the Committee for information relevant to this review by no later than 1 March 2010. Upon completion of this review, the Committee will conduct an annual review of all names on the Consolidated List that have not been reviewed for three or more years.<sup>76</sup>

## 7. Assessment of the UN Delisting Procedure

Notwithstanding the improvements examined above, especially the changes introduced by Security Council Resolution 1904 (2009), the sanctions regime remains in many respects Kafkaesque. An individual subject to the sanctions regime may understandably feel as if he is being persecuted by a remote, inaccessible authority, with the nature of his ‘crime’ never being fully revealed to him nor him being given any proper opportunity to prove his ‘innocence.’

Generally, the listed individuals and entities are not provided with adequate reasons or grounds for their designation. The only information provided with regard to their listing is the information provided in the Consolidated List and the narrative summaries,<sup>77</sup> both of which are available on the Committee’s website.

The Consolidated List provides identifying information and narrative summaries, which often contain vague and general allegations without specific evidence or underlying material in support of allegations against listed individuals and entities. Nor is the listed person provided with evidence as to the sources of the information underlying the allegations. Statements provided in narrative summaries can also lack sufficient evidence to constitute to prove that the listed individual or entity is associated with Al Qaida, Osama bin Laden, or the Taliban. In the absence of the supporting information and evidence, the listed persons are deprived of any opportunity to develop an adequate defence in relation to their listings. A narrative summary, for instance, could allege that the listed person has contacts with senior individuals within Al Qaida; however, the allegation of ‘contact’ with any of the senior individuals within Al Qaida, without more, cannot possibly amount to a proper allegation of being involved in terrorist activity. For example, a doctor who has treated senior individuals within Al Qaida, a person who has made a house call to their homes or a person who has met them socially, for example, at a mosque, would all have had ‘contact’ with them. Narrative summaries often provide no information as to the nature, time-frame, existence or significance of any of the alleged contact.

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<sup>75</sup> Security Council Resolution 1822, para. 25; Security Council Resolution 1904, para. 29. See fn. 5.

<sup>76</sup> Security Council Resolution 1822, para. 26; Security Council Resolution 1904, para. 32. See fn. 5. It should be noted that the Sanctions Committee’s consideration of a delisting request should be considered equivalent to a review of that listing.

<sup>77</sup> The Sanctions Committee started making available the narrative summaries on the Committee’s website only in March 2009, following the adoption of UN Security Council resolution 1822 (2008). However, not all narrative summaries have yet been provided. Some individuals and entities therefore remain unaware of any reasons for their designation.

Narrative summaries could also indicate that the listed person participated in radicalising young Muslims, recruiting these individuals to the Al Qaida cause, arranging for them to attend Al Qaida training camps to undertake terrorist training or facilitating their travel to other countries to fight and support terrorism. Sufficient evidence must be provided to establish the identities of these individuals, a time-frame for any of the alleged activities, and how the alleged activities were carried out.

With no supporting evidence or material being made available to the Sanctions Committee, the Ombudsperson, the Monitoring Team or any other State involved in the process, it is obvious that none of them are in a position to meaningfully assess whether the listing concerned is appropriate and justified. Therefore, none of the bodies or States involved in the delisting process is able to engage in a meaningful assessment of the listings. Since the sources of information provided in the narrative summaries are usually unknown, the possibility that the information was obtained illegally (indeed, even by torture) cannot be excluded.

Those petitioners, whose delisting requests have been denied, are typically not informed of any reasons or evidence for the Committee's negative decision. They are also not informed of the identity of the State(s) which opposed their delisting request. The revised procedure undoubtedly introduces more transparency in the delisting process; however, it is not clear how much more information the petitioner will, in fact, receive. One fact remains unchanged: the Committee's deliberations and communications between the Ombudsperson and Member States are confidential.<sup>78</sup>

States enjoy unlimited discretion in deciding what information to disclose and what information remains confidential. When providing a statement of case, States are entitled to identify parts of the statement as being confidential to the Committee.<sup>79</sup> States are also permitted to keep their status as a designating State confidential.<sup>80</sup> The Ombudsperson, in preparing the Comprehensive Report, must respect confidential elements of Member States' communications with the Ombudsperson.<sup>81</sup>

It seems that the Ombudsperson is not only entitled to summarise the information received from everyone involved in the delisting process, but may draft 'the principal arguments concerning the delisting request.'<sup>82</sup> The final decision on whether to remove a designated individual or entity from the Consolidated List remains in the hands of the Sanctions Committee. The Comprehensive Report prepared by the Ombudsperson is advisory in nature and does not have binding force. The members of the Sanctions Committee may follow the Ombudsperson's recommendations or, as it appears, they may disregard them.

The Sanctions Committee is not a judicial body but it is a political organ composed of members of the Security Council. Although the Committee does not vote, it continues to consider delisting requests by consensus. This means that the objection of one member of the Sanctions Committee (often the designating State) automatically prevents the removal of a listed person's name from

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<sup>78</sup> Security Council Resolution 1904, Annex II, para. 14. See fn. 5.

<sup>79</sup> Security Council Resolution 1617, para. 6; Security Council Resolution 1735, para. 6; Security Council Resolution 1822, para. 12; Security Council Resolution 1904, para. 11. See fn. 5.

<sup>80</sup> Security Council Resolution 1904, para. 12. See fn. 5.

<sup>81</sup> Security Council Resolution 1904, Annex II, para. 7(a). See fn. 5.

<sup>82</sup> Security Council Resolution 1904, Annex II, para. 7(c). See fn. 5.

the Consolidated List. In practice, the processing of delisting requests may remain purely a matter of intergovernmental consultations among the States involved.

Instead of seeking consensus to delist an individual or entity concerned when considering a delisting request, the Sanctions Committee should consider whether the listed individual or entity should remain on the Consolidated List by re-examining the evidentiary grounds on which the listing is based. According to the current system, the decision on delisting is adopted if none of the members of the Sanctions Committee opposes it. The individual or entity should be removed from the Consolidated List if one member of the Committee opposes the continuation of the listing.

The Committee meets in closed session, making it unclear to what extent (if at all) a member of the Sanctions Committee who is opposed to the delisting needs to justify its position. In Security Council Resolution 1904 (2009), the Committee Members are only called on ‘to make every effort to provide their reasons for objecting to such delisting requests,’<sup>83</sup> rather than being required to do so. As a consequence, there is no mechanism in place whereby the reasons for objections could be adequately assessed.

According to Security Council Resolution 1904 (2009), the Sanctions Committee is encouraged to give due consideration to the opinions of designating State(s), and State(s) of residence, nationality or incorporation when considering delisting requests. In some cases, the individual’s State of residence will request his or her delisting after having reviewed the case and discovered that the evidence no longer justified the listing.

In the absence of judicial oversight of the listing and delisting process, there is always a significant risk that the sanctions regime may be used for politically motivated designations. Without a proper judicial review of the reasons and evidence supporting listings and without affording the petitioners necessary procedural guarantees, a State may use the sanctions regime as a means to incapacitate and silence their critics and opponents by proposing their names for the Consolidated List, leading to the imposition of sanctions against them.

The current delisting procedure does not satisfy minimum requirements of due process rights. The sanctions regime continuously violates the right of individuals and entities to be informed of the evidence presented against them and consequently deprives them of the opportunity to make their views known. As regards the right to judicial review and an effective remedy, the UN Secretary-General explained in his ‘non-paper’ that the effectiveness of the review mechanism depends on ‘its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or... compensation.’<sup>84</sup> The delisting procedure clearly fails to satisfy any of these requirements.<sup>85</sup>

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<sup>83</sup> Security Council Resolution 1904, para. 25. See fn. 5.

<sup>84</sup> See Proceedings of 5474<sup>th</sup> Meeting of the UN Security Council, S/PV.5474, New York, 22 June 2006, p. 5.

<sup>85</sup> This conclusion has been confirmed by the Parliamentary Assembly of the Council of Europe which held in its Resolution 1597 (2008) that the procedural and substantial standards currently applied by the UN Security Council and by the Council of the European Union, despite some recent improvements, in no way fulfil the minimum standards of due process and violate the fundamental principles of human rights and the rule of law. Available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm>.



## 8. Human Rights Committee

Blacklisted persons may, under certain conditions, challenge their blacklisting before the HRC.<sup>86</sup> First, the HRC may only consider individual complaints in relation to State parties to the First Optional Protocol to the ICCPR (Optional Protocol).<sup>87</sup> Therefore, any blacklisted individual who claims that his or her rights under the ICCPR have been violated by a State party to that treaty may bring a communication before the HRC, provided that the State has recognised the competence of the HRC to receive such complaints under the First Optional Protocol. The HRC also considers written communication from individuals only after they have exhausted all available domestic remedies.<sup>88</sup> However, the HRC does not consider any communication from an individual if the same matter is being or has been examined under another procedure of international investigation or settlement.<sup>89</sup>

The HRC has so far considered one complaint relating to the Al Qaida and Taliban sanctions regime submitted by a Belgian couple, Nabil Sayadi and his wife Patricia Vinck.<sup>90</sup> They co-founded a charitable organisation *Fondation Secours Mondial*, the European branch of the Global Relief Foundation (an Islamic charitable organisation based in the United States) which was placed on the UN Consolidated List in 2002 upon the request of the United States for its alleged association with Al Qaida. In 2003, the names of Sayadi and his wife were added to the Consolidated List at Belgium's request.<sup>91</sup> The couple submitted several requests for their delisting to the Belgian, EU and UN authorities in 2003.<sup>92</sup> Neither Sayadi nor Vinck had been indicted for any criminal offences and indeed criminal proceedings against them had been dismissed.<sup>93</sup> In 2005, the Belgian Court of First Instance ordered the Belgian State to file a delisting request to the Sanctions Committee. Belgium complied with the order, but the members of the Sanctions Committee blocked the delisting procedure.<sup>94</sup>

Sayadi and Vinck filed a complaint with the HRC arguing that by proposing their names for the Consolidated List without providing them with any reasons or any relevant information justifying their listing, Belgium had violated their right to a fair hearing and effective remedy (Articles 2 and 14 of the ICCPR) and their freedom of movement (Article 12 of the ICCPR). Belgium argued, among other things, that it had simply carried out its obligations under the UN Charter in requesting the petitioners to be placed on the Consolidated List and that it had since taken all adequate measures within its powers to have them delisted.<sup>95</sup> The HRC decided that it could not consider the legality of the Security Council measures taken under the UN Charter, but

<sup>86</sup> ICCPR, Articles 28-32. See fn. 17. HRC is a panel of 18 independent experts in the field of human rights who serve in their personal capacity with a four year mandate with a possibility of re-election. Their task is to monitor the implementation of the ICCPR by its State parties.

<sup>87</sup> ICCPR, Article 1. See fn. 17. Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol), signed 16 December 1966, entered into force 23 March 1976, 999 United Nations Treaty Series 171. Currently, there are 113 parties to the Optional Protocol. For status see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en).

<sup>88</sup> ICCPR, Article 2. See fn. 17.

<sup>89</sup> ICCPR, Article 5. See fn. 17.

<sup>90</sup> Views of the Human Rights Committee of 22 October 2008, Communication No 1472/2006 submitted by Nabil Sayadi and Patricia Vinck on 14 March 2006, CCPR/C/94/D/1472/2006, 29 December 2008, available at <http://sim.law.uu.nl/SIM/CaseLaw/fulltextccpr.nsf/160f6e7f0fb318e8c1256d410033e0a1/b2f96ef1bdf7a3c3c1257521002d93be?OpenDocument>.

<sup>91</sup> Views of the Human Rights Committee of 22 October 2008, para. 2.1-2.3. See fn. 90.

<sup>92</sup> Views of the Human Rights Committee of 22 October 2008, para. 2.4. See fn. 90.

<sup>93</sup> Views of the Human Rights Committee of 22 October 2008, para. 2.3, 2.5. See fn. 90.

<sup>94</sup> Views of the Human Rights Committee of 22 October 2008, para. 2.5. See fn. 90.

<sup>95</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 4.1-4.12. See fn. 90.

that it was competent to consider whether ‘a State party had violated rights set forth in the Covenant, regardless of the source of the obligations implemented by the State party.’<sup>96</sup>

In its decision, the HRC accepted Belgium’s argument that the Security Council sanctions are of a preventive rather than a punitive nature and, therefore, despite their serious consequences for the individuals concerned, cannot be characterised as ‘criminal’ in the meaning of Article 14(1) of the ICCPR. As a consequence, the fair trial guarantees in paragraphs 2 and 3 of Article 14 and the principle of legality of penalties in Article 15 were not engaged in their case.<sup>97</sup> As regards the alleged violation of Article 14(1), the HRC observed that the petitioners had a remedy by bringing the matter before the Brussels Court and obtaining the order requiring Belgium to request delisting.<sup>98</sup>

However, the HRC held that Belgium had violated the petitioners’ freedom of movement under Article 12 of the ICCPR, as well as unlawfully interfered with their rights to privacy and home, and attacked their reputation, in violation of Article 17 of ICCPR. The HRC considered that the restrictions of their freedom of movement were ‘not necessary to protect national security and public order’<sup>99</sup> given the dismissal of the criminal investigation against the couple and Belgium’s request for delisting.<sup>100</sup> As regards the violation of Article 17 of the ICCPR, the HRC held that the stigmatisation associated with the inclusion of petitioners’ names in the Consolidated List and their full contact details constituted an attack on their honour and reputation.<sup>101</sup>

The HRC rejected Belgium’s argument that it had done all it could to secure the petitioners’ delisting and concluded that the State party is responsible for the presence of the petitioners’ name on the Consolidated List even though it is not competent to remove their names from the list.<sup>102</sup> The HRC ordered Belgium to make an appropriate remedy available and to undertake all that was in its power to have their names removed from the Consolidated List as soon as possible, to provide the authors with some form of compensation and to make public the request for removal and to prevent similar violations from occurring in the future.<sup>103</sup> In 2009, Sayadi and Vinck were finally removed from the Consolidated List.

The decision confirms the HRC’s competence to engage in a quasi-judicial review of the merits of cases involving challenges to the Al Qaida and Taliban sanctions regime. The HRC stated that it was its duty to ‘consider to what extent the obligations imposed on the State by the Security Council resolutions may justify the infringement of [the ICCPR rights]...’<sup>104</sup> Although the HRC did not pronounce upon the lawfulness of the Security Council resolutions establishing the sanctions regime in light of human rights, it made clear that domestic acts giving effect to the sanctions regime must comply with human rights.<sup>105</sup> Accordingly, States cannot excuse themselves for disregarding human rights by arguing that they are only complying with binding Security Council resolutions.<sup>106</sup> It should be noted that although the views of the HRC carry

<sup>96</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 7.2. See fn. 90.

<sup>97</sup> ICCPR, Article 14(1). See fn. 17.

<sup>98</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 10.9. See fn. 90.

<sup>99</sup> Views of the Human Rights Committee, Communication No.1472/2006, para. 10.8. See fn. 90.

<sup>100</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 10.8. See fn. 90.

<sup>101</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 10.12-10.13. See fn. 90.

<sup>102</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 10.13. See fn. 90.

<sup>103</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 12. See fn. 90.

<sup>104</sup> Views of the Human Rights Committee, Communication No 1472/2006, para. 10.6. See fn. 90.

<sup>105</sup> See Helen Keller and Andreas Fischer, ‘The UN Anti-terror Sanctions Regime under Pressure’, (2009) *Human Rights Law Review* 1, p. 8.

<sup>106</sup> This corresponds with Security Council resolution 1456 (2003) which provides that ‘States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, in particular human

considerable authority, they are not legally binding. However, it is plain from this case that a decision of this nature by the HRC carries considerable potential for influencing the Sanctions Committee to achieve the delisting of a successful petitioner.

## 9. Challenging the Sanctions Regime before the EU Courts

Given that the possibilities for challenging the imposition of the Al Qaida and Taliban sanctions at the UN level are limited, the question is whether the EU legal framework offers effective means to challenge the UN designations as implemented by the EU. Article 263 of the Treaty on the Functioning of the European Union (TFEU)<sup>107</sup> authorises individuals and entities to start proceedings before the General Court for the annulment of the EU regulations which included their names in Annex I of Council Regulation (EC) No. 881/2002. A number of proceedings have been instituted before the General Court by individuals and entities whose names were included in Annex I as a result of their designation by the UN Sanctions Committee.

The first four applications were filed with the General Court, pursuant to Article 230 of the Treaty Establishing the European Community (now replaced by Article 263 of the TFEU) by Yassin Abdullah Kadi, Ahmed Ali Yusuf & Al Barakaat International Foundation, Faraj Hassan, and Chafiq Ayadi. These applicants challenged the legality of the Council and Commission regulations which gave effect to their listings in the Consolidated List and included their names in Annex I of Council Regulation (EC) No 881/2002. The applicants requested the General Court to annul these regulations on the grounds that they infringed their fundamental rights, including their right to be heard, right to an effective judicial review and right to respect for property and the principle of proportionality.<sup>108</sup>

The applicants argued, *inter alia*, that they were not told why the sanctions were imposed on them nor informed of any evidence and facts adduced against them to justify their inclusion in Annex I. The applicants arguably had no opportunity to make their views on the matter known. The only reason for their names being entered in Annex I was the fact that they were included in the Consolidated List. However, neither the Council nor the Commission had apparently examined the reasons for which the Sanctions Committee included the applicants on the Consolidated List. The source of the information received by the Sanctions Committee was obscure and there was no mention of the reasons why certain individuals had been included in the list. There was also no procedure for consultation of the individuals or entities concerned, neither before nor after the freezing of their funds. The UN procedure for delisting was ineffective and materially infringed the applicants' right to a fair hearing. The contested regulations did not provide for an opportunity for an effective judicial review and the General Court, due to lack of any evidence, was prevented from investigating the merits of the case. In

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rights, refugee and humanitarian law ...' Security Council Resolution 1456, UN Doc. S/RES/1456, 20 January 2003.

<sup>107</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115, p. 47 (TFEU), Article 263 (ex Article 230).

<sup>108</sup> *Yassin Abdullah Kadi v. Council and Commission*, Case T-315/01, Judgement of the Court of First Instance, 21 September 2005 [2006] ECR II-3649; (*Kadi*), *Ahmed Ali Yusuf & Al Barakaat International Foundation v. Council and Commission*, Case T-306/01, Judgement of the Court of First Instance, 21 July 2005 [2005] ECR II-3553 (*Al Barakaat*); *Faraj Hassan v. Council and Commission*, Case T-49/04, Judgement of the Court of First Instance, 12 July 2006 [2006] ECR II-52 (*Hassan*); *Chafiq Ayadi v. Council*, Case T-253/03, Judgement of the Court of First Instance, 12 July 2006 [2006] ECR II-2139 (*Ayadi*).

the absence of any weighing up of competing interests, the restrictive measures also disproportionately interfered with the applicants' right to property.<sup>109</sup>

The General Court dismissed all four applications, which were based on almost identical factual grounds, by ruling that it had no jurisdiction to review either the lawfulness of the contested regulations or the lawfulness of the relevant UN Security Council resolution.<sup>110</sup> The only exception that the General Court permitted was the review of the lawfulness of the relevant UN Security Council resolutions with regard to *jus cogens*.<sup>111</sup> The reasoning was that the EU regulations implemented UN Security Council resolutions adopted under Chapter VII of the UN Charter, which were therefore binding upon the EU Member States and, by virtue of Article 103 of the UN Charter, prevailed over their obligations under the TFEU.<sup>112</sup> After having reviewed the EU regulations with regard to *jus cogens* norms, the General Court concluded that the restrictive measures provided in the contested EU regulations did not infringe the applicants' fundamental rights as protected by *jus cogens*.<sup>113</sup>

Subsequently, the respective General Court's judgements were appealed. The appellants filed their appeals with the Court of Justice of the European Union (ECJ), seeking to set aside the judgments by the General Court. The ECJ delivered two judgements in the four cases, joining *Kadi* with *Al Barakaat* and *Hassan* with *Ayadi*.<sup>114</sup> The judgement in *Hassan & Ayadi* closely follows the earlier judgement in *Kadi & Al Barakaat*<sup>115</sup> delivered on 3 September 2008. In sum, the ECJ disagreed with the General Court's finding on lack of jurisdiction to review the internal lawfulness of the contested EU regulations and confirmed its full competence to review the lawfulness of the EU acts designed to give effect to Security Council resolutions adopted under Chapter VII of the UN Charter.<sup>116</sup>

The ECJ further held that 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures'<sup>117</sup> and that 'respect for human rights is a condition for lawfulness of Community acts.'<sup>118</sup> The ECJ concluded that:

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principles that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.<sup>119</sup>

<sup>109</sup> *Kadi*, para. 136-152; *Al Barakaat*, para. 191-204; *Hassan*, para. 64-84. See fn. 108.

<sup>110</sup> *Kadi*, para. 225; *Al Barakaat*, para. 276. See fn. 108.

<sup>111</sup> *Kadi*, para. 226; *Al Barakaat*, para. 277. See fn. 108.

<sup>112</sup> *Kadi*, para. 212-231; *Al Barakaat*, para. 263-282. See fn. 108.

<sup>113</sup> See fn. 105, *Kadi*, para. 233-291; *Al Barakaat*, para. 284-346.

<sup>114</sup> See Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, Judgement by the ECJ, 8 September 2008 [2008] ECR I-6351 (*Kadi and Al Barakaat*); Joined Cases C-399/06 P and C-403/06 P, *Faraj Hassan v. Council and Commission* and *Chafiq Ayadi v. Council*, Judgement by the ECJ, 3 December 2009 [2009] ECR I-11393 (*Hassan and Ayadi*).

<sup>115</sup> Due to his delisting by the Sanctions Committee, the Commission removed Mr. Yusuf's name from Annex I of Council Regulation (EC) No 881/2002. Consequently, by order of 13 November 2007, the President of the Court of Justice of the EU (ECJ) ordered the name of Ahmed Ali Yusuf to be struck from the Court's register in response to his abandonment of the appeal that he had brought jointly with Al Barakaat International Foundation in Case C-415/05 P.

<sup>116</sup> *Kadi and Al Barakaat*, para. 278, 326. See fn. 114.

<sup>117</sup> *Kadi and Al Barakaat*, para. 283. See fn. 114.

<sup>118</sup> *Kadi and Al Barakaat*, para. 284. See fn. 114.

<sup>119</sup> *Kadi and Al Barakaat*, para. 285. See fn. 114.

The ECJ found, however, that the EU courts were not competent to review the lawfulness of UN Security Council resolutions, even if such review were limited to examining the compatibility of that resolution with *jus cogens*.<sup>120</sup>

As regards the fundamental rights in question, the ECJ clarified that the principle of effective judicial protection and the right to property are general principles of Community law stemming from the constitutional traditions common to the Member States.<sup>121</sup> The former has been enshrined in Articles 6 and 13 of the ECHR and Article 1 of Protocol 1 of the ECHR and reaffirmed by Article 47 of the EU Charter<sup>122</sup>, and the latter has been enshrined in Article 1 to Protocol 1 to the ECHR and reaffirmed in Article 17 of the EU Charter.<sup>123</sup> According to the case-law, the observance of the right to be heard, which comprises the right of the party to be informed of the evidence and to have an opportunity to make known his view on that evidence, must be guaranteed in all proceedings initiated against a person which are likely to culminate in a measure adversely affecting that person.<sup>124</sup>

In considering whether the contested regulations violated the appellants' fundamental rights, the ECJ held that the right to be heard and the right to effective judicial review were 'patently not respected.'<sup>125</sup> The contested regulations provided no procedure for communicating the evidence justifying the inclusion of the appellants on the list. The Council never informed the appellants of the evidence adduced against them to justify the restrictive measures and therefore they were not in a position to make their point of view known to advantage. For this reason, the appellants' right to be heard was violated.<sup>126</sup> Consequently, since the appellants were not able to defend their rights with regard to that evidence in satisfactory conditions before the EU courts, the ECJ found that the regulation also infringed the appellants' right to an effective legal remedy.<sup>127</sup>

Given the failure by the Council to communicate inculpatory evidence to the appellants, the ECJ concluded that it was therefore not able to undertake the review of the lawfulness of the contested regulations—an additional reason which supported the Court's ruling that the appellants' fundamental right to an effective legal remedy had not been observed.<sup>128</sup>

The ECJ acknowledged that restrictions on the right to property as provided by the restrictive measures imposed by the contested regulations might, in principle, be justified.<sup>129</sup> However, the prerequisite is that 'those restrictions in fact correspond to objectives of public interest pursued by the Community and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.'<sup>130</sup> The ECJ found that due to the absence of any guarantees enabling the applicants to put their case to the

<sup>120</sup> *Kadi and Al Barakaat*, para. 287. See fn. 114.

<sup>121</sup> *Kadi and Al Barakaat*, para. 335, 355. See fn. 114.

<sup>122</sup> *Kadi and Al Barakaat*, para. 335. See fn. 114.

<sup>123</sup> *Kadi and Al Barakaat*, para. 356. See fn. 114.

<sup>124</sup> *Organisation des Modjahedines du peuple d'Iran v. Council*, Case T-228/02, (2006) ECR II-04665, para. 91, 93 (OMPI). See further *Fiskano v Commission*, Case C-135/92, (1994) ECR I-2885, para. 39; *Transocean Marine Paint v Commission*, Case 17/74 (1994) ECR I-2885, para. 39; *Hoffmann-La Roche v Commission*, Case 85/76 (1979) ECR 416, para. 9. See fn. 111, *Kadi and Al Barakaat*, para. 336-337.

<sup>125</sup> *Kadi and Al Barakaat*, para. 334. See fn. 114.

<sup>126</sup> *Kadi and Al Barakaat*, para. 345-348; *Hassan and Ayadi*, para. 83-84. See fn. 114.

<sup>127</sup> *Kadi and Al Barakaat*, para. 349; *Hassan and Ayadi*, para. 85-86. See fn. 114.

<sup>128</sup> *Kadi and Al Barakaat*, para. 350-351; *Hassan and Ayadi*, para. 87-88. See fn. 114.

<sup>129</sup> *Kadi and Al Barakaat*, para. 366; *Hassan and Ayadi*, para. 91. See fn. 114.

<sup>130</sup> *Kadi and Al Barakaat*, para. 355. See fn. 114.

competent authorities, the freezing of the applicants' funds constituted an unjustified restriction on their right to property.<sup>131</sup>

The ECJ concluded that the contested regulations infringed the appellants' fundamental rights under the EU law, namely the right to be heard, the right to effective judicial review and the right to property. The ECJ therefore annulled the contested regulations insofar as they concerned the appellants. However, in *Kadi & Al Barakaat*, the ECJ allowed the EU to maintain in effect the contested Council Regulation (EC) No 881/2002 for a three-month period which would enable the Council time to remedy the infringements found.<sup>132</sup> In contrast, in the subsequent *Othman* case, the General Court, in its judgement of 11 June 2009, decided not to do so because the period that had already elapsed since the delivery of the judgement in *Kadi & Al Barakaat* far exceeded the maximum period of three months.<sup>133</sup> In addition, since the applicant's situation in that case was comparable to the situation of the appellants in *Kadi & Al Barakaat*, the Council could not have been unaware of its obligation to remedy the infringements.<sup>134</sup> Similarly, in *Hassan & Ayadi* and other subsequent cases, the EU courts held that, despite taking formal note of the guidance given in *Kadi & Al Barakaat*, the Council had failed to remedy the infringements in the course of the action.<sup>135</sup> The ECJ thus annulled the relevant contested regulations with immediate effect.

Following the ECJ's judgement in *Kadi & Al Barakaat*, the Commission obtained from the Sanctions Committee the narrative summaries of the reasons for the applicants' listing and communicated these reasons to Mr. Kadi and Al Barakaat in order to give them the opportunity to comment on these grounds and make their point of view known. Similarly, the Commission informed Mr. Hassan and Mr. Ayadi that they could make a request in regards to the grounds for their listing to the Commission. For example, in Mr. Hassan and Mr. Ayadi's case, the Commission published in the Official Journal of the EU a notice for the attention of Mr. Hassan and Mr. Ayadi, respectively, in which the Commission indicated that following the judgement by the ECJ in *Kadi & Al Barakaat*, the Sanctions Committee had provided grounds for the listing of Mr. Hassan and Mr. Ayadi and informed them that they may request the Commission to communicate these grounds to them.<sup>136</sup> In each notice, the Commission further held that it would review their inclusion in Annex I and make a new decision concerning their listings after having given them an opportunity to express their views on the grounds for listings.

After having received the comments by Mr. Kadi and Al Barakaat, the Commission examined these comments and decided that their listings were justified because of their association with the Al Qaida network. Consequently, on 28 November 2008, more than a month before the expiration of the three-month extension granted by the ECJ, the Commission adopted Regulation (EC) No 1190/2009, in which it ordered that the names of Mr. Kadi and Al Barakaat

<sup>131</sup> *Kadi and Al Barakaat*, para. 369-370; *Hassan and Ayadi*, para. 92-94. See fn. 114.

<sup>132</sup> *Kadi and Al Barakaat*, para. 374-376. See fn. 114.

<sup>133</sup> *Omar Mohammed Othman v. Council and Commission*, Case T-318/01, Judgement by the Court of First Instance, 11 June 2009 [not yet reported], para. 96 (*Othman*).

<sup>134</sup> *Othman*, para. 97. See fn. 133.

<sup>135</sup> *Hassan and Ayadi*, para. 87. See fn. 114; Joint Cases T-135/06 to T-138/06, *Al-Bashir Mohammed Al-Faqih, Sanabel Relief Agency Ltd, Ghunia Abdrabbah, Taher Nasuf v. Council of the EU*, Judgement of the General Court, 29 September 2010 [not yet reported], available at [http://curia.europa.eu/jcms/jcms/j\\_6/](http://curia.europa.eu/jcms/jcms/j_6/).

<sup>136</sup> Faraj Faraj Husein Al-Sa'idi, OJ 2009 C 105, p. 31. Similar notices were published by the Commission in the case of Othman Omar Mahmud, OJ 2009 C 80, p. 12; Shafiq Ben Mohamed Al-Ayadi, OJ 2009 C 145, p. 21; Abd Al-Rahman Al-Faqih, OJ 2009 C 189, p. 33; Tahir Nasuf, OJ 2009 C 190, p. 37; Ghuma Abd'rabbah, OJ 2009 C 230, p. 29.

International Foundation be re-entered in Annex I of Council Regulation (EC) No 881/2002.<sup>137</sup> Similarly, the Commission provided the narrative summaries of reasons for listings to Mr. Hassan and Mr. Ayadi and, after having considered the comments received by them, the Commission concluded that their listings were justified also for reasons of their association with the Al Qaida network.<sup>138</sup> As a consequence, the Commission adopted Regulation (EC) No 954/2009 which re-enters the names of Mr. Hassan and Mr. Ayadi in Annex I.

It should be noted that Commission Regulation (EC) No 945/2009 was adopted before the delivery of the judgement by the ECJ in the joined cases *Hassan & Ayadi* and just after the closure of the appellate written and oral proceedings. The ECJ, therefore, deemed it necessary to consider whether, in view of withdrawal of Regulation (EC) No 881/2002 and its retroactive replacement by Regulation (EC) No 954/2009, it was still necessary to adjudicate on the appeals. The ECJ held that Commission Regulation (EC) No 954/2009 had kept the names of Mr. Ayadi and Mr. Hassan in Annex I with retroactive force, so that the restrictive measures continued to apply to them for the period for which Council Regulation (EC) No 881/2002 was applicable. The adoption of Commission Regulation (EC) No 954/2009 could therefore not be considered to constitute a fact occurring after the judgements under appeal and capable of rendering the appeals devoid of purpose. Furthermore, Regulation (EC) No 954/2009 was not yet definitive as it could be the object of an action for annulment. If Regulation (EC) No 954/2009 was annulled as a result of such proceeding, the contested regulation might come back into force as far as the appellants are concerned.<sup>139</sup>

Not surprisingly, Mr. Kadi, Al Barakaat,<sup>140</sup> Mr. Hassan and Mr. Ayadi all instituted new proceedings, separately, before the General Court, pursuant to Article 263 of the TFEU, seeking annulment of Commission Regulation (EC) No 1190/2008 and Commission Regulation (EC) No 954/2009, respectively.<sup>141</sup> The applicants argued, *inter alia*, that: (i) the contested regulations failed to remedy the infringements of rights of defence, including the right to an effective hearing and the right to effective judicial protection, as found by the ECJ in *Kadi & Al Barakaat*; (ii) the contested regulations provided no procedure for communicating to the applicants the evidence justifying the decision to freeze their assets, or enabling them to comment meaningfully on that evidence; (iii) the reasoning as to why the applicants should remain on the list failed to include precise information regarding their alleged association with Al Qaida; (iv) the Commission failed to undertake an assessment of all relevant facts and circumstances in deciding whether to enact the contested regulations and therefore manifestly erred in its assessments; and, (v) the indefinite restrictions of the applicants' right to property caused by freezing their assets amounted to a disproportionate and intolerable interference with their right to property which was not justified by compelling evidence.<sup>142</sup>

<sup>137</sup> See preamble of Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) No 881/2002, OJ 2008 L 322, p. 25.

<sup>138</sup> See preamble of Commission Regulation (EC) No 954/2009 of 13 October 2009 amending for the 114th time Council Regulation (EC) No 881/2002, OJ 2009 L 269, p. 20.

<sup>139</sup> *Hassan and Ayadi*, para. 53-65. See fn. 114.

<sup>140</sup> On 22 October 2009, the Sanctions Committee removed Al Barakaat International Foundation from the Consolidated List. The Commission amended Annex I accordingly, by adopting Regulation (EC) No 1033/2009 of 28 October 2009 which deletes, among others, Al Barakaat International Foundation from Annex I. Consequently, on 22 March 2010, the President of the General Court issued an order removing the case from the register. See OJ 2010 C 148, p. 51.

<sup>141</sup> Mr. Kadi brought his action on 26 February 2009, OJ 2009 C 90, p. 37; Al Barakaat International Foundation brought its action on 30 January 2009, OJ 2009 C 153, p. 39; Faraj Hassan Al Saadi brought his action on 7 January 2010, OJ 2010 C 51, p. 46; Ayadi brought his action on 6 April 2010, OJ 2010 C 148, p. 31.

<sup>142</sup> Preamble of Commission Regulation (EC) No 954/2009. See fn. 138.

On 22 December 2009, the Commission's new review procedure was codified in Council Regulation (EU) No 1286/2009 which accordingly amended Regulation (EC) No 881/2002. The regulation explicitly indicates that the amendments were necessary to provide for a listing procedure that ensured respect for the fundamental rights of the defence and in particular the right to be heard, in accordance with the ECJ's judgement in *Kadi & Al Barakaat*.<sup>143</sup>

The new procedure provides that when the UN Sanctions Committee decides to list an individual or entity for the first time, the Commission includes the individual or entity in Annex I, as soon as a statement of reasons has been provided by the Sanctions Committee. Once the individual or entity is included in Annex I, the Commission must communicate to that person the statement of reasons provided by the Sanctions Committee – either directly, if the address is known, or following the publication of a notice – in order to give them an opportunity to express their views on the matter. Where comments are submitted, the Commission reviews its decision in light of those comments and in accordance with the regulatory procedure laid down in Council Decision 1999/486/EC.<sup>144</sup> The Commission then communicates the result of its review to the individual or entity concerned and to the Sanctions Committee. The Commission may conduct a further review if a further request is made, based on substantial new evidence, to remove an individual or entity from Annex I.<sup>145</sup> The same review procedure is applied with regard to individuals and entities who were included in Annex I before the ECJ delivered its judgement in *Kadi & Al Barakaat*.<sup>146</sup>

On 30 September 2010, the General Court rendered its judgement in the *Kadi II* case,<sup>147</sup> annulling the new regulation which re-entered Kadi's name in Annex I insofar as it concerned Kadi.<sup>148</sup> Interestingly, the General Court held that its task was to ensure 'a full and rigorous review of the lawfulness of the regulation, without affording the latter any immunity from jurisdiction on the ground that it gives effect to resolutions adopted by the UN Security Council.'<sup>149</sup> The Court deemed this particularly important because the re-examination procedure by the Sanctions Committee 'clearly fails to offer guarantees of effective judicial protection.'<sup>150</sup> The Court thus, for the first time, defined the standard of judicial review by holding that the review must concern, 'indirectly, the substantive assessment of the Sanctions Committee itself and the evidence underlying it.'<sup>151</sup> In the Court's view this approach is justified given the significant and long-lasting effect of the measures on Kadi's fundamental rights.<sup>152</sup>

<sup>143</sup> Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain restrictive measures directed against certain persons and entities associated with Al Qaida network and the Taliban, OJ 2009 L 346, p. 42, Preamble (4).

<sup>144</sup> Council Decision 1999/468/EC, OJ 1999 L 184, p. 23, Preamble (7), para. 5, 7.

<sup>145</sup> Council Regulation (EU) No 1286/2009, Article 7a. See fn. 143.

<sup>146</sup> The same review procedure applies to persons, entities, bodies and groups which were included in Annex I before 3 Sept. 2008, the date when the ECJ delivered its judgement in *Kadi and Al Barakaat*. Council Regulation (EC) No 1286/2009, Article 7c. See fn. 143.

<sup>147</sup> *Yassin Abdullah Kadi v. Commission of the EU (Kadi II)*, Case T-85/09, Judgement by the General Court, 30 September 2010 [not yet reported]. Available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>.

<sup>148</sup> *Kadi II*, para. 195. See fn. 147. Al Barakaat International Foundation was removed from the UN Consolidated List and consequently, it withdrew its request for annulment which was pending before the General Court. Hassan was also delisted and his action for annulment was terminated due to his death. Ayadi's case is still pending before the General Court.

<sup>149</sup> *Kadi II*, para. 126. C.f. *OMPI*, fn. 121, para. 159. See fn. 147.

<sup>150</sup> *Kadi II*, para. 127. See fn. 147.

<sup>151</sup> *Kadi II*, para. 129, 135. See fn. 147.

<sup>152</sup> *Kadi II*, para. 151. See fn. 147.



In the context of that full review, the General Court held that the ‘statements of reasons’, by which the Commission provides to designated individuals and entities the grounds for their listing, do not satisfy the requirements of the right of defence. In the Court’s view, the Commission did not grant Kadi ‘even the most minimal access to the evidence against him’,<sup>153</sup> and continued to ‘refuse such access despite his express request.’<sup>154</sup> The General Court concluded that ‘the limited information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable Mr. Kadi to launch an effective challenge to the allegations against him.’<sup>155</sup> Moreover, the Commission had made no real effort to refute exculpatory evidence advanced by Kadi in relation to the few allegations against him which were successfully precise to permit him to know what was being raised against him.<sup>156</sup> The Court concluded that the contested regulation was adopted in breach of Kadi’s rights of defence.<sup>157</sup>

The Court also held that given the lack of any proper access to the information and evidence used against him, Kadi had also been unable to defend his rights with regard to that evidence in satisfactory conditions before the EU courts, with the result that it had to be concluded that his right to effective judicial review had also been infringed.<sup>158</sup> The Court also held that ‘the contested regulation was adopted without any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his actually being properly heard in that regard’<sup>159</sup> and, therefore, ‘the regulation was adopted according to a procedure in which the rights of the defence were not observed, which has had the further consequence that the principle of effective judicial protection has been infringed.’<sup>160</sup> Lastly, given the general application and duration of the freezing measures and the absence of any ‘real safeguard enabling the applicant to put his case to the competent authorities’, the Court held that the contested regulation also constituted an unjustified restriction of Kadi’s right to property.<sup>161</sup>

The General Court’s decision takes effect only as from the date of expiry of the period allowed for bringing an appeal before the Court of Justice, that is to say, two months and ten days from notification of the judgement or, if an appeal has been brought, as from the date of its dismissal. If there is no appeal or if the appeal is dismissed by the General Court, EU Member States will be required to terminate the restrictive measure of the asset freeze against Kadi; assuming, that is, that the Commission in the meantime does not circumvent the General Court’s ruling by adopting a new regulation including Kadi’s name again in Annex I of Council Regulation (EC) No 881/2002.

The General Court’s judgement does not affect Kadi’s designation by the Sanctions Committee. This means that, notwithstanding the General Court’s ruling, EU Member States continue to be bound by the Security Council resolutions to impose the asset freeze against Kadi. It is expected that the General Court will adopt similar rulings in other pending cases which concern the same circumstances as the Kadi case. It should also be mentioned that the Commission has been recently reviewing the existing designations in Annex I of Council Regulation (EC) No 881/2002 and for that purpose it has been sending ‘summaries of reasons’ to designated individuals and entities and inviting them to provide their comments. In cases where the

<sup>153</sup> *Kadi II*, para. 173. See fn. 147.

<sup>154</sup> *Kadi II*, para. 173. See fn. 147.

<sup>155</sup> *Kadi II*, para. 174. See fn. 147.

<sup>156</sup> *Kadi II*, para. 178. See fn. 147.

<sup>157</sup> *Kadi II*, para. 179. See fn. 147.

<sup>158</sup> *Kadi II*, para. 183. See fn. 147.

<sup>159</sup> *Kadi II*, para. 184. See fn. 147.

<sup>160</sup> *Kadi II*, para. 184. See fn. 147.

<sup>161</sup> *Kadi II*, para. 192-194. See fn. 147.

Commission adopts new regulations confirming the existing designations, the affected individuals and entities, who might have previously missed the two-month deadline for challenging regulations pursuant to Article 263 of the TFEU, will be able to institute proceedings before the General Court requesting the General Court to annul these new regulations.

## 10. Assessment of the EU Mechanisms to Challenge the Listings

On the face of it, the Commission's new review procedure provided in Commission Regulation (EC) No 1286/2009 satisfies the requirements of the right to be heard in accordance with *Kadi & Al Barakaat*. Additionally, the Commission's decisions to re-enter the names of the individuals and entities in Annex I following the reconsideration of the listings in accordance with the new review procedure may be challenged before the General Court. According to Article 275(2) of the TFEU<sup>162</sup> the Court of Justice of the EU has jurisdiction to rule on proceedings, brought in accordance with Article 263 of the TFEU,<sup>163</sup> reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2, Title V of the Treaty on the European Union.<sup>164</sup> Therefore, the right to an effective judicial review of the listed individuals and entities also appears to be satisfied.

Notwithstanding the improvements introduced recently in the EU implementation of the Al Qaida and Taliban sanctions regime, the efforts by the listed individuals and entities to challenge their listings in Annex I remain, to certain extent, Sisyphean in their potential for futile and repetitive action in light of the following reasons.

If an individual challenges his listing before the General Court and requests annulment of a regulation which includes his name in Annex I, the Commission is not precluded from adopting a new regulation confirming the existing listings, including the one that has been challenged before the General Court, following, for example, the amendments by the Sanctions Committee of the identifying data of certain individuals and entities in the Consolidated List. If the proceeding in the case concerned before the General Court is not yet concluded, then the General Court may, if it considers that the request for annulment is justified, order, upon request, annulment of the new regulation as well. However, if the regulation is adopted after the closure of the written and oral proceedings (for example, in the case of Faraj Hassan) the individual concerned would have to start the legal proceedings all over again.

Another example concerns individuals and entities that have already filed an application for annulment of the regulations which include their names in the Consolidated List. Dr. Al-Faqih and the Movement for Reform in Arabia (MIRA), for example, instituted proceedings before the General Court before receiving any reasons for their listings in Annex I. In fact, they have, on their own initiative, requested the Council and Commission to provide them the reasons for their listings. Neither the Council nor the Commission responded to their request. Only when Dr. Al-Faqih and MIRA started legal proceedings before the General Court, did they receive the narrative summaries from the Commission with the invitation to respond to them. Therefore, it is

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<sup>162</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115, Article 275(2). See fn. 107.

<sup>163</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115, Article 263. See fn. 107.

<sup>164</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115, p. 13. See fn. 107; see also Article 24 of the Treaty on European Union.

not clear whether the Commission is fulfilling its obligations in cases where legal action against the Commission and the Council has not yet been initiated.

There is no guarantee that the listed individuals and entities, who have successfully challenged their inclusion in Annex I before the EU courts, will not simply be re-listed in Annex I. If the General Court decided that the listing of an applicant, who requested the General Court to review the lawfulness of his designation, was unjustified and consequently annulled the regulations giving effect to such listings, the Commission could decide, on the basis of allegedly new facts, that the individual in question should be put back in Annex I. The person could bring another challenge, succeed again before the General Court, only to be yet again re-listed by the Commission in Annex I. This process, taking into account the fact that the proceedings before the Commission and the EU courts, takes an extremely long time, and could, in principle, continue indefinitely.

The reasons provided by the Commission according to the new review procedure are the ones contained in the statement of reasons prepared by the Sanctions Committee. As discussed above, in the critical assessment of the UN delisting procedure, the statements of reasons or narrative summaries generally provide nothing but vague and general allegations without any supporting evidence on the basis of which it could be decided whether the allegations have any foundation. In the absence of any specific and concrete evidence justifying the listings, the Commission deprives the listed individuals and entities of any effective opportunity to make relevant representations with regard to the alleged reasons for their listing.

Although the new review procedure itself does not afford the protection enshrined in the right to an effective legal remedy, it arguably enables individuals and entities to bring an action before the General Court against the new Commission's decision. The General Court would then be able to review the legality of the listing decisions by examining all the evidence justifying the listings, including exculpatory evidence submitted by the applicants. However, the General Court is unable to carry out a merits-based review of the justifiability of the listings if no specific evidence is available. Since the narrative summaries provide no evidence as to the source of the information, the individuals and entities are also unable to test the reliability and probative value of any evidence.

There are no precise timelines built into the Commission's review procedure. It is unclear how much time the Commission requires to provide statements of reasons. The Commission does not itself gather the information regarding the listings and requests narrative summaries from the Sanctions Committee. Only when the Sanctions Committee provides the reasons to the Commission, again without any indication as to how long this process takes, the Commission may forward these reasons to the individuals or entities concerned. Once the Commission receives the comments on the reasons, there is no indication as to how much time the Commission may take to carry out the review of the designation. This process, at least according to present practice, may take many months.

The proceedings before the General Court usually take a very long time. Applicants challenging the Al Qaida and Taliban sanctions regime have spent on average from five to seven years challenging their designations in Annex I before the EU courts.<sup>165</sup> Article 76a of the Rules of

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<sup>165</sup> Mr. Kadi, Al Barakaat International Foundation and Mr. Ayadi on average spent more than 7 years in the proceedings before the General Court and the ECJ; Faraj Hassan has, so far, spent more than 5 years challenging his designation before the EU courts.

Procedure of the General Court<sup>166</sup> provides that the Court may, on application by the applicant or the defendant, decide to adjudicate the case under an expedited procedure having regard to the particular urgency and the circumstances of the case. The expedited procedure is largely oral and significantly shortens the proceedings. It remains to be seen whether the General Court will be inclined to authorise requests for the expedited procedure in these cases given the complexity of the issues involved.<sup>167</sup>

It is not clear what standard of review the Commission applies in considering the listings. So far it appears that the Commission deems itself obliged to strictly comply with designations by the Sanctions Committee. This implies that the Commission is unable to engage in any kind of assessment of the justifiability, well-foundedness, accuracy and appropriateness of the listings. If the Commission is not authorised to review the listings on the basis of the information received by both sides involved, then the new review procedure would be without any purpose and would be purely ‘window-dressing.’

Further, what occurs if after reviewing a listing of a person or entity, the Commission finds that an individual or an entity in Annex I no longer met the criteria for their listing? Can the Commission remove that individual or entity from Annex I if it considers, after reviewing the listing, that the evidence does not support the designation? Paragraph 3 of Article 7a of Council Regulation (EU) No 1286/2009 does not provide a clear answer to this question:

Where observations are submitted, the Commission shall review its decision referred to in paragraph 1 in the light of those observations and after following the procedure referred to in Article 7b(2). Those observations shall be forwarded to the Sanctions Committee. The Commission shall communicate the result of its review to the person, entity, body or group concerned. The result of the review shall also be forwarded to the Sanctions Committee.

On the basis of the textual interpretation of the above article it appears that all that the Commission can do is to forward to the Sanctions Committee the result of its review of the listing. The Commission, therefore, is not authorised to remove the names from Annex I without prior authorisation by the Sanctions Committee. If the Commission disagrees with the listings, the Sanctions Committee is not obliged to endorse the Commission’s view. The decision of whether such a person or an entity is to be removed from the Consolidated List, and consequently Annex I, remains in the discretion of the Sanctions Committee.

If, hypothetically, the person’s name were removed from Annex I, either on the basis of the Commission’s decision or the EU courts’ ruling that the evidence, or the lack thereof, did not support that person’s designation, the name of the person, notwithstanding its removal from Annex I, would remain in the Consolidated List. As a result of the removal of that person’s name from Annex I, EU Member States would be obliged to terminate restrictive measures against that person. However, the EU Member States’ obligation to terminate sanctions against that person would arguably clash with their obligations under international law, which require States to

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<sup>166</sup> Consolidated Version of the Rules of Procedure of the General Court, OJ 2010 C 177, p. 37.

<sup>167</sup> The General Court has previously granted applications for adjudication under expedited procedure in actions brought under Article 263 of the TFEU in cases involving freezing of assets of persons and entities allegedly involved in terrorism pursuant to Council Regulation (EC) No 2580/2001. These cases include, for example: *People’s Mojahedin’s Organization of Iran v Council*, Case T-284/08, Judgement by the Court of First Instance, 4 December 2008 [2008] ECR II-3487, para. 12 (*PMOI II*); *People’s Mojahedin’s Organization of Iran v Council*, Case T-256/07, Judgement by the Court of First Instance, 23 October 2008 [2008] ECR II-3019, para. 20 (*PMOI I*); *Sison v Council*, Case T-341/07, Judgement by the Court of First Instance, 30 September 2009 [2009] ECR II-3625, para. 26 (*Sison*).

comply with the Security Council's decisions and the UN Charter. It is not clear how the EU and the Security Council would settle this conflict. The decision by the EU institutions would not interfere with the imposition of the sanctions by States other than EU Member States. This would cause fragmentation in the implementation of sanctions which might in turn render the sanctions regime ineffective. There is no doubt that the most effective way - in fact, the only way - to effectively terminate the restrictive measures imposed under the Al Qaida and Taliban sanctions regime is to secure the individuals' removal from the Consolidated List. And this brings us back to the UN Sanctions Committee delisting procedure.

## 11. UK Implementation and Legal Challenges

In order to give effect to the Al Qaida and Taliban sanctions regime in the UK and provide for enforcement of the EU implementing regulations, Her Majesty's Treasury (Treasury) adopted the Al Qaida and Taliban (United Nations Measures) Order 2006 (Al Qaida Order).<sup>168</sup> This order was adopted on the basis of section 1(1) of the 1946 United Nations Act which authorises the UK Government to make such Orders in Council as are 'necessary and expedient' to give effect to UN Security Council resolutions.<sup>169</sup> The Al Qaida Order requires the assets of those designated by the Sanctions Committee as being associated with Al Qaida and the Taliban to be automatically frozen in the UK without them having any right to challenge their designations before a court.<sup>170</sup>

Although there is no statutory appeal available under the Al Qaida Order 2006, the Order has been successfully challenged before the UK courts by means of judicial review. In *Ahmed and others v. Treasury*,<sup>171</sup> the Supreme Court quashed the Al Qaida Order as *ultra vires*, ruling that the Treasury was not empowered by the 1946 UN Act to introduce an asset-freezing regime by means of Orders in Council.<sup>172</sup> There was no indication, when Parliament debated the 1946 UN Act, that it had in mind the imposition of restrictions on individuals, such as the Order had.<sup>173</sup> The Supreme Court held that the Order, which 'strikes at the very heart of the individual's basic right to live his own life as he chooses', had a 'devastating' effect on the designated persons and their families, making them effectively 'prisoners of the state.'<sup>174</sup>

As regards the impact on human rights, the Supreme Court rejected the argument that the Al Qaida Order was unlawful because it breached Articles 6 and 8 of the ECHR and Article 1 of Protocol 1 of the ECHR. Instead, the Supreme Court endorsed the judgment in *Al-Jedda*,<sup>175</sup> where the House of Lords held that, by virtue of Article 103 of the UN Charter, the UK's obligations under Article 25 of the UN Charter prevail over any other international agreement, including the ECHR. Only the ECtHR may, in the Supreme Court's view, provide the

<sup>168</sup> Al Qaida and Taliban (United Nations Measures) Order 2006 (S.I. 2006/2952).

<sup>169</sup> United Nations Act 1946 (c.45). 15 April 1946.

<sup>170</sup> Al Qaida Order, Articles 3, 4 and 7. See fn. 168.

<sup>171</sup> *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants); Her Majesty's Treasury (Respondent) v. Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v. Her Majesty's Treasury (Appellant)* [2010] UKSC 2.

<sup>172</sup> See further the case analysis by Miša Zgonec-Rožej (2011), *American Journal of International Law* 105, pp. 114-121.

<sup>173</sup> Al Qaida Order, para. 16 and 44. See fn. 168.

<sup>174</sup> Al Qaida Order, para. 60, 38-39. See fn. 168. Lord Hope endorsed Lord Justice Sedley's view that the restrictive measures 'freeze individual's assets to the point where they are effectively prisoners of the state.' *A, K, M, Q and G v. HM Treasury*, Court of Appeal, 30 October 2008 [2008], EWCA Civ 1187, para. 125.

<sup>175</sup> *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2008] 1 AC 332.

authoritative guidance as to the extent to which, if at all, any of the ECHR rights can be held to prevail over the UN Charter.<sup>176</sup> The ECtHR has not yet considered the matter.<sup>177</sup>

The Supreme Court, however, found that the Al Qaida Order breached fundamental rights under domestic law, namely the right to peaceful enjoyment of property and the right of unimpeded access to a court. As those rights are found in common law, their application was not affected by Article 103 of the UN Charter. Lord Hope accepted that some interference with the right to peaceful enjoyment of one's property may have been foreseen by the framers of Section 1 (1) of the 1946 Act. However, in the absence of any effective means to challenge the extensive interference with the right to enjoyment of one's property, the Al Qaida Order exceeded the threshold of permissible interference with fundamental rights.<sup>178</sup> As a result, the Supreme Court held that the Al Qaida Order went beyond the scope of Section 1 (1) of the 1946 Act.<sup>179</sup>

Although the Supreme Court quashed the Order on the basis of separation of powers, the judgement raises concerns regarding the extreme restrictions of human rights introduced by sanctions. The Supreme Court observed that the regime was 'drastic' and 'oppressive'<sup>180</sup> and the consequences of implementing UN Security Council resolution 1276 (1999) were described as 'traumatic.'<sup>181</sup> The Supreme Court held that the regime affects 'all aspects of [the designated person's] life, including his ability to move around at will by any means of private or public transport.'<sup>182</sup> In the Supreme Court's view, the system of licensing which enables payments to be made for basic living expenses 'is extremely rigorous.'<sup>183</sup> Therefore, '[t]he overall result is very burdensome on all members of the designated person's family' and '[t]he impact on normal family life is remorseless and it can be devastating.'<sup>184</sup> The Supreme Court established that the delisting procedure at the UN Sanctions Committee does not offer any effective judicial review.<sup>185</sup>

Notwithstanding the Supreme Court's judgement, the Treasury maintained the asset freezing measures in effect on the basis of EU Council Regulation (EC) No 881/2002, which is directly applicable in the UK (as it is in all Member States of the EU).<sup>186</sup> On 7 April 2010 the Treasury made, and Parliament approved, the Al Qaida and Taliban (Asset-Freezing) Regulations 2010 which formally revoked the Al Qaida and Taliban Order and made provisions for enforcement of Council Regulation (EC) No 881/2002, that is, determining sanctions where the provisions of the regulation are infringed. The Al Qaida and Taliban Regulations themselves do not contain any provisions allowing the designated persons and entities to apply to the High Court to set aside their designation.

Nonetheless, targeted individuals and entities will probably continue to challenge their blacklisting in the UK courts through judicial review procedure. It appears, however, that the courts are only able to order the Foreign and Commonwealth Office to commence the delisting procedure at the Sanctions Committee. Unfortunately, the success of delisting requests is not

<sup>176</sup> Al Qaida Order, para. 71-74. See fn. 168.

<sup>177</sup> Al Qaida Order, para. 73-74, 93-98. See fn. 168.

<sup>178</sup> Al Qaida Order, para. 76-80. See fn. 168.

<sup>179</sup> Al Qaida Order, para. 81-82. See fn. 168.

<sup>180</sup> Al Qaida Order, para. 6. See fn. 168.

<sup>181</sup> Al Qaida Order, para. 203. See fn. 168.

<sup>182</sup> Al Qaida Order, para. 38. See fn. 168.

<sup>183</sup> Al Qaida Order, para. 38. See fn. 168.

<sup>184</sup> Al Qaida Order, para. 38. See fn. 168.

<sup>185</sup> Al Qaida Order, para. 78, 81, 82, 149, 181, 239. See fn. 168.

<sup>186</sup> Council Regulation No 881/2002. See fn. 14.

guaranteed even if the UK proposed the name concerned for the Consolidated List. Even if a domestic court, in theory, ordered that the sanctions imposed against a certain individual be terminated, that individual would remain in Annex I of Council Regulation (EC) No 881/2002 which, as mentioned, has direct effect in the UK. The individual's name would also remain in the Consolidated List and consequently, the UK would find itself in breach of its obligations vis-à-vis the EU and UN.

In domestic legal actions, the UK courts might, pursuant to Article 267 (ex-Article 234) of the TFEU, refer to the ECJ questions for preliminary rulings on the 'validity and interpretation' of Council Regulation (EC) No 881/2002 with regard to particular listings which are being challenged before the UK courts.<sup>187</sup> In relation to the Al Qaida and Taliban sanctions regime, the House of Lords requested a preliminary ruling on the interpretation of Article 2(2) of Council Regulation (EC) No 881/2002 in the case *R (on the application of M)(FC) v. HM Treasury* brought to the Court by several spouses of individuals listed in Annex I. The Supreme Court asked the ECJ to determine whether the provision requesting that no funds be made available for the benefit of listed individual apply to social security or social assistance benefits of the spouse of a listed person on the ground that the money might be used to cover the basic needs of the household to which the listed person belongs.<sup>188</sup>

The Treasury argued that social benefits were caught by the prohibition in Article 2(2) of the regulation and could be available only if they were covered by an exception for basic expenses in the form of a licence granted by the Treasury.<sup>189</sup> Taking account of the Treasury's burdensome licensing terms, the House of Lords described the regime as applied to wives of listed individuals as 'disproportionate and oppressive' and the invasion of the privacy of someone who was not a listed person as 'extraordinary.'<sup>190</sup> The ECJ responded to the question in the negative holding that the social security and social assistance benefits could not be used to support terrorist activities and, therefore, they do not fall within the ambit of Article 2(3) of Council regulation (EC) No 881/2002.<sup>191</sup>

It is worth pointing out that, in the UK, those suspected of being involved with Al Qaida and the Taliban are in a considerably worse position than those allegedly involved with terrorism whose assets are frozen pursuant to the UK domestic legislation adopted in implementation of the UN Security Council resolution 1373 (2001)<sup>192</sup> and relevant EU regulations.<sup>193</sup> First of all, the latter enjoy the statutory right to challenge their designation before the High Court and thus have access to a judicial review of their listing. Second, the new Terrorist Asset-Freezing etc. Act 2010 (Act 2010) raises the legal threshold for indefinite designations from 'reasonable suspicion' to 'reasonable belief', although the reasonable suspicion threshold may be used for interim designations for a maximum of thirty days.

<sup>187</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2008 C 115, Article 234 of the TFEU. See fn. 107.

<sup>188</sup> Case C-340/08, Judgement of the Court of Justice of the EU of 29 April 2010 (reference for a preliminary ruling from the House of Lords – United Kingdom), *The Queen, M and others v. Her Majesty's Treasury*, Official Journal C 260 (11.10.2008).

<sup>189</sup> *R (on the application of M) (FC) v. Her Majesty's Treasury and two other actions* [2008], UKHL 26, 2 All ER 1097, para. 11.

<sup>190</sup> Case C-340/08, para. 15. See fn. 189.

<sup>191</sup> *R (on the application of M) (FC)*, para. 52-74. See fn. 188.

<sup>192</sup> Security Council Resolution 1373, supplemented by the UNSC Resolution 1624 (2005) on prohibition of incitement to commit acts of terrorism, UN Doc. S/RES/1624 (14 September 2005). See fn. 8.

<sup>193</sup> See Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, 2001 O.J. (L 344) 70.

In these circumstances, it would be sensible to abolish the Al Qaida and Taliban sanctions regime altogether. The present nature of the terrorism threat does not appear to justify the existence of two parallel mechanisms dealing with the terrorism threat by imposing preventive sanctions. There is no reason why those who are suspected of being involved with Al Qaida and Taliban should not be listed under the UK counter-terrorism mechanism giving effect to the UN Security Council resolution 1373 (2001). Interestingly, some individuals are listed under both regimes; this means that even if they were cleared by the High Court under the Act 2010 they could remain under sanctions by virtue of the Al Qaida and Taliban regime.

## 12. European Court of Human Rights

Generally, after exhausting all domestic remedies, blacklisted persons may seek redress before the ECtHR. The ECtHR has previously engaged in merits-based reviews of domestic measures implementing UN Security Council sanctions adopted under Chapter VII of the UN Charter.<sup>194</sup> The ECtHR, however, has not yet considered the compatibility of the Al Qaida and Taliban sanctions regime with the ECHR, even indirectly. Nevertheless, the ECtHR has created considerable jurisprudence on due process requirements in relation to terrorism cases which can be applied *mutatis mutandis* to cases involving the Al Qaida and Taliban sanctions regime.<sup>195</sup>

For example, the ECtHR ruled that although the requirements of a fair trial may be modified in anti-terrorism cases, the right of access to a court under Article 6 cannot be totally blocked for national security reasons.<sup>196</sup> The ECtHR also considered the scope of disclosure of evidence necessary for a fair trial in compliance with due process guarantees. In *A and Others v the United Kingdom* the ECtHR observed that where the evidence is to large extent undisclosed and the closed material played the predominant role in the determination, it could be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the belief and suspicions about him.<sup>197</sup>

As regards the right to property, the ECtHR pronounced upon the conditions under which the restriction of that right may be justified under the ECHR.<sup>198</sup> The ECtHR made it clear that the proportionality test is not only applied in general terms but it also requires a specific evaluation of whether the specific measures against specific individuals are necessary for the maintenance of international peace and security and whether the gain to international peace and security is proportionate to the violation of their property rights. Furthermore, the principle of necessity also requires an examination of whether the freezing of the assets of designated persons is capable of achieving the goal, which is maintenance of international peace and security.<sup>199</sup>

At the moment, there is one case pending before the ECtHR which raises the question of the compatibility of the Al Qaida and Taliban sanctions regime with the ECHR.<sup>200</sup> The applicant is

<sup>194</sup> See, for example, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, App. No. 45036/98 (30 June 2005).

<sup>195</sup> The relevant jurisprudence by the ECtHR is analysed in I. Cameron, Report on the ECHR. See fn. 43.

<sup>196</sup> Iain Cameron, 'Report on the ECHR', p. 2, 12-14. See fn. 43.

<sup>197</sup> *A and Others v. the United Kingdom*, App. No. 3455/05 (19 February 2009), para. 220, 223-224. See also *Secretary of State for the Home Department v. AF, AW and AE* [2009] 3 WLR 74, [2009] Kingdom House of Lords, 28, para. 57-59.

<sup>198</sup> See also the Council of Europe Guidelines on Human Rights and the Fight against Terrorism (March 2005), p.12. Available at [http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/176C046F-C0E6-423C-A039-F66D90CC6031/0/LignesDirectrices_EN.pdf).

<sup>199</sup> Iain Cameron, 'Report on the ECHR', pp. 17-18. See fn. 43.

<sup>200</sup> *Nada v. Switzerland*, ECtHR (App. No. 10593/08).



Youssef Mustafa Nada, an Italian national residing in Campione which is a small (1.6 km) Italian enclave within Switzerland. In 2001, he was listed in the Consolidated List on the USA's proposal on suspicion of being involved with Al Qaida. As a result of the travel ban imposed against him, Switzerland denied him entrance and permission to transit through its territory thereby rendering him effectively under house arrest. Mr. Nada brought the application to the ECtHR against the ruling of the Swiss Federal Tribunal which rejected his request to terminate the sanctions against him. In his application, he challenges the legality of the Swiss national measures implementing the sanctions regime on the basis of violations of his human rights under the ECHR. It remains to be seen how the Grand Chamber will decide this case. Meanwhile, on 23 September 2009, Nada's name was removed from the Consolidated List.<sup>201</sup>

### 13. Conclusion

While many of those subject to the Al Qaida and Taliban sanctions regime may indeed be associated with terrorism, there is ample scope for the regime to be abused and for persons to be arbitrarily designated and/or unjustifiably kept on the UN's Consolidated List of individuals and entities allegedly associated with Al Qaida and Taliban for political reasons. For listed persons seeking to have their names removed from the list, without knowing exactly what is alleged against them, is to find themselves in the world of Kafka's *The Trial*.<sup>2</sup> To the extent that they can challenge their designation, they will find that they have to do it in one forum after another – domestic, EU and UN – and that no sooner have they succeeded in one court or forum, they have to start all over again in another, or the same forum, having been re-designated or had their assets re-frozen under new laws or regulations. This suggests another fictional parallel – the myth of Sisyphus, who toiled all day pushing a huge rock to the summit of a hill, only to have it roll down the hill overnight, condemning him to push it back up again for all eternity.

In this era of human rights and due process, it should not be the fate of a few unfortunate individuals to live their lives persecuted by remote, inaccessible authority, with the nature of their crime never revealed to them or to the bystander. In the circumstances where there are no effective or adequate means available to the designated persons and entities to challenge the sanctions, the significant interference with human rights caused by the Al Qaida and Taliban sanctions regime can hardly be considered justified by the aim pursued, even if that aim is the potential prevention of a terrorist threat.<sup>202</sup> In order to ensure a fair balance between the need to fight international terrorism and the protection of human rights, independent judicial review is all the more imperative.<sup>203</sup> If human rights and the international rule of law are to prevail, then the injustice of a system as powerful and arbitrary as to justify these Kafkaesque and Sisyphian parallels has to be immediately corrected.

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<sup>201</sup> See press release available at <http://www.un.org/News/Press/docs/2009/sc9744.doc.htm>.

<sup>202</sup> The UK Supreme Court, however, made it clear that '[e]ven in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty.' Al Qaida Order, para. 6. See fn. 168.

<sup>203</sup> *OMPI*, para. 155; fn. 162, para. *PMOI II*, para. 75. See fn. 121.