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***Targeted Sanctions and the Fight against Terrorism:***

***Developments and Procedural Reforms***

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## I. Introduction<sup>1</sup>

Chapter VII of the UN Charter allows the United Nations Security Council (UNSC) to take enforcement measures to maintain or restore international peace and security. According to Article 41 of the UN Charter “[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.” The use of mandatory ‘sanctions’ shall “apply pressure on a State or entity to comply with the objectives set by the Security Council without resorting to the use of force”.<sup>2</sup>

The measures provided for in Article 41 “are not necessarily intended as a substitute for military action”<sup>3</sup>. These sanctions have been applied to, “respond to serious violations of international law amounting to a threat or a breach of peace, and to react to situations which, although not constituting a violation of international law, imperilled peace and security”<sup>4</sup>. The wording of Article 41 is not precise and leaves it open whether these measures could only be applied to States or State-like entities or also to individuals or other entities.

Before the end of the Cold War economic and other sanctions have been applied in very few cases.<sup>5</sup> Only after 1990 this instrument has been more widely used. The UNSC imposed economic sanctions or military embargoes against Iraq (Resolution 661 of 6 August 1990), Somalia (Resolution 733 of 23 January 1992), Libya (Resolution 748 of 31 March 1992), Yugoslavia (Resolution 757 of 30 May 1992), Liberia (Resolution 788 of 19 November 1992), Haiti (Resolution 841 of 16 June 1993), Sierra Leone (Resolution 1132 of 8 October 1997) and against the Taliban in Afghanistan (Resolution 1267 of 15 October 1999)<sup>6</sup>. Some of these resolutions were followed by others renewing or modifying the original sanction regime.

The basic requirement economic and other sanctions should meet is that they should induce the targeted State to stop the misbehaviour addressed by the sanctions. Sanctions should not be misused in order to gain political or diplomatic or economic advantages. They are “primarily intended

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<sup>1</sup> The present seminar paper aims at giving an overview on the origins, shortcomings and (procedural) reforms of the UN system on targeted sanctions adopted in the fight against international terrorism and in particular Al-Qaida. It should also give a brief outline on the current workings within the European Union that aim at reforming the (financial) sanctions system of the EU and bringing it in line with the new legal framework introduced by the Lisbon Treaty. The paper does not specifically tackle the issue of accountability of the UN which has been extensively dealt with in a prior seminar paper (Finnur Magnússon, *Targeted Sanctions and Accountability of the United Nations’ Security Council*, June 2008).

<sup>2</sup> On the different sanctions regimes see the dedicated UN Security Council Sanctions Committee website, available at <http://www.un.org/sc/committees/index.shtml>.

<sup>3</sup> Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), p. 340.

<sup>4</sup> *Ibid.*

<sup>5</sup> The UNSC explicitly referred to Article 41 in its sanctions against Southern Rhodesia (1966-1979) and against South Africa (1977-1994).

<sup>6</sup> See A. Cassese, p. 341.

to dramatize and articulate the condemnation of a certain form of behaviour and [...] to 'delegitimize' it".<sup>7</sup>

The sanctions applied by the UNSC since 1966 have often proven to be poorly effective.<sup>8</sup> Over the years, it has become increasingly clear that the sanctions undertaken by the UNSC in the early 1990s, though on the one hand achieving the goal to politically delegitimize the misbehaviour of the targeted States, on the other hand had serious and adverse impacts on the most vulnerable groups in the targeted country.<sup>9</sup> Mainly the sanctions against Iraq, Serbia-Montenegro and Haiti raised widespread concern about the hardship caused on civilian populations. Concerns have been raised particularly about the effects of comprehensive economic sanctions which – through shortages in food and medication – tend to bring suffering to children, the elderly and the poor.<sup>10</sup>

In order to avoid harmful consequences for the civil population of the targeted country "and to reform the concept of UN sanctions as a whole, the Commission on Human Rights of the UN Economic and Social Council suggested that the Security Council should better apply targeted sanctions. Those should be directed at specific members of the regime or of the military of the country in question, by freezing their bank accounts in foreign countries and by limiting their access to the international financial market. To this end, the UN should compile "lists" with the names of relevant persons belonging to the regime or to the military"<sup>11</sup>. For that purpose the Commission on Human Rights relied in particular on the preliminary works made within the framework of the 'Interlaken Process'.

As a result of the growing interest in the use of targeted sanctions, the Swiss Government convened in March 1998 and again in March 1999, seminars of experts to explore ways of making United Nations targeted financial sanctions more effective. The sessions gathered representatives of governments, the private sector (financial community), the United Nations and other international organizations, as well as academia to discuss the challenges of designing and implementing targeted financial sanctions. The purpose of the sessions was to elaborate the specific requirements of financial sanctions, and to develop new options to refine the tool for exerting pressure directly on a targeted country's decision-makers through freezing their assets in the world financial markets. The results of the 'Interlaken Process,' [...], significantly advanced the collective understanding of the promise and feasibility of targeted financial sanctions.<sup>12</sup>

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<sup>7</sup> *Ibid.*, p. 312.

<sup>8</sup> According to G. Holley this lack of effectiveness has four reasons: „first, because the Security Council had [...] an outdated concept of international trade, viewing it as bilateral trade flows, in mind; second, because they targeted only the trade in goods, but not the financial services, which made their evasion considerably easier than had the latter also applied; third because there was no systematic monitoring by the respective 'sanctions' committees, whose task consisted only of gathering information about reported violations of sanction regimes; and fourth because humanitarian exemptions were often granted in a rather generous way and because there were hardly any control mechanisms to ensure that exempted goods were in fact used for humanitarian purposes." (Gerhard Holley, *Essay on How to Ensure the Human Rights Conformity of the UN Targeted Sanctions Mechanism*, In: ÖJZ 2011/106, p. 1004.)

<sup>9</sup> See A. Cassese, p. 312.

<sup>10</sup> See the first report of the Swiss Federal Office for Foreign Economic Affairs Department of Economy on the *Expert Seminar on Targeting UN Financial Sanctions* held in Interlaken from 17 to 19 March 1998, p. 14.

<sup>11</sup> G. Holley, p. 1005.

<sup>12</sup> Watson Institute for International Studies, Brown University, *Summary of the Interlaken Process*, available at [http://www.watsoninstitute.org/tfs/CD/ISD\\_Summary\\_of\\_Interlaken\\_Process.pdf](http://www.watsoninstitute.org/tfs/CD/ISD_Summary_of_Interlaken_Process.pdf). "The first meeting (Interlaken I) focused

## II. Targeted Sanctions

There are currently thirteen sanctions regimes in place which have been imposed by the UN Security Council acting under Chapter VII. The oldest sanction regime is the one established by Security Council Resolution (UNSCR) 751 of 24 April 1992 against Somalia, and the most recent established pursuant to Resolution 2048 concerning Guinea-Bissau in May 2012. Most of the sanctions regimes have been established with the purpose, *inter alia*, to target individuals and entities. Usually, sanctions encompass travel bans, assets freezing and arms embargos. In some sanctions regimes, lists have been established with the names of designated individuals and entities.<sup>13</sup>

The comprehensive sanctions against Iraq and their consequences for the civilian population led the international community to question the efficacy of such measures. Hence, the UNSC started to focus on 'smart' or 'targeted' sanctions. Many considered the adoption by the UNSC of measures against the *Uniao Nacional para a Independencia Total de Angola* (UNITA) "as the inauguration of a new course of action"<sup>14</sup>.

The sanctions against UNITA consisted in travel bans ("[...] To prevent the entry into or transit through their territories of all senior officials of UNITA and of adult members of their immediate families [...].")<sup>15</sup> and financial restrictions ("[...] Decides that all States, except Angola, in which there are funds and financial resources, including any funds derived or generated from property of UNITA as an organization or of senior officials of UNITA or adult members of their immediate families [...], shall require all persons and entities within their own territories holding such funds and financial resources to freeze them and ensure that they are not made available directly or indirectly [...].")<sup>16</sup>.

Targeted sanctions other than comprehensive economic sanctions against a country are intended to be directed at individuals, companies and organizations, or restrict trade with key commodities. The following instruments can be applied: Financial sanctions (freezing of funds and other financial assets, ban on transactions, investment restrictions); trade restrictions on particular goods (e.g. arms, diamonds, oil, lumber) or services; travel restrictions; diplomatic constraints; cultural and sports

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on the specific technical requirements of financial sanctions and identified a number of preconditions necessary for targeted sanctions to be effective: clear identification of the target, ability to identify and control financial flows, and strengthening the UN sanctions instrument. The first order challenge concerns the target, and the need for analysis regarding the vulnerability of targeted governments and elites; success of targeting depends to a large extent on the characteristics of the targeted country. In addition, a clear delineation of parties covered by the sanctions, as well as the nature of the sanctions themselves (extending to all financial assets, including property, or just blocking financial transactions) is necessary. Participants also noted that speed and discretion in determining targets and the specific sanctions –which are often difficult to accomplish – are critical to success" (Watson Institute, *Summary of the Interlaken Process*).

<sup>13</sup> See Bardo Fassbender, *Targeted Sanctions imposed by the UN Security Council and due process rights*, In: International Organizations Law Review 3: 437–485, 2006, p. 442.

<sup>14</sup> Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, In: EJIL (2006), Vol. 17 No. 5, p. 881.

<sup>15</sup> S/RES/1127 (1997) of 28 August 1997.

<sup>16</sup> S/RES/1173 (1998) of 12 June 1998. Also S/RES/1176 (1998) of 24 June 1998 concerns financial sanctions against UNITA.

restrictions; air traffic restrictions.<sup>17</sup> “Targeted sanctions are typically applied either as incentives to change behavior or as preventive measures, as in the case of sanctions against individuals or entities that facilitate terrorist acts. Sanctions to stem the financing of terrorism or to deny safe haven or travel by terrorists have become valuable tools in the global effort to counter terrorism.”<sup>18</sup>

Despite controversies with regard to the identification of legitimate targets the sanctions against UNITA conveyed the impression that targeted sanctions could effectively work in order to reach compliance with UN Security Council resolutions without affecting civilians. The UN gained confidence from this new instrument and, therefore, decided to adopt a similar strategy for the fight against the Taliban and Usama Bin Laden.<sup>19</sup>

### III. Sanctions against Al-Qaida and the Financing of Terrorism

When targeted sanctions were first introduced the rights of the individually targeted (usually dictators or autocratic leader) were not considered as the people targeted were generally not the subject of widespread sympathy. Only after the application of resolution 1267 (1999)<sup>20</sup> on a vast number of individuals and entities, concerns about the violation of human rights were more and more raised. Indeed, it has been the widespread application of targeted sanctions in support of counter-terrorism measures since 2001 that has raised many questions about their potential violation of individual human rights.

The UN Security Council adopted Resolution 1267 on 15 October 1999. This resolution was a measure designed to put pressure on the Taliban regime in Afghanistan to hand over Usama bin Laden for the attacks on two US embassies in Africa in August 1998. The resolution was unusual as it named an individual in the text of the resolution, Usama bin Laden, even though he was technically not initially the target of the sanctions.<sup>21</sup> Of the various sanctions regimes, the one established by UNSCR 1267 (1999) has gained particular practical importance because of the relatively high number of individuals and entities listed. More than 500 individuals and entities have been targeted according to this resolution.

The UN Member States are obliged to take, *inter alia*, the following measures in order to comply with UNSCR 1267 (1999):<sup>22</sup> Freeze without delay the funds and other financial assets or economic

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<sup>17</sup> On the notion of ‘smart’ or ‘targeted’ sanctions see also the website of the Swiss State Secretariat for Economic Affairs (SECO), available at <http://www.seco.admin.ch/themen/00513/00620/00639/index.html?lang=en>.

<sup>18</sup> Watson Institute for International Studies, Brown University, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, White Paper prepared by the Targeted Sanctions Project, 30 March 2006, p. 5, available at [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf).

<sup>19</sup> See A. Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-Terrorism Measures*, p. 882.

<sup>20</sup> S/RES/1267 (1999) was adopted by the Security Council at its 4051<sup>st</sup> meeting on 15 October 1999.

<sup>21</sup> See Watson Institute for International Studies, Brown University, *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”*, October 2009, p. 6.

<sup>22</sup> Paragraphs 2 and 4 of UNSCR 1267 read:

resources (including funds derived from property owned or controlled directly or indirectly), prevent the entry into or transit through their territories and to prevent the direct or indirect supply, sale or transfer of arms and related material, including military and paramilitary equipment, technical advice, assistance or training related to military activities, with regard to the individuals, groups, undertakings and entities placed on the 'Consolidated List'.

The Security Council Committee established pursuant to paragraph 6<sup>23</sup> of UNSCR 1267 (1999) (hereinafter referred to as the Committee) oversees the implementation by States of the three sanctions measures (assets freeze, travel ban and arms embargo) imposed by the Security Council on individuals and entities associated with Al-Qaida. The Committee maintains a List of individuals and entities subject to the sanctions measures.

The 'Al-Qaida Consolidated Sanctions List' consists of two sections: A. Individuals associated with Al-Qaida; B. Entities and other groups and undertakings associated with the Al-Qaida. All names and identifying information on the Al-Qaida Sanctions List have been submitted to the Committee by United Nations Member States and international organizations. Individuals are listed alphabetically by their family name/surname/last name as it appears in Latin script. Entities are also arranged in alphabetical order. All geographical locations are

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"2. Demands that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;

4. Decides further that, in order to enforce paragraph 2 above, all States shall:

(a) Deny permission for any aircraft to take off from or land in their territory if it is owned, leased or operated by or on behalf of the Taliban as designated by the Committee established by paragraph 6 below, unless the particular flight has been approved in advance by the Committee on the grounds of humanitarian need, including religious obligation such as the performance of the Hajj;

(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need;"

<sup>23</sup> Paragraph 6 reads:

"6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

(a) To seek from all States further information regarding the action taken by them with a view to effectively implementing the measures imposed by paragraph 4 above;

(b) To consider information brought to its attention by States concerning violations of the measures imposed by paragraph 4 above and to recommend appropriate measures in response thereto;

(c) To make periodic reports to the Council on the impact, including the humanitarian implications, of the measures imposed by paragraph 4 above;

(d) To make periodic reports to the Council on information submitted to it regarding alleged violations of the measures imposed by paragraph 4 above, identifying where possible persons or entities reported to be engaged in such violations;

(e) To designate the aircraft and funds or other financial resources referred to in paragraph 4 above in order to facilitate the implementation of the measures imposed by that paragraph;

(f) To consider requests for exemptions from the measures imposed by paragraph 4 above as provided in that paragraph, and to decide on the granting of an exemption to these measures in respect of the payment by the International Air Transport Association (IATA) to the aeronautical authority of Afghanistan on behalf of international airlines for air traffic control services;

(g) To examine the reports submitted pursuant to paragraph 9 below;"

reproduced as submitted and are cited without prejudice to their political or legal status. By 3<sup>rd</sup> July 2012 243 individuals and 68 entities were listed.<sup>24</sup>

In order to strengthen the sanctions regime, UNSC Resolution 1267 (1999) was modified by subsequent resolutions, including Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009) and Resolution 1989 (2011). According to the '1267 Guidelines'<sup>25</sup> (which, essentially, were introduced in order to overcome the lack of transparency in the decision-making procedure) "[t]he Committee will meet in closed sessions, unless it decides otherwise. The Committee may invite any Member of the United Nations to participate in the discussion of any question brought before the Committee in which interests of that Member are specifically affected. The Committee will consider requests from Member States and relevant international organizations to send representatives to meet with the Committee [...]. The Committee may invite members of the Secretariat or other persons to provide the Committee with appropriate expertise or information or to give it other assistance in examining matters within its competence."<sup>26</sup>

The Committee shall take its decisions by consensus of its Members. If consensus cannot be reached on a particular issue, including listing and delisting, the chairperson<sup>27</sup> of the committee should undertake further consultations in order to facilitate the agreement. If after these consultations consensus still cannot be reached the matter is to be submitted to the UNSC.<sup>28</sup> Where the Committee agrees, decisions may be taken by a written procedure. In such cases the Chairperson will circulate to all Members of the Committee the proposed decision, and will request Members of the Committee to indicate any objection they may have to the proposed decision within five full working days or, in urgent situations, such shorter period as the Chairperson shall determine.<sup>29</sup>

With regard to the Al-Qaida Sanctions List the Guidelines provide the following provisions (section 5):

(a) The Committee will update regularly the Al-Qaida Sanctions List when it has agreed to include or delete relevant information in accordance with the procedures set out in these guidelines.

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<sup>24</sup> See the Website of the Committee established pursuant to UNSCR 1267 (1999), available at [http://www.un.org/sc/committees/1267/eq\\_sanctions\\_list.shtml](http://www.un.org/sc/committees/1267/eq_sanctions_list.shtml).

<sup>25</sup> Guidelines of the 'Al-Qaida Sanctions Committee', adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005, 29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011, and 30 November 2011, 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>26</sup> *Ibid.*, p. 2.

<sup>27</sup> According to section 1 paragraph (c) of the Guidelines the Chairperson of the Committee is appointed by the Security Council to serve in his/her personal capacity. The Chairperson is assisted by two delegations who act as Vice-Chairpersons, and who are also be appointed by the Security Council. The Chairperson can convene meetings of the Committee, both formal and informal, at any time he/she deems necessary, or at the request of a Member of the Committee. To the extent possible, four working days notice will be given for any meeting of the Committee, although shorter notice may be given in urgent situations.

<sup>28</sup> See *ibid.*, p. 2.

<sup>29</sup> See Guidelines, Section 4 paragraph (b).

(b) The updated Al-Qaida Sanctions List will be made promptly available on the website of the Committee. At the same time, any modification to the Al-Qaida Sanctions List will be communicated to Member States immediately through Notes Verbales, including an electronic advance copy, and United Nations Press Releases.

(c) Once the updated Al-Qaida Sanctions List is communicated to Member States, States are encouraged to circulate it widely, such as to banks and other financial institutions, border points, airports, seaports, consulates, customs agents, intelligence agencies, alternative remittance systems and charities.

As regards the listing and de-listing requests, section 4 paragraph (c) of the Guidelines establishes that they shall be assessed, together with all relevant information, by the chairperson, and shall be considered in accordance with section 6 paragraph (n)<sup>30</sup> and section 7 paragraph (f)<sup>31</sup> respectively. If no objection is received within the specified period (usually ten working days) the decision will be deemed adopted.

UN Member States are *encouraged* [emphasis added] to establish a national mechanism or procedure to identify and assess names for the inclusion on the Al-Qaida Sanctions List and to appoint a national contact point concerning entries on that list according to national laws and procedures.<sup>32</sup> In line with section 6 paragraph (c) of the Guidelines, Member States before proposing a name for inclusion on the Al-Qaida Sanctions List, are “*strongly encouraged, to the extent possible* [emphasis added], to approach the State(s) of residence and/or nationality of the individual or entity concerned to seek additional information.” When proposing names Member States should use the standard forms for listing available on the Committee’s website “and shall include as much relevant and specific information as possible on a proposed name, in particular sufficient identifying information to allow for the accurate and positive identification of the individual, group, undertaking or entity concerned by competent authorities, and to the extent possible, information required by INTERPOL to issue a Special Notice”<sup>33</sup>.

Section 6 of the Guidelines also provides for a procedure that applies as soon as a name has been added to the List:

(t) As soon as a name is added to the Al-Qaida Sanctions List, the Committee shall request the Secretariat to communicate the decision in writing to the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national to the extent this information is known.

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<sup>30</sup> Section 6 paragraph (n) reads: “The Committee will consider listing requests within a period of ten full working days, which may be shortened, if requested, at the Chairperson’s discretion, for emergency and time-sensitive listings. If a proposal for listing is not approved within the decision-making period, the Committee, or the Secretariat on its behalf, will notify the submitting State on the status of the request”.

<sup>31</sup> Section 7 paragraph (f) reads: “The Committee will decide on delisting requests within a period of ten working days, which may be shortened to a minimum of two full working days, if requested and in exceptional circumstances, at the Chairperson’s discretion, for emergency and time-sensitive delistings after previously informing the Members of the Committee”.

<sup>32</sup> See Guidelines, section 6 paragraph (b).

<sup>33</sup> Guidelines, section 6 paragraph (g).

(u) The Secretariat shall include with this communication a copy of the narrative summary of reasons for listing, a description of the effects of designation, as set forth in the relevant resolutions, the Committee's procedures for considering delisting requests, including the possibility of submitting delisting requests to the Office of the Ombudsperson in accordance with paragraphs 21 and annex II of resolution 1989 (2011), and the provisions for available exemptions.

(v) The letter shall remind States receiving such notification that they are required to take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the newly listed individuals and entities on the Al-Qaida Sanctions List of the measures imposed on them, any information on reasons for listing available on the Committee's website as well as all the information provided by the Secretariat in the abovementioned communication.

As regards the de-listing procedure there are different provisions that apply depending on whether Member States or the designating State(s) or the 'Office of the Ombudsperson' requests the delisting of an individual or an entity.<sup>34</sup> The Committee makes available basic information on de-listing procedures in a 'Fact Sheet on de-listing'<sup>35</sup>. By Resolution 1904 (2009)<sup>36</sup>, the Security Council established an Office of the Ombudsperson<sup>37</sup> to assist the Committee in considering de-listing requests.

The Guidelines stipulate that any individuals, groups, undertakings, and/or entities on the Al-Qaida Sanctions List, may submit a petition for de-listing. The de-listing submission should explain why the individual or entity concerned no longer meets the criteria for inclusion on the Al-Qaida Sanctions List, as described in paragraphs 2 and 3 of Security Council Resolution 1617 (2005) and reaffirmed in paragraph 4 of Resolution 1989 (2011). Any documentation supporting the request can be referred to and/or attached together with the explanation of its relevance.

A petitioner can submit a request for de-listing either directly to the Ombudsperson in accordance with paragraph 21 and Annex II of Resolution 1989 (2011) as outlined in Section 7 paragraph (w)<sup>38</sup> of the Guidelines, or through his/her State of residence or citizenship as outlined in Section 7 paragraph (w) of the Guidelines. A standard form for the submission of de-listing requests can be found in the de-listing section of the Committee's website.

Member States may submit delisting requests to the Committee at any time, after having bilaterally consulted with the designating State(s), the State(s) of nationality, residence or incorporation, where applicable. Further

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<sup>34</sup> See Guidelines, section 7.

<sup>35</sup> The Fact Sheet on de-listing is available at [http://www.un.org/sc/committees/1267/fact\\_sheet\\_delisting.shtml](http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml).

<sup>36</sup> Resolution 1904 (2009) was adopted by the Security Council at its 6247<sup>th</sup> meeting, on 17 December 2009.

<sup>37</sup> On 3 June 2010, the Secretary-General appointed Ms. Kimberly Prost to serve as Ombudsperson. On 17 June 2011, by Resolution 1989 (2011), the Security Council extended the mandate of the Ombudsperson until December 2012. The Ombudsperson process is set out in Annex II of resolution 1989 (2011). For further information concerning the Office of the Ombudsperson see <http://www.un.org/en/sc/Ombudsperson/>. The mandate of the Ombudsperson was extended or a further period of 18 months by Resolution 1989 (2011), adopted by the Security Council at its 6557<sup>th</sup> meeting, on 17 June 2011. Moreover, UNSCR 1989 (2011) reaffirms the assets freeze, travel ban and arms embargo affecting all individuals and entities on the Committee's Al-Qaida Sanctions List and extends the mandate of the Analytical Support and Sanctions Monitoring Team for a further period of 18 months.

<sup>38</sup> Section 7 paragraph (w) reads: "A petitioner (individual(s), groups, undertakings, and/or entities on the Al-Qaida Sanctions List or their legal representative or estate) seeking to submit a request for delisting can do so either directly to the Office of the Ombudsperson as outlined below and in the attached annex, or through his/her State of residence or nationality as outlined in paragraphs (a)-(p)".

details are provided in section 7 of the Committee's guidelines. In paragraph 31 of resolution 1989 (2011), the Security Council encouraged Member States to submit delisting requests for individuals that are officially confirmed to be dead, particularly where no assets are identified, and for entities that have ceased to exist, while at the same time taking all reasonable measures to ensure that the assets that had belonged to these individuals or entities have not been or will not be transferred or distributed to other entities or individuals on the Al-Qaida Sanctions List.<sup>39</sup>

By Resolution 1373 (2001)<sup>40</sup> the Council also established a Committee of the Council to monitor the resolution's implementation and called on all States to report on actions they had taken to that end. The UNSC decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the wilful provision or collection of funds for such acts. The funds, financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists should also be frozen without delay. The UNSC also decided that Member States should prohibit their nationals or persons or entities in their territories from making funds, financial assets, economic resources, financial or other related services available to persons who commit or attempt to commit, facilitate or participate in the commission of terrorist acts. The Security Council decided that all States should prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other countries and their citizens. States should also ensure that anyone who has participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice. The Member States should also ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations and that the seriousness of such acts is duly reflected in sentences served.<sup>41</sup>

#### **IV. Shortcomings of the Targeted Sanctions Regime**

Similar to comprehensive (economic) sanctions, also targeted sanctions can interfere with human rights. Travel bans interfere primarily with the right of free movement. Financial sanctions have an impact on property rights but can also affect a person's privacy and reputation.<sup>42</sup> If the sanctions are wrongly imposed on listed individuals without granting these individuals the possibility of being heard or of challenging the measures taken against them, there may also be a violation of the right of access to court, the right to a fair trial and the right to an effective remedy. In the extreme, sanctions could conceivably violate the right to life, for instance if a travel ban prevents a targeted person from leaving the country to seek medical aid, or when financial sanctions are so stringent that a targeted person does not have resources to buy basic goods such as food. However, existing UN sanctions regimes invariably include a possibility to grant exemptions precisely to avoid those kinds of situations. The travel ban could also conflict with rights and freedoms such as the freedom of

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<sup>39</sup> Fact Sheet on de-listing, available at [http://www.un.org/sc/committees/1267/fact\\_sheet\\_delisting.shtml](http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml).

<sup>40</sup> S/RES/1373 (2001) was adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28 September 2001.

<sup>41</sup> See Press Release SC/7158 of 28 September 2001 published after the 4385<sup>th</sup> Meeting of the Security Council, available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm>.

<sup>42</sup> Watson Institute, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, p. 9-10.

religion, if the particular religion requires pilgrimages, and the right to seek asylum. It is noteworthy that UN sanctions committees have routinized exemptions for travel for religious purposes.<sup>43</sup>

When individuals or entities are potentially targeted, there is no prior notification. Under the current practice any Member State can submit listing requests at any time. Guidelines for the various Committees require designating States to provide a detailed statement of case in support of the proposed listing that forms the basis or justification for listing. The statement of case should also include sufficient identifiers to allow for the positive identification of the individual or entity. Usually, the designating State will have bilateral consultations with key members of the Committee concerned to ensure support for its submission. [...] Persons or entities recommended for designation do not have access to sufficient information regarding the grounds for listing, so they do not have the means at their disposal to challenge the decision to list them and present an effective defence prior to their designation. Under the current practice, this process also fails to inform the prospective designee of the identity of the designating State. The non-disclosure of the identity of the designating State not only violates the designee's right to be informed (to the detriment of their legal defence), but denies the designating State the opportunity to consider exculpatory evidence. Informing designees of a potential listing would also have the effect of inducing designating States to fulfil their obligation for due diligence. [...] Under the current practice in the Security Council and its subsidiary organs, however, individuals or entities that are proposed for listing have no opportunity to prevent or challenge this by demonstrating it is unjustified. Once the designee is informed of the Committee's intention to designate, the Committee (or an office or individual designated by the Committee), should allow the designee to present potentially exculpatory evidence.<sup>44</sup>

The Committee reflects the composition of the Security Council and, thus, can usually base its decisions only on the information provided by the 'intelligence' services of the concerned States. That is probably also the reason why originally no information was given on the modalities and procedures related to the inclusion of a particular individual or entity on the List.<sup>45</sup> An independent review of the information brought forward by a State would, of course, represent a major step forward.<sup>46</sup> However, it seems obvious that States – as it is usually the case in matters related to the internal and national security – are very reluctant to share classified information or even allow an independent *ex ante* review before a decision on a listing has been adopted. Not less important is the question on the possible establishment of certain criteria that shall apply with regard to the inclusion on a terror list. Neither the relevant resolutions nor the Guidelines give precise indications which quality or level the association to Al-Qaida, the Taliban and/or Usama bin Laden should have in order to justify targeting a particular individual or entity. Moreover, there is no indication on the level of probability required for the association to Al-Qaida, the Taliban and/or Usama bin Laden.<sup>47</sup>

As we will see, the legal challenges against the sanctions regimes established in particular by UNSCR 1267 (1999) and UNSCR 1373 (2001) essentially focused on due process concerns, on the

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<sup>43</sup> *Ibid.*, p. 10.

<sup>44</sup> Kiho Cha, Tilo Stolz and Maarten Wammes, *Ensuring fairness in the listing and de-listing process of individuals and entities subject to sanctions*, p. 4-5.

<sup>45</sup> See Annalisa Ciampi, *Sanzioni del Consiglio di Sicurezza e Diritti Umani*, (Milano: Dott. A. Giuffrè Editore, 2007), p. 97.

<sup>46</sup> See *ibid.*, p. 102.

<sup>47</sup> See *ibid.*, p. 103.

proportionality of sanctions, or the denial of fundamental rights to property and freedom of movement.

## V. Major Reforms of the Al Qaida Sanctions Regime

In case targeted sanctions are implemented effectively, they cause economic disruption and financial hardship on the targeted parties. These consequences are mitigated to some degree by exemptions to cover basic needs, as appropriate, which are administered by relevant sanctions committees. However, the stigmatizing and psychological impact of being wrongly listed may have more significant and far-reaching effects than economic or financial hardships. From the standpoint of individuals engaged in business operations, a damaged reputation may be the most significant and longest lasting consequence of being targeted.<sup>48</sup>

The Interlaken Process triggered an international diplomatic and academic process on targeted sanctions. This process was initiated by Switzerland and focused on financial sanctions. It was followed by the initiative of Germany, the 'Bonn-Berlin Process', dealing with arms embargoes, aviation sanctions and travel bans. These processes brought together experts, academic researchers, diplomats, practitioners and non-governmental organizations. Two volumes with practical suggestions were presented to the UN Security Council in October 2001. At this occasion, Sweden announced the start of a similar, third process, the 'Stockholm Process', concentrating on the implementation of targeted sanctions.<sup>49</sup>

As mentioned under point III., the sanctions regime established by UNSCR 1267 (1999) has been modified several times. The main improvements that aimed at addressing the major shortcomings of the targeted sanctions regime against Al-Qaida were in particular the following:

Resolution 1526 (2004)<sup>50</sup> established an 'Analytical Support and Sanctions Monitoring Team' (hereinafter referred to as Monitoring Team) in order to assist the 1267 Sanctions Committee in evaluating the changing face of the Taliban and al Qaeda and gathering information necessary for strengthening and updating the Consolidated List. The team is composed of eight independent experts with experience in counter-terrorism, financing of terrorism, arms embargoes, travel bans and related legal issues. In UNSCR 1526 (2004) the Security Council also *reiterated* "the importance of proposing to the Committee the names of members of the Al-Qaida organization and the Taliban or associated with Usama bin Laden and other individuals, groups, undertakings and entities associated with them for inclusion in the Committee's list, unless to do so would compromise

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<sup>48</sup> *Ibid.*, p. 5.

<sup>49</sup> See Peter Wallensteen (*et al.*) (edit.), *Making Targeted Sanctions Effective Guidelines for the Implementation of UN Policy Options*, Results from the Stockholm Process on the Implementation of Targeted Sanctions, (Uppsala: Uppsala University Department of Peace and Conflict Research, 2003), p. iii.

<sup>50</sup> S/RES/1526 (2004) of 30 January 2004.

investigations or enforcement actions”<sup>51</sup>. The Security Council also called upon “all States, when submitting new names to the Committee’s list, to include identifying information and background information, to the greatest extent possible, that demonstrates the individual(s)’ and/or entity(ies)’ association with Usama bin Laden or with members of the Al-Qaida organization and/or the Taliban, in line with the Committee’s guidelines”<sup>52</sup>.

On 19 December 2006, the Security Council adopted Resolution 1730<sup>53</sup> calling for the establishment within the Secretariat of a Focal Point to receive delisting requests. UNSCR 1730 was proposed by France (supported by the US) and allows individuals to petition directly to the UN Secretariat for delisting. The Focal Point, after receiving a request from a petitioner, acknowledges its receipt and informs the petitioner on procedures for processing delisting requests. The Focal Point forwards the requests to the designating States and States of citizenship and residence, and informs the petitioner of the sanctions committee’s decision (as the Focal Point services all sanctions committees, not only the 1267 Committee). The Focal Point became operational as of 27 March 2007. It allows petitioners seeking de-listing to submit requests to the Secretariat, in addition to their State of residence or citizenship. Prior to the Focal Point, targeted parties generally could only access the UN system through their country of residence or nationality.<sup>54</sup>

UNSCR 1267 (1999) contained no provision for delisting when it was first introduced. Following the recommendations of the ‘Watson Report’ in 2006, the Security Council adopted Resolution 1735 (2006) which elaborated minimal standards for statements of case, created a provision for the public release of that information, and established a procedure to improve deficiencies in notification. Targets were to be provided with a redacted statement of case indicating the basis for listing.<sup>55</sup>

Review mechanisms were at the heart of a further reform introduced in 2008. The Security Council significantly expanded the 1267 committee’s role in addressing listing and de-listing issues. UNSCR 1822 (2008)<sup>56</sup> required a review of all names on the list within two years (30 June 2010), and an annual review thereafter to ensure that every designation is reviewed at least every three years (including those deceased). Secondly, it required the development of narrative summaries (for all listings) which are published on the committee website and explain the basis for inclusion of names on the list.

By Resolution 1904 (2009), the Security Council introduced a further improvement by establishing the Office of the Ombudsperson to assist the Committee in considering de-listing requests (see also under point III.). The new established office has the task to investigate any individual petitions for the removal of names from the 1267 Consolidated List. The mandated duties of the Office of the

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<sup>51</sup> *Ibid.*, paragraph 16.

<sup>52</sup> *Ibid.*, paragraph 17.

<sup>53</sup> S/RES/1730 (2006) of 19 December 2006.

<sup>54</sup> See Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”*, p. 12.

<sup>55</sup> *Ibid.*, p. 14.

<sup>56</sup> S/RES/1822 (2008) of 30 June 2008.

Ombudsperson include gathering information and interacting with petitioners, relevant states and organisations with regard to de-listing. The Ombudsperson is expected to present a comprehensive report to the Security Council on each request submitted to the Committee, after which the outcome is communicated to the petitioner by the Ombudsperson.<sup>57</sup> The Ombudsperson replaces the Focal Point as the only avenue for listed individuals to directly petition the U.N. to be de-listed under the 1267 sanctions regime. However, the Focal Point will still be available for individuals to directly petition the U.N. to be de-listed from other targeted sanctions regimes.<sup>58</sup>

## VI. Legal challenges

Notwithstanding their utility, targeted sanctions have given rise to several concerns. In particular, listing procedures and the opportunity for review by wrongly-designated individuals or entities raise ‘serious accountability issues and possibly violate fundamental human rights norms and conventions’.<sup>59</sup>

Targeted or smart sanctions are meant to be of a rather preventive nature and should not, in theory, be punitive. The inclusion on the list “is not a legal determination, but rather a political finding of association with al Qaeda and the Taliban”<sup>60</sup>. The designations are also intended to be temporary, at least in theory. As such, they do not require the evidentiary standards associated with legal prosecutions. Nonetheless, the open-ended nature of their application by UN sanctions committees, combined with the potential violation of elements of due process in their application to individuals, have led to legal challenges about their punitive nature.

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

The relative lack of scrutiny in this extraordinary period (from late 2001 through the first half of 2002), laid the basis for many, though not all, of the legal challenges that have subsequently emerged, challenging the implementation of Security Council targeted sanctions by individual Member States.<sup>61</sup>

Numerous legal challenges to UN Security Council targeted sanctions listings have been pursued in courts worldwide – in Europe, the US, Pakistan, Canada, and Turkey – over designations made either

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<sup>57</sup> See Amber Ramsey, Civil-Military Fusion Centre, *Peace&Reconciliation: De-listing the Taliban*, p. 2.

<sup>58</sup> See Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, In: Georgetown Journal of International Law, p. 688.

<sup>59</sup> See Stephen Tully, *Implementing Targeted Sanctions in Australia: A Role for Procedural Fairness*, In: eLaw Journal: Murdoch University Electronic Journal of Law (2009) 16(1), p. 116.

<sup>60</sup> Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”*, p. 6.

<sup>61</sup> Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”*, p. 7.

by the UNSCR 1267 Committee or in the context of the implementation of UNSCR 1373. Some of the cases have been dropped, after individuals were delisted by the 1267 Committee. The most highly visible and significant challenges were the *Kadi I* and *Kadi II* cases that were dealt with by the European Court of Justice (ECJ).<sup>62</sup>

Mr Kadi, a Saudi resident, and the Al Barakaat International Foundation, established in Sweden [...] brought actions for annulment before the Court of First Instance, claiming that the Council was not competent to adopt Council Regulation 881/2002<sup>63</sup> and that the regulation breached several of their fundamental rights, in particular the right to property and the rights of the defence. By its judgments of 21 September 2005 (Case T-306/01 *Yusuf and Al Barakaat Foundation v Council* and Case T-315/01 *Kadi v Council and Commission*), the Court of First Instance dismissed these actions, taking the view, *inter alia*, that the Member States were required to comply with the Security Council resolutions under the terms of the Charter of the United Nations, an international Treaty which prevails over Community law. Consequently, in the view of the Court of First Instance, the Community judicature may review the legality of the regulation at issue only in the light of higher-ranking rules of general international law – understood to constitute a public international legal system from which neither the Member States nor the UN courts can derogate (*jus cogens*) – which were not infringed in this case.

Mr Kadi and Al Barakaat then lodged appeals against those judgments before the Court of Justice. The Court confirmed that Articles 60, 301 and 308 TEC are the correct legal basis for the contested regulation. In particular, the Court pointed to the relevance of Article 308 EC not, as the Court of First Instance had held, to the pursuit of the objective of combating international terrorism – which is a CFSP objective and does not therefore fall under the “*objectives of the Community*” within the meaning of Article 308 TEC – but rather with regard to enabling the adoption of restrictive measures of an economic nature under a Community instrument in order to implement the actions decided upon within the framework of the Common Foreign and Security Policy (CFSP). However, the Court did point out that the full review by the Community judicature of the validity of any act subject to its jurisdiction in the light of fundamental rights is the expression of a constitutional guarantee stemming from the EC Treaty. The fact that the Community judicature may have to review the legality of a Community act which seeks to implement a resolution of the UN Security Council does not permit derogation from that constitutional guarantee; however, this does not call into question the primacy of such a resolution from the perspective of international law. The Court therefore concluded that the Court of First Instance erred in law by holding that the Community judicature was not competent to review the legality of Regulation 881/2002 with regard to *jus cogens*. The judgments appealed against were consequently set aside.<sup>64</sup>

The ECJ finally decided in favour of the two legal challenges on 3 September 2008 and annulled the European Union regulation implementing UNSCR 1267 with specific reference to the two cases. In its judgments in the cases of *Kadi & Al Barakaat* (joined cases C-402/05 P and C-415/05 P)<sup>65</sup>, the Court distinguished between the imposition of the sanctions by the 1267 Committee and the implementation of the sanctions at the EU level, holding that the latter are bound by fundamental rights when implementing the sanctions, and that therefore they must ensure that the persons affected have the right to be informed of the reasons for their listing and the right to contest those reasons before an independent body. The Court specifically charged that the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.<sup>66</sup>

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<sup>62</sup> See Watson Institute, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, p. 8.

<sup>63</sup> On the EU provisions implementing the relevant UN resolutions see under point VII.

<sup>64</sup> See the summary of Cases C-402 P and 415/05 P of the European Commission, Legal Service, available at [http://ec.europa.eu/dgs/legal\\_service/arrets/05c402\\_en.pdf](http://ec.europa.eu/dgs/legal_service/arrets/05c402_en.pdf).

<sup>65</sup> Cases C-402 P and 415/05 P, *Kadi & Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351.

<sup>66</sup> Watson Institute, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, p. 8.

## VII. Targeted Sanctions within the legal framework of the European Union

EU legislation concerning procedures for listing persons and entities related to terrorism, with a view to freezing their assets, is currently based on Common Position 931/2001<sup>67</sup>, Regulation 2580/2001<sup>68</sup> and Regulation 881/2002<sup>69</sup>. Common Position 931/2001 and Regulation 2580/2001 allow the EU to establish its 'own (non-UN) terrorist list' based on names of persons and entities which are characterised as having their main field of activity outside the EU. These measures were taken on the basis of former Articles 60 or 301 TEC in conjunction with former Article 308 TEC. However, the previous Treaties were interpreted as not containing any specific legal basis for the freezing of assets of (non-UN listed) persons and entities located inside the EU. Council Regulation 881/2002 provides for the implementation into EU law of the designations of persons and entities carried out by the UN Security Council. This legal framework has been reviewed to strengthen the fundamental rights components (such as the rights of the defence). In addition, the Lisbon Treaty<sup>70</sup> (Article 75 TFEU)<sup>71</sup> gives the EU the responsibility to define a framework of administrative measures for capital movements and payments, such as the freezing of funds belonging to or owned or held by natural or legal persons, groups or non-State entities.

The ECJ dealt in the *Kadi* case also with the question of overlapping competences (between the former pre-Lisbon TEU and the TEC). The Lisbon Treaty has changed the legal situation by introducing two separate legal bases for measures related to the freezing of assets related to terrorism: Article 75 TFEU<sup>72</sup> (based on former Art. 60 TEC), under the Title V of Part III of the TFEU (Area of Freedom, Justice and Security) explicitly gives the responsibility to define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds of natural, legal persons or non-State entities to prevent terrorism. Appearing under the chapter on Union policies and internal actions, Article 75 TFEU does not explicitly limit this

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<sup>67</sup> Official Journal of the European Union, L 344/93, 28.12.2001.

<sup>68</sup> Official Journal of the European Union, L 344/70, 28.12.2001.

<sup>69</sup> Official Journal of the European Union, L 139/9, 29.5.2002.

<sup>70</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, UNTS, I-47938.

<sup>71</sup> Article 75 TFEU reads:

"Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph.

The acts referred to in this Article shall include necessary provisions on legal safeguards."

<sup>72</sup> The text of Article 75 TFEU is based on Article III-260 of the Constitutional Treaty. However, the provision of the Constitutional Treaty was part of the provisions concerning free movement of capital. The Lisbon Treaty moved the provision to the general provisions on the Area of Freedom, Security and Justice (AFSJ). Therefore, the possible opt-out of the UK from the whole AFSJ as well as the Danish opt-out are applicable to this provision.

responsibility to EU external persons or groups. The second legal basis is Article 215(2) TFEU<sup>73</sup>, under the 'External Action by the Union', which appears to be based on the former Article 301 TEC.

While the framework referred to in Article 75(1) TFEU is adopted following the ordinary legislative procedure (Commission tables the legislative proposal, co-decision between European Parliament and Council), measures under Article 215 TFEU are adopted by the Council after a joint proposal from the Commission and the High Representative and the European Parliament (EP) is only informed thereof. Consequently, the EP has now fewer powers than under the Nice Treaty as far as sanctions under Art. 215 TFEU are concerned.<sup>74</sup>

Since the entry into force of the Lisbon Treaty on 1 December 2009 there have been only few informal debates on the freezing of funds of persons suspected of terrorist activities inside the European Union and as well as on Article 75 TFEU. The majority of the Member States' experts held the position that the Commission should table a regulation on financial sanctions against 'EU internal suspects' based on Article 75 TFEU. Only few Member States (in particular UK) held a different view and supported the adoption of measures based on Article 74 TFEU<sup>75</sup>.

Currently the Commission is working on a 'Regulation on administrative measures with regard to capital movements and payments, by natural or legal persons, groups or non-State entities to fight terrorism within the EU' which was already expected to be presented in the first quarter of 2011. The initiative will address persons and entities active in the EU who should not be in a position to gain access to, move or collect funds for terrorist activities such as attacks, recruitment, training or propaganda for terrorist purposes. The initiative will supplement the Regulation 2580/2001 which covers terrorist activities outside the EU. The new Regulation would contribute to the adoption of one European list of persons/entities related to 'EU internal'<sup>76</sup> terrorism and by doing so it should

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<sup>73</sup> Article 215 TFEU reads:

"1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.  
2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards."

<sup>74</sup> See Reflection Paper of the European Commission, *Terrorism related asset freezing measures after the entry into force of the Lisbon Treaty*, Ref. Ares(2011)157264 - 11/02/2011, of 10 September 2010.

<sup>75</sup> Article 74 TFEU reads:

"The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Article 76, and after consulting the European Parliament".

<sup>76</sup> According to the European Commission an 'internal' measure applies "[i]f the predominant objective of the measure is put on the internal EU dimension, thus to prevent and combat terrorism to ensure a high level of security in the area of freedom, security and justice [...]." In that case Article 75 TFEU could be the appropriate legal basis. "In the contrary, if the sole or predominant aim of the measure is to serve as a matter of common foreign and security policy, like when it comes to implement UN Security Council designations, Art. 215 TFEU could be the correct legal basis", (Reflection Paper of the European Commission, p. 2-3).

help simplifying procedures<sup>77</sup>. The administrative burden for financial institutions and other institutions /professions offering financial services could be reduced given that there would be just one EU list to check.<sup>78</sup>

In both Articles 75 TFEU and 215 TFEU, an explicit request is made for the adoption of the necessary legal safeguards.<sup>79</sup> In this respect we also have to consider Declaration No. 25 ‘on Articles 75 and 215 of the Treaty on the Functioning of the European Union’<sup>80</sup>. The Intergovernmental Conference recalled “that the respect for fundamental rights and freedoms implies, in particular, that proper attention is given to the protection and observance of the due process rights of the individuals or entities concerned. For this purpose and in order to guarantee a thorough judicial review of decisions subjecting an individual or entity to restrictive measures, such decisions must be based on clear and distinct criteria. These criteria should be tailored to the specifics of each restrictive measure.”

The provisions on legal safeguards will be crucial for the ‘success’ of the new measure and should consider the legal findings of the ECJ in the *Kadi* cases. However, the application of the ordinary legislative procedure to the measures based on Article 75 TFEU may give rise to strong opposition of some Member States, who fear an ‘improper’ interference of the European Parliament in matters of internal or even national security, and may lead to difficult negotiations on the expected Regulation. It goes without saying that if the negotiations fail, the status quo – with all its deficiencies – would be maintained.

## VIII. Concluding Remarks

The listing process can have a dramatic impact on people’s lives. The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, affirmed in its report, ‘Assessing Damage, Urging Action’<sup>81</sup> that though the freezing of assets of those involved in terrorism “is clearly an acceptable and indeed necessary tactic in effectively combating terrorism,”<sup>82</sup> the listing system is “unworthy” of international institutions like the UN and EU. Also other institutions such as the Council of Europe

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<sup>77</sup> As the Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights says: “There is, inevitably, a considerable amount of overlap between listing at the national and international levels: international listings are drawn in part from national lists, and national authorities are required to add internationally listed names to their domestic lists. This overlapping of names means that organisations and individuals that appear on one list soon find themselves on a number of different lists, with an array of proscribed activities. With such overlapping, comes both the potential for increased error, and the difficulty of legal challenge, or correction.” (Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, (Geneva: International Commission of Jurists, 2009), p. 113, available at <http://ejp.icj.org/IMG/EJP-Report.pdf>.

<sup>78</sup> See the Roadmap of the European Commission, available at

[http://ec.europa.eu/governance/impact/planned\\_ia/docs/2011\\_home\\_002\\_asset\\_freezing\\_en.pdf](http://ec.europa.eu/governance/impact/planned_ia/docs/2011_home_002_asset_freezing_en.pdf).

<sup>79</sup> See Juan Santos Vara, *The External Dimension of the Area of Freedom, Security and Justice*, p. 8, available at [http://www.euce.org/eusa2009/papers/santos%20vara\\_03C.pdf](http://www.euce.org/eusa2009/papers/santos%20vara_03C.pdf).

<sup>80</sup> Official Journal of the European Union C 83/01, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*, 30.3.2010.

<sup>81</sup> Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, (Geneva: International Commission of Jurists, 2009), available at <http://ejp.icj.org/IMG/EJP-Report.pdf>.

<sup>82</sup> *Ibid.*, p. 113.

and the European Parliament have issued reports critical of the UN sanctions process for inadequate procedures for delisting.<sup>83</sup> The legal challenges brought against several UN and/or EU provisions undertaken against Al-Qaida and the financing of terrorism have clearly shown that the original provisions of the Al-Qaida sanctions regime were lacking of appropriate legal safeguards. As far as the EU is concerned the anti-terrorist sanctions cases have also shown that the ECJ has developed a greater willingness to review and to strike down EU law when it violates fundamental rights and to assert priority of fundamental rights over secondary legislation and even over international law.<sup>84</sup>

Despite the reforms of the Al-Qaida sanctions regime that have been undertaken both at UN as well as on EU level throughout the last decade (greater transparency through guidelines, listing and delisting mechanisms, review mechanisms, the establishment of a Focal Point and the 'Ombudsperson' etc.) there is still room to improve the procedures and legal safeguards. Some of the provisions that have been introduced to "strengthen" UNSCR 1267 (1999) may be too recent to be judged upon, others have already shown some effectiveness and again others may still be too weak to comply with international fundamental rights standards. Whereas the procedural changes to date are generally fairly good on addressing concerns about notification and improved accessibility<sup>85</sup>, the current delisting procedure, for example, seems still lacking of an effective remedy entailing elements of independence, impartiality and effectiveness.

At the same time we have to consider that the 1267 sanctions are counter-terrorism measures and their application usually involves classified information (up to 'secret' and 'top secret' level of classification) that cannot easily be shared with independent reviewers.<sup>86</sup> Any advisory mechanism should have clear and specific regulations in place to deal with classified information. General declarations may not suffice in this respect. Of course, listings should not be done purely on the basis of classified information in light of existing rights of targeted individuals to know the case against them and to have some insight into the evidence adduced against them.<sup>87</sup> The fairly recent introduction of an 'Ombudsperson' improves "compliance with the accessibility element of due process" as targeted individuals can have direct contact with the Ombudsperson. Still, the Office of the Ombudsperson "does not satisfy the element requiring an independent decision-maker because it is only empowered to give 'observations' and not empowered to make 'decisions'"<sup>88</sup>.

Apart from the lack of due process rights, enhanced implementation of targeted sanctions would be equally necessary. Implementation could be improved "by making better use of existing resources through cooperation with other multilateral and regional organizations and with the addition of some vital new resources, particularly to enhance the capacity of the Secretariat to better administer

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<sup>83</sup> See also Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"*, p. 10.

<sup>84</sup> See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 5th ed. (Oxford University Press, 2011), p. 378.

<sup>85</sup> Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"*, p. 22.

<sup>86</sup> See Watson Institute, *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report"*, p. 19.

<sup>87</sup> See *ibid.*, p. 20.

<sup>88</sup> Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, p. 745.

sanctions and to enhance the capacity of Member States to fully implement sanctions”<sup>89</sup>. In this respect, the UN has undertaken steps to increase cooperation between the Security Council and Interpol. The EU should try to enhance cooperation and information exchange between the Member States, the EU Intelligence Analysis Centre (EU IntCen) within the External Action Service (EEAS) and Europol. This could be even more important when the EU will establish two different sanctions regimes based on Articles 75 TFEU (included in the Area of Freedom, Security and Justice where also Europol’s [new] legal basis can be found) and 215 TFEU. An increased cooperation with all relevant international law enforcement actors would probably diminish the risk to target the ‘wrong ones’.

Despite the still existing shortcomings of the targeted sanctions system (and, of course, the broader question of strengthening the accountability of the United Nations) it cannot be denied that the UN (and the EU) have undertaken serious efforts, both, to improve the efficiency and effectiveness of the sanctions system as well as to establish fair and clear procedures. It goes without saying that countering the financing of terrorism is a core component of the UN and EU strategies in the fight against terrorism. As terrorists and their supporters constantly modify their ways to collect, move and gain access to funds, there is a need of a robust and efficient sanctions system. If the measures against international terrorism adopted by the UN, the EU and consequently the Member States shall be effective they must also comply with international human rights standards. Otherwise, in the long term, the efforts could be vane.

*Antonio-Maria Martino*

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<sup>89</sup> Erica Cosgrove, *Recent Challenges to Implementation of Targeted Sanctions (2003-2008): From Smart Targeting to Effective Implementation*, p. 19, available at [http://humansecuritygateway.com/documents/ISA\\_challengestargetedsanctions.pdf](http://humansecuritygateway.com/documents/ISA_challengestargetedsanctions.pdf).