

Sanctions and Security Research Program

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The Sanctions and Security Research Program is a leading source of scholarly expertise and analysis on the use of targeted sanctions as instruments of international peacemaking. The program provides research, consulting services, and policy recommendations to governments and organizations seeking to make sanctions more effective means of resolving conflict and enforcing international norms. The program is a partnership of the Fourth Freedom Forum and the Kroc Institute for International Peace Studies, University of Notre Dame.

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## **Human Rights Standards for Targeted Sanctions**

### **Legal Foundations**

The core legal principles that are to ensure due process in instances of targeted sanctions are crystallizing through doctrine and jurisprudence. They are grounded in fundamental principles of law, as embodied in the United Nations Charter and international treaties, including the founding documents of the European Union. These standards are meant to apply to the sanctions regime designed by UN Security Council Resolution 1267 and subsequent resolutions and to the operations of its sanctions committee (the Al-Qaida and Taliban Sanctions Committee).

At the core of these legal obligations is the principle of human rights protection. Article 1 of the United Nations Charter describes the mission of the organization as “promoting and encouraging respect for human rights.” Article 24 of the Charter declares that the Security Council must “act in accordance” with the purposes and principles of the organization, which include respect for human rights. The decisions of the Security Council therefore have to be informed by human rights standards.

Of central importance in the context of the listing practices under the Al-Qaida and Taliban sanctions regime is the right to a fair hearing, as this right is a prerequisite for contesting the extent to which other rights such as the freedom of movement or the right to property have been violated by a particular listing. The right to a fair hearing in turn implies the right to be heard, the right to impartial and independent judicial review, and the right to a remedy. These rights form the very foundation of due process of law.

Article 6 of the Maastricht Treaty establishing the European Union requires that member states respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR). European courts—the Court of First Instance (CFI) and the European Court of Justice (ECJ)—have relied on the ECHR in determining general principles for the protection of human rights. These principles include the right to be heard and the right to an effective remedy (guaranteed in Articles 6(1) and 13 ECHR). They are further enshrined in the Universal Declaration of Human Rights, Articles 10 and 8 respectively, and in Articles 14(1) and 2(3) of the International Covenant on Civil and Political Rights (ICCPR). In the ICCPR the threshold for the applicability of the right to a fair hearing is the connection with a “criminal charge” or with “rights and obligations in a suit of law.” This is similar to the threshold contained in the ECHR, where Article 6(1) is triggered by a “determination of civil rights and obligations” or of any “criminal charge.”

### **Human Rights and Security**

Support for human rights principles is essential for sustaining political support for the fight against global terrorism. Nothing erodes support for antiterrorism measures more than the perception that such programs are eroding basic individual freedoms. Disregard for the rule of law and an overreliance on

repressive measures alienates many of the social groups and political constituencies whose cooperation is needed in the collective struggle against terrorism.

The defense of individual rights is not an impediment to the fight against terrorism but an essential part of that struggle. Security policies are likely to be more effective if they are carried out within a framework that is respectful of due process rights.<sup>1</sup> United Nations declarations and resolutions have been unequivocal in urging strict adherence to human rights standards in the global fight against terrorism. Secretary-General Kofi Annan stated in September 2003:

There is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism: on the contrary, the moral vision of human rights—the deep respect for the dignity of each person—is among our most powerful weapons against it.

To compromise on the protection of human rights would hand terrorists a victory they cannot achieve on their own. The promotion and protection of human rights . . . should, therefore, be at the center of anti-terrorism strategies.<sup>2</sup>

At its ministerial meeting in January 2003 the Security Council adopted Resolution 1456 urging greater international compliance with United Nations counterterrorism mandates but also reminding states of their duty to comply with international legal obligations, “in particular international human rights, refugee, and humanitarian law.”<sup>3</sup>

The United Nations General Assembly Global Counter-Terrorism Strategy, adopted in September 2006, calls on all states to develop effective law enforcement and criminal justice systems to counter terrorism, while striking a proper balance between liberty and security.<sup>4</sup> The Strategy not only reaffirms that counterterrorism efforts must respect human rights and the rule of law but declares that the promotion of those principles in their own right is a critical element in effectively addressing terrorism. Terrorism by its very nature is a violation of the rule of law. The greatest protection against that threat is the defense of human rights.

### **The Legal Standards Inherent in a Fair Hearing According to Experts**

In 2006 the United Nations Office of Legal Affairs issued an influential study on due process rights written by German law professor Bardo Fassbender. The report argued that minimum standards for fair and clear procedures must include the right to seek an effective remedy. This is a right that is solidly established in international human rights treaties and national constitutional law. The report defined the term “remedy” as requiring the right of appeal before an impartial body previously established. A strict interpretation of this right would require that the competent body also be able to make binding decisions. The report defines impartiality as decision making that is based on facts and the law, without political influence or restrictions.<sup>5</sup>

The Fassbender report acknowledged the tension that exists for the Security Council in meeting these human rights legal standards while fulfilling the obligation to uphold international peace and security. When imposing targeted sanctions under Chapter VII of the United Nations Charter, the Security Council must to the greatest possible extent balance its principal duty to maintain peace and security with

respect for the human rights and fundamental freedoms of targeted individuals. This means that “[e]very measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.”<sup>6</sup>

Fassbender defined the rights of due process for individuals and entities targeted by Security Council sanctions as the following:

- (a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
- (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
- (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council;
- (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established.<sup>7</sup>

According to Fassbender, these rights constitute the minimum standards of “fair and clear procedures in a legal order committed to the idea of the rule of law.”<sup>8</sup> Fassbender also argued that the Security Council has a legal obligation to guarantee these standards, which are derived directly from the United Nations Charter and general principles of international law.<sup>9</sup>

Secretary-General Kofi Annan defined the human rights legal foundation of due process rights in a very similar fashion in a non-paper presented to the Security Council in June 2006. In a session devoted to “strengthening international law: rule of law and maintenance of international peace and security,” the Secretary-General set out his views concerning the listing/delisting of individuals and entities on sanctions lists.<sup>10</sup> The non-paper was largely based on the outcome document of the 2005 world summit in which member states called upon the Security Council, with the support of the Secretary-General, to ensure that “fair and clear procedures” exist for the listing/delisting of individuals and entities on targeted sanctions lists.<sup>11</sup> According to the Secretary-General, the minimum standards required to ensure that the procedures are fair and transparent include the following four basic elements:

- (1) A person against whom measures have been taken by the Council has the right to be informed of those measures and to know the case against him or her as soon as and to the extent possible. The notification should include a statement of the case and information as to how requests for review and exemptions may be made. An adequate statement of the case requires the prior determination of clear criteria for listing.
- (2) Such a person has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the ability to directly access the decision-making body, possibly through a focal point in the Secretariat, as well as the right to be assisted or represented by counsel. Time limits should be set for the consideration of the case.

(3) Such a person has the right to review by an effective review mechanism. The effectiveness of that mechanism will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation.

(4) The Security Council should, possibly through its Committees, periodically review on its own initiative targeted individual sanctions, especially the freezing of assets, in order to mitigate the risk of violating the right to property and related human rights. The frequency of such review should be proportionate to the rights and interests involved.<sup>12</sup>

In 2008 the Eminent Jurists Panel of the International Commission of Jurists produced a report on legal challenges related to global counterterrorism policies. The report, *Assessing Damage: Urging Action*, included a critical assessment of listing/delisting procedures used in targeted sanctions. The panel identified the essential international legal principles that should apply to counterterrorism sanctions:

- The criteria for listing should be clear, publicly available and non-discriminatory;
- The listings must be strictly time-limited and subject to limited renewal;
- There must be sufficient notification to the affected parties;
- Opportunities must be accorded to rectify errors;
- There must be an effective remedy to allow decisions to be contested; and
- There must be independent review mechanisms.<sup>13</sup>

All of these eminent reports have identified the need for listed individuals to be notified about the case against them; to be given the opportunity to be heard by the listing organ; and the right to impartial and independent review of the particular listing. The subsequent paragraphs will explain that these principles have also been recognized and developed in recent decisions of the ECJ and CFI (the so-called European Community courts)

### **Legal standards inherent to a fair hearing according to European case law**

The legal standards inherent to a right to a fair hearing have found resonance in the landmark *Kadi* ruling of the ECJ of September 2008.<sup>14</sup> This ruling, which concerned the targeted sanctions flowing from Security Council Resolution 1267 (1999) and subsequent resolutions (i.e. the Al-Qaida and Taliban sanctions regime), followed the same reasoning which the ECJ had developed in the series of *OMPI* cases.<sup>15</sup> These cases concerned the decentralized targeted sanctions regime resulting from Security Council Resolution 1373 (2001), in accordance with which the European Union compiled its own autonomous sanctions lists.

In the *Kadi* decision the ECJ underscored the essential importance of a fair hearing before the executive body ordering the freezing of assets, followed by judicial review (which is intertwined with the right to a remedy in European law) before the Community courts. However, the ECJ based these findings on

fundamental principles of European law and did not elaborate on the extent to which similar protection can or must be derived from international human rights instruments such as the ICCPR or the ECHR.<sup>16</sup> In addition, the Community courts did not question whether the Security Council had the powers to impose a stringent sanctions regime or whether the Al-Qaida and Taliban sanctions regime as such was legal. Instead, they reviewed the legality or factual basis of a particular blacklisting.

Where the restrictions on the accessibility of the facts and evidence were such that the courts could not review the gist of the case, they ordered the annulment of the measures implementing the sanctions regime against the individual or entity in question. Such an order may lead to relief for the affected individuals or entities in a particular jurisdiction such as the European community or some of its member states. However, they are not legally binding on the United Nations Security Council or its Al-Qaida and Taliban Sanctions Committee. The listing remains in place at the United Nations level until such a time as the Al-Qaida and Taliban Sanctions Committee decides to delist a particular entity or individual.

### **The Right to Be Heard**

Within the European legal order the right to be heard applies to all proceedings which can culminate in a measure adversely affecting the person in question. It requires notifying those persons of the evidence against them, providing them with a statement of reasons for the adverse decision, and the opportunity to make their views known.

Both the *Kadi* and series of *OMPI* cases underscored that where a first decision to freeze the funds of a particular person or entity is concerned, the notification of evidence and the right to be heard are only triggered after the blacklisting has taken place. To expect the authorities to notify the affected persons or entities prior to the blacklisting would undermine the very objective and effectiveness pursued by the listing, which is based on the element of surprise and must apply with immediate effect.<sup>17</sup> However, these decisions also underscored that the authorities had to communicate the grounds for the contested decision concomitantly with, or as soon as possible after the adoption of the initial decision to freeze funds. This is necessary to enable the person or entity concerned to be heard regarding that decision, and to consider exercising the right to bring action before the Community courts in the matter.<sup>18</sup>

European regulations require that the Council of the European Union (the Council) review the listings every six months.<sup>19</sup> Where it subsequently decides to prolong the freezing of funds, this must be preceded by the notification of any new evidence (including exculpatory evidence) and the possibility of a further hearing.<sup>20</sup> In the case of prolongation the element of surprise is no longer relevant, nor would the efficacy of the measures be threatened as the freezing of assets had already been effectuated for some time.<sup>21</sup>

The notification of evidence and the giving of reasons for (the prolongation of) a particular listing are two closely intertwined criteria. They become all the more important in a situation where persons are not afforded the opportunity to be heard prior to their placement on the sanctions list (which is the case with all persons listed for the first time), as it constitutes the sole safeguard that enables them to challenge the lawfulness of that decision before the Community courts.<sup>22</sup> Thus, there is a close link

between the obligation to provide a statement of reasons and the right to an effective remedy in the form of judicial review. On one hand, the affected individual must be able to determine whether the blacklisting was justified, or whether there was an error that justifies an action before the Community courts. At the same time, the courts themselves must be enabled to exercise review, which is not possible in the absence of a statement of reasons.<sup>23</sup> As a result, the statement of reasons has to indicate in a clear and unequivocal fashion, based on fact and law, the actual and specific reasons for listing. Where the Council decides to maintain a name on the list (a so-called subsequent decision) after its periodic review every six months, it must indicate the actual and specific reasons why, after re-examination, the freezing of the funds remains justified.<sup>24</sup>

At this point it is important to note that the ECJ in the *Kadi* case, relying on jurisprudence of the European Court of Human Rights (ECtHR), acknowledged that not all relevant matters have to be conveyed to the affected persons during the notification of evidence or the statement of reasons.<sup>25</sup> The requirements of public security as well as the maintenance of international relations may justify limitations on the notification of certain serious and credible evidence or clues on which the national decision was based; or on conveyance of the specific content or grounds of that national decision; or even regarding the identity of the authority that took the decision. Under specific circumstances, those factors may also prevent the identification of the country in which the national authority took the decision.<sup>26</sup> However, to the extent that the listing is based on evidence that is in the public domain, confidentiality should not be used as a pretext for not notifying the affected person of this fact. For example, where authorities relied on a domestic court ruling as incriminating evidence, this must be mentioned in the statement of reasons. Since these are official acts adopted at the end of public judicial proceedings to which the affected person has been a party, the communication of those acts to the applicant cannot be prevented by any requirement of confidentiality.<sup>27</sup>

In the *Kadi* case the references to the limitation of the notification of evidence and reasons were made *obiter dictum* and the courts did not engage in any detail as to what these limitations may imply concretely. On one hand, it became clear that a complete absence of notification of evidence or of a statement of reasons (as was the case in *Kadi*) was not acceptable. On the other hand, it remained unclear what type of evidence or reasons may be withheld from the listed person or entity, without violating the right to be heard. Subsequent to the ECJ's decision, Mr. Kadi received an explanation of the reasons as to why he was included in the sanctions list. The Al-Qaida and Taliban Sanctions Committee provided the information, which was limited to the data that the designating country in the United Nations had decided to disclose. However, Mr. Kadi has launched a renewed challenge to the Commission's decision to relist him, submitting inter alia that the contested regulation provided no procedure for communicating the evidence on which the decision to freeze the assets was based to the applicant, nor for enabling the applicant to comment meaningfully on that evidence. This decision is currently pending.<sup>28</sup>

## **The Right to Judicial Review (The Right to a Remedy)**

The right of access to courts as guaranteed by international treaties is not absolute. International and national legal precedents allow for limitations and exceptions to the exercise of this right, but only under specific conditions, usually in relation to the protection of national and international security. Case law in the European Court of Human Rights indicates that the right of access to the courts may be subjected to limitations, provided they have a legitimate aim and are in accordance with the principles of necessity and proportionality. In applying these principles to the implementation of the Al-Qaida and Taliban sanctions regime, the ECJ and the CFI indicated that they would not accept a complete suspension of the right to judicial review in the interest of international security. The courts followed the same line of reasoning that they developed in relation to the sanctions regime resulting from Security Council Resolution 1373 (2001), striking a balance between international security and the right to judicial review as guaranteed by European law.<sup>29</sup>

The Community courts have to give deference to the Council's assessment of the facts in the sense that the courts are not allowed to reassess the evidence, facts, and circumstances justifying the adoption of the respective measures and replace the assessment made by the Council with that reassessment. In evaluating the appropriateness of the Council's decision, the judicial review must be restricted to determining whether any manifest error of assessment of the facts or abuse of power has occurred. The review exercised by the courts is primarily procedural in nature. First, compliance with the rules of procedure and the statement of reasons must be verified, and it must be ensured that any claim by the Council that overriding (security) considerations prevents compliance with the right to a fair hearing is well-founded.<sup>30</sup> Second, the courts must review the material accuracy of the facts, the reliability and consistency thereof, and question whether all the relevant information had indeed been taken into account during the assessment and whether such information is capable of substantiating the conclusions that were subsequently drawn.<sup>31</sup> Where the Council effectively ignores the exculpatory evidence which the applicant produced as justifying removal from the list, this can constitute a fatal flaw in the Council's decision.<sup>32</sup>

The *Kadi* case and the *OMPI* cases did not elaborate in any detail on whether the applicants and/or their lawyers must be provided with (all) the evidence and information alleged to be confidential, or whether such information must be provided only to the court in accordance with a procedure which remains to be defined.<sup>33</sup> Nonetheless, the *OMPI III* case indicated that the Council is not allowed to base its fund-freezing decisions entirely on confidential materials received from a member state unwilling to authorize the communication of the materials to the Community judicature.<sup>34</sup> In this particular case the French authorities did not convey any information pertaining to the inquiry, apart from identifying the nature of the offences under investigation and the details concerning the date when the inquiry commenced in a general manner. The authorities did not even convey the identity of the affected individuals, apart from noting that the inquiry concerned certain persons who were alleged to be members of OMPI.<sup>35</sup> The CFI concluded that the refusal of the French authorities to communicate evidence adduced against OMPI—even to the court alone—prevented the court from reviewing the lawfulness of the decision to list the organization, as required by European law.<sup>36</sup>

Jurisprudence confirms, therefore, that the Community courts must be able to review the lawfulness and merits of a decision to freeze funds, despite the fact that some information may have to remain confidential when national security is at stake.<sup>37</sup> It is the task of the court itself, in the course of judicial review, to adopt suitable techniques for striking a balance between security concerns pertaining to the nature and sources of the information and the provision of justice for the affected individual.<sup>38</sup>

The principle that the court itself must have access to the gist of the evidence against listed persons can also be identified in court decisions in the United Kingdom, notably in the *A, K, M, Q and G* case and *Hay* case. Both decisions concern the Al-Qaida and Taliban sanctions regime and are currently on appeal before the United Kingdom Supreme Court (which replaced the House of Lords in October 2009). Disputed in these particular cases is the extent to which the gist of the evidence regarding a particular listing must be available also to the affected individual (as opposed to the court); and whether the appointment of a special advocate would suffice in overcoming the lack of even-handedness that an individual faces where he/she is denied access to core evidence against him/her.<sup>39</sup>

Questions regarding the role of the special advocate procedure resulted from a recent decision of the ECtHR in the case of *A v. The United Kingdom*, which concerned the compatibility of long-term detention of foreign nationals suspected of international terrorist involvement with the fair trial guarantees laid down in articles 5(4) and 6(1) of the ECHR.<sup>40</sup> The ECtHR confirmed that the special advocate could perform an important role in counter-balancing both the lack of full disclosure and the absence of a full, open adversarial hearing, by gauging the evidence and forwarding arguments on behalf of the detainee during closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. This will not be possible if the open material consisted purely of general assertions, and the court's decision to uphold detention was based solely—or to a decisive degree—on closed material.<sup>41</sup>

In the *A v. The United Kingdom* case there was open evidence that large sums of money passed through the applicants' bank accounts and in some instances even that this money was raised fraudulently. However, the evidence allegedly linking the money raised to terrorism was not disclosed to the applicants. Under such circumstances the applicants were not in a position to challenge effectively the allegations against them.<sup>42</sup> Subsequently the House of Lords interpreted this decision in a case concerning a control order (which severely restricted the free movement of the individual) as implying that no matter how cogent the case based on the closed materials may be, the affected individual must always be provided with sufficient information about the allegations against him/her so that he/she can give effective instructions to a special advocate.<sup>43</sup> It now remains to be seen if and to what extent the United Kingdom Supreme Court will extend this reasoning to individuals affected by Security Council sanctions regimes, including the Al-Qaida and Taliban sanctions regime. The Supreme Court's decisions are likely to be handed down after mid-January 2010.

## **Prevention or Punishment?**

An important conclusion that can be drawn from the European case law is that the right to judicial review is not dependent on whether the assets freezing would amount to a criminal charge. Rather, what is decisive is the gravity of the consequences of the decision for the affected person. The Community courts have been at pains to comment on the non-punitive, precautionary nature of asset-freezing.<sup>44</sup> Similarly, the United Nations guidelines assert that counterterrorism sanctions are not criminal penalties. The Guidelines of the Al-Qaida and Taliban Sanctions Committee (Section 6(c)) state that “a criminal charge or conviction is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventive in nature.”<sup>45</sup> However, this fact did not prevent the Community courts from requiring the Council (of the European Union) to provide those affected by the Al-Qaida and Taliban sanctions regime with the opportunity to be heard as well as judicial review. In accordance with the jurisprudence of these courts, judicial protection has to be available in relation to all proceedings which can culminate in adverse measures for the affected person.

The same approach was reflected by the *A,K,M,Q & G* and *Hay* decisions in the United Kingdom. These decisions followed a reasoning similar to that which was developed by the House of Lords in the *Control Orders* decision of 2007. This decision concerned so-called non-derogating control orders which were imposed under the Prevention of Terrorism Act 2005 and which confined the affected individuals to their homes for eighteen hours per day. The orders were adopted on the basis of a “reasonable suspicion of their involvement in terrorism.”<sup>46</sup> The House of Lords did not accept that the (cumulative effect of) the control order constituted a criminal charge as there was no assertion of criminal conduct but merely a foundation of suspicion. Additionally, the purpose of the order was preventative, and not punitive or retributive.<sup>47</sup> However, the House of Lords confirmed that the proceedings fell within the civil limb of article 6(1) ECHR.<sup>48</sup> In addition, it relativized the difference (as far as the consequences are concerned) between the criminal and civil limbs of that article by emphasizing the need for procedural protection commensurate with the gravity of the potential consequences—regardless of whether one is dealing with the criminal or civil dimension of article 6(1).<sup>49</sup> As a consequence, the thrust of the argument that led to the restriction of the civil rights or obligations of a “controlled person” had to be conveyed to him/her. Anything less would amount to a violation of the irreducible minimum core of article 6(1) of the ECHR.<sup>50</sup> The *A,K,M,Q & G* and *Hay* decisions essentially followed a similar approach, even though these decisions turned on domestic law and the applicability of article 6(1) ECHR were not directly at issue.

## **Improved Procedures at the United Nations Level**

The 1267 sanctions regime has been criticized for failing to uphold human and legal rights standards. The listing and delisting procedures of the Al-Qaida and Taliban Sanctions Committee have lacked impartiality and do not provide for independent judicial review.

In recent years sanctions committee procedures have improved. Various resolutions adopted since 2005 have introduced stronger review mechanisms, enhanced procedures to ensure that listed individuals and entities are notified of the action taken against them, and the dissemination of statements and

narrative summaries of reasons for listing. A Focal Point was established with Resolution 1730 (2006) to facilitate and process the submission of requests for delisting. Resolution 1822 (2008) directed the committee to undertake a comprehensive review of all listed names and to review each entry again every three years.

The Focal Point aimed to improve the accessibility of a remedy, but it did not have the authority to conduct an independent review.<sup>51</sup> Further changes were introduced with Security Council Resolution 1904 of 17 December 2009. The resolution introduced an independent and impartial Ombudsperson to replace the Focal Point.<sup>52</sup> The resolution and its annexes are directed at improving the gathering of relevant information pertaining to listings; expanding the flow of information between the sanctions committee and listed persons and entities; and ensuring that requests for delisting are more fully considered by the sanctions committee. The Ombudsperson has the potential to play a key role in this regard.<sup>53</sup> However, member states will still be able to withhold any information which they prefer to keep confidential during the information exchange process.<sup>54</sup> It therefore remains to be seen whether the factual information conveyed to listed persons or entities will in the future be more comprehensive than has been the case in the past.

The introduction of the Ombudsperson does not amount to the introduction of independent and impartial judicial review. The Ombudsperson has no direct decision-making authority on delisting requests, as his/her formal role is limited to the gathering and presenting of information. The delisting decisions are still taken confidentially and by consensus by the sanctions committee.<sup>55</sup> The new procedures are an improvement and show some willingness by the Security Council to make incremental adjustments that allow petitioners to engage in dialogue with the Ombudsman and possibly receive more detailed information concerning their designation. However, the new procedures do not satisfy the international legal standard guaranteeing the accused the right to a fair hearing, which includes the right to be heard, the right to impartial and independent judicial review and the right to a remedy.

It remains to be seen how the ECJ, the CFI, and domestic courts in Europe will react to the introduction of the Ombudsperson. If member states are indeed willing to share information with the Ombudsperson in an extensive fashion and the sanctions committee pays deference to suggestions by the Ombudsperson regarding delisting, this may in practice lead to a significant reduction in the number of listed individuals and entities. This in turn would imply that the number of individuals and entities seeking redress through domestic or regional court procedures would decline. In those instances where delisting requests at the international level are unsuccessful, however, the affected individuals or entities will yet again turn to domestic or regional courts for relief and these courts are likely to engage in judicial review. As long as there is no guarantee of impartial and independent judicial review at the United Nations level the European courts likely will continue to play a role in reviewing listing and delisting decisions and addressing due process rights for those affected.

## Notes

- <sup>1</sup> United Nations General Assembly, *A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change*, A/59/565, New York, 2 December 2004, paras. 147–48.
- <sup>2</sup> Kofi Annan, “Appendix 1: Keynote Addresses, UN Secretary-General Kofi Annan,” *Fighting Terrorism for Humanity: A Conference on the Roots of Evil* (New York: International Peace Academy, 22 September 2003), 10.
- <sup>3</sup> United Nations Security Council, *Security Council Resolution 1456*, S/RES/1456, New York, 20 January 2003, para. 6.
- <sup>4</sup> For a more detailed discussion of human rights in the context of the Strategy, see Eric Rosand, Alistair Millar, and Jason Ipe, *Human Rights and the Implementation of the UN Global Counter-Terrorism Strategy: Hopes and Challenges* (Washington, D.C.: Center on Global Counterterrorism Cooperation, January 2008).
- <sup>5</sup> Bardo Fassbender, *Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter* (study commissioned by the United Nations Office of Legal Affairs, Office of the Legal Counsel, Humboldt-Universität zu Berlin, 20 March 2006), 6-7.
- <sup>6</sup> Bardo Fassbender, *Targeted Sanctions and Due Process*, 7.
- <sup>7</sup> Bardo Fassbender, *Targeted Sanctions and Due Process*, 8.
- <sup>8</sup> Bardo Fassbender, *Targeted Sanctions and Due Process*, 28.
- <sup>9</sup> Bardo Fassbender, *Targeted Sanctions and Due Process*, 19–21, 24–27.
- <sup>10</sup> Secretary-General Kofi Annan, non-paper written to United Nations Security Council referenced by Under-Secretary-General for Legal Affairs Nicolas Michel in his address to the United Nations Security Council, *Proceedings of 5474th Meeting*, S/PV.5474, New York, 22 June 2006, 5.
- <sup>11</sup> United Nations General Assembly, *2005 World Summit Outcome*, A/RES/60/1, New York, 24 October 2005, para. 109.
- <sup>12</sup> Kofi Annan, non-paper written to United Nations Security Council, 5.
- <sup>13</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva: International Commission of Jurists, 2009), 122.
- <sup>14</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P (judgment of the Court of Justice of the European Communities [Grand Chamber], Luxembourg, 3 September 2008). Available online at *EUR-Lex*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (accessed 17 April 2009).
- <sup>15</sup> European Communities, Court of Justice, *People’s Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I); Case T-256/07, OJ C313/31 [23 October 2008] (OMPI II); and Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III). For an extensive analysis of the implications of these and other European decisions for the implementation of Security Council sanctions regime in the European Union, see Erika de Wet, “Human rights considerations and the enforcement of targeted sanctions in Europe: the emergence of core standards of judicial protection,” in *Proceedings of the 20<sup>th</sup> Session of the Academy of European Law*, ed. Bardo Fassbender, (Oxford: Oxford University Press, forthcoming).
- <sup>16</sup> See also the *Abdelrazik* case. A Canadian court *en passant* described the Al-Qaida and Taliban sanctions regime as untenable under international human rights standards. However, the court did not elaborate on or explicitly

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refer to any articles in a particular human rights treaty. It merely indicated that the procedure had to ensure that at the very least, the affected individual received a narrative summary of the reasons leading to the blacklisting, as well as (limited) rights to a hearing that met the requirements of impartiality and independence. *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada*, T-727-08, 2009 FC 580 (Reasons for Judgment and Judgment, Federal Court of Canada, Ottawa, Ont., 4 June 2009), para. 51.

- <sup>17</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para 339; European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 128.
- <sup>18</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 336; European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para 131.
- <sup>19</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 116.
- <sup>20</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 131.
- <sup>21</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 131; European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III), para. 41.
- <sup>22</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 139.
- <sup>23</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), paras. 89, 93, 143, and 145.
- <sup>24</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), paras. 138, 143, and 145.
- <sup>25</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 344; European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), paras. 135 and 146.
- <sup>26</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 136.
- <sup>27</sup> *Jose Maria Sison v. Council of the EU*, T-47/03, ECR II-73 (Judgment of the Court of First Instance, 11 July 2007), paras. 212, 217, and 224. The facts of this case were similar to that of the *OMPI I* decision. In the *Sison* case it was also unclear who exactly constituted the competent national authority in the Netherlands. Whereas the Council had indicated in its written pleadings that it was a decision of a domestic court of first instance dating from 1997, the oral pleadings of the Council referred to the State Secretary as the competent national authority.
- <sup>28</sup> *Yassin Abdullah Kadi v. Commission of the EC*, T-85/09, *Official Journal of the European Union*, C 90/37. See also *Al Barakaat International Foundation v. Commission of the EC*, T-45/09, *Official Journal of the European Union*, C 153/39.
- <sup>29</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 155.

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- <sup>30</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), paras. 154 and 159.
- <sup>31</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-256/07, OJ C313/31 [23 October 2008] (OMPI II), paras. 138-39.
- <sup>32</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III), paras. 64-65.
- <sup>33</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 158.
- <sup>34</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III), para. 73.
- <sup>35</sup> The inquiry concerned a series of offences under French law, all of which had a principle or subsidiary link with "a collective undertaking whose aim is to seriously disrupt public order through intimidation or terror" as well as "laundering of direct or indirect proceeds of fraud offences against particularly vulnerable persons" and "organised fraud having a link with a terrorist undertaking." See European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III), para. 58.
- <sup>36</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union*, Case T-284/08, 2009/C 19/55 [24 January 2009] (OMPI III), para. 76. France has appealed the CFI's ruling, see case C-27/09P which is currently pending before the ECJ.
- <sup>37</sup> European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), paras. 155-56. The CFI referred to the *Chahal* case as well as to *Öcalan v Turkey* (ECtHR, 12 March 2003), para. 106.
- <sup>38</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 344; European Communities, Court of Justice, *People's Mojahedin Organization of Iran v Council of the European Union* Case T-228/02, ECR II-4665 [12 December 2006] (OMPI I), para. 135.
- <sup>39</sup> On the domestic level a special advocate appointed by the Solicitor General to act on behalf of an applicant has access to the closed materials. However, from the point at which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of the court.
- <sup>40</sup> Council of Europe, European Court of Human Rights, *Case of A. and Others v. the United Kingdom*, Application no. 3455/50, Strasbourg, 19 February 2009.
- <sup>41</sup> Council of Europe, European Court of Human Rights, *Case of A. and Others v. the United Kingdom*, Application no. 3455/50, Strasbourg, 19 February 2009, paras. 220 and 215.
- <sup>42</sup> Council of Europe, European Court of Human Rights, *Case of A. and Others v. the United Kingdom*, Application no. 3455/50, Strasbourg, 19 February 2009, para. 223.
- <sup>43</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v AF and another and one other action*, UKHL 28, Session 2008-09, 10 June 2009. See para. 59 (Lord Phillips of Worth Matravers), para. 81 (Lord Hope of Craighead), and paras 116 (Lord Brown of Eaton-under-Heywood).
- <sup>44</sup> Joined cases T-37/07 and T-323/07 *Mohamed El Morabit v Council of the European Union* of 2 September 2009 (*El Morabit* case) paras. 40, 51, and 52. See also United Nations International Covenant on Civil and Political Rights, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights*, CCPR/C/94/D/1472/2006, 29 December 2008, para. 8.1.

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- <sup>45</sup> See Security Council Committee established pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and associated individuals and entities, *Guidelines of the Committee for the Conduct of its Work*, 9 December 2008. Martin Scheinen, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, expressed concern that listings for targeted sanctions can become open-ended in duration, thereby turning measures defined as temporary and administrative into permanent and punitive. See United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/61/267, New York, 16 August 2006, para. 35.
- <sup>46</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF*, UKHL 46, Session 2006-07, 31 October 2007, para. 65 (Baroness Hale of Richmond).
- <sup>47</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF*, UKHL 46, Session 2006-07, 31 October 2007, para. 24 (Lord Bingham of Cornhill).
- <sup>48</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF*, UKHL 46, Session 2006-07, 31 October 2007, para. 15 (Lord Bingham of Cornhill). The relevant sentence of Article 6(1) of the European Convention on Human Rights reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
- <sup>49</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF*, UKHL 46, Session 2006-07, 31 October 2007, paras. 24 (Lord Bingham of Cornhill).
- <sup>50</sup> United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause, Secretary of State for the Home Department v. MB and Secretary of State for the Home Department v. AF*, UKHL 46, Session 2006-07, 31 October 2007, paras. 28-30 (Lord Bingham of Cornhill).
- <sup>51</sup> Clemens A. Feinäugle, "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?," *German Law Journal* 9, no. 11 (1 November 2008): 1530.
- <sup>52</sup> United Nations Security Council, *Security Council Resolution 1904, S/RES/1904*, New York, 17 December 2009, para. 20.
- <sup>53</sup> United Nations Security Council, *Security Council Resolution 1904, S/RES/1904*, New York, 17 December 2009, Annex II, para. 1.
- <sup>54</sup> United Nations Security Council, *Security Council Resolution 1904, S/RES/1904*, New York, 17 December 2009, Annex II, paras. 13 and 14.
- <sup>55</sup> United Nations Security Council, *Security Council Resolution 1904, S/RES/1904*, New York, 17 December 2009, para. 22.

*Patterns of Implementation*  
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Improved Due Process Procedures.

This project evaluates listing  
and delisting procedures and assesses  
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