

# Overdue Process

## Protecting Human Rights while Sanctioning Alleged Terrorists



A report to Cordaid from the  
Fourth Freedom Forum  
and Kroc Institute  
for International Peace Studies  
at the University of Notre Dame

*George A. Lopez, David Cortright,  
Alistair Millar, and Linda Gerber-Stellingwerf*

**APRIL 2009**



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## Acronyms

CSOs	civil society organizations
CTMs	counterterrorism measures
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
NGO	non-governmental organization
OLA	United Nations Office of Legal Affairs
OSCE	Organization for Security and Co-operation in Europe
P5	permanent five members of the Security Council

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### The Problem

Practices used by the United Nations Security Council (the “Council”) in the name of countering terrorism have led to serious concerns about violations of human rights and limitations on the work of civil society groups. The use of blacklisting has eroded due process rights and discredited elements of the international fight against terrorism. Enhanced efforts to create clear and fair listing procedures are urgently needed and long overdue.

With the adoption of Security Council resolutions 1267, 1373, and related resolutions, the Council has required states to impose an assets freeze and other restrictive measures on individuals or entities associated with al-Qaida, Osama bin Laden, and/or the Taliban, as designated by the Al-Qaida and Taliban Sanctions Committee (hereafter the “1267 Committee”) which maintains a list of such individuals and entities (the “Consolidated List”). In addition to the UN regime, some states and the European Union (EU) have established their own practices for designating individuals or entities.<sup>1</sup> National lists are often developed through joint intelligence operations with powerful Western states, especially the United States and Great Britain. The decision to place an individual or entity on a list denies basic rights to liberty and property and has serious legal consequences. Whether initiated by the UN, the EU, or national authorities, terrorist listing procedures have faced intense scrutiny and criticism for the lack of due process protections before, during, or after the listing of those named.

The reach of these listing mechanisms—and the threat of being listed—has placed civil society organizations in a continuing position of vulnerability, with some governments considering CSOs foe rather than friend. These effects are particularly severe for those working in conflict zones and within societies with repressive governments. Organizations engaged in economic development, humanitarian assistance, and conflict transformation efforts have encountered difficulties working with certain communities and local partners because of blacklisting policies. In some cases these difficulties may impede the ability of CSOs to engage in social welfare programs and conflict resolution efforts, which are important counterterrorism measures in their own right. Blacklisting restrictions have made it more difficult in some cases to engage with armed actors and negotiate peace settlements. Civil society organizations that support development and mediation efforts in these settings face operational restrictions. These realities have caused aid and philanthropic organizations in the United States, Canada, and Europe to become risk averse and exercise a caution that has led in some circumstances to a decline in financial support for development and peace dialogue activities.

Current mechanisms for listing/de-listing are flawed. The procedures for placing individuals and entities on the sanctions list and for removing them do not respect internationally recognized human rights. Security Council procedural improvements now require a statement of case and narrative summary of the reasons for listing, but the information upon which a listing decision is made cannot be examined or challenged in a judicial proceeding. The Eminent Jurists Panel of the International Commission of Jurists received “virtually uniform criticism” of this system, which is deemed “arbitrary” and discriminatory by numerous nations and international agencies. It is a system, said the Panel, “unworthy” of international institutions such as the United Nations and the European Union.<sup>2</sup> In response to such concerns the UN General Assembly declared in the 2005 World Summit Outcome document that the Security Council and the Secretary-General should “ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”<sup>3</sup>

The year 2008 witnessed a series of foundational challenges and fault lines in the system. These were played out in political and legal form at the Security Council and on regional and national levels. A coalition of like-minded European states, emphasizing the human rights dilemmas inherent in listing/de-listing, urged the Council to consider a system of independent judicial review of listing/de-listing decisions.<sup>4</sup> The European Court of Justice (ECJ) ruled in the *Kadi* case that the Council's refusal to abide by certain rights and processes guaranteed in the EU system voided the obligation of European states to implement targeted sanctions in this case. The Council of the European Union issued a ruling reinstating the measures in the *Kadi* case, but this action merely delayed the prospect of a full-scale crisis in European implementation of listing/de-listing counterterrorism measures (CTMs).<sup>5</sup> The fundamental flaws and contradictions in the system remain.

The Security Council has expressed its commitment to improving listing procedures, and has taken steps in this direction with the adoption of Resolutions 1730 (2006), 1735 (2006), and 1822 (2008). These improvements and the current status of the Consolidated List are reviewed in Appendix A. Resolution 1822 introduced stronger review mechanisms of listings, enhanced procedures to help ensure that listed individuals and entities are notified of the action taken against them, and mandated public release of statements and narrative summaries of reasons for listing.<sup>6</sup> The resolution also directed the 1267 Committee to undertake a review of all names on the Consolidated List by 30 June 2010 and to review each entry again every three years, "to ensure the Consolidated List is as updated and accurate as possible and to confirm that listing remains appropriate."<sup>7</sup>

Despite these modest improvements in listing/de-listing mechanisms, Security Council procedures still do not meet fundamental human rights standards, which include the right to judicial review, the right to procedural fairness, the right to be heard, and the right to judicial remedy. These rights form the very basis of due process of law and are guaranteed by leading international legal agreements, including the Universal Declaration of Human Rights, the United Nations Covenant on Civil and Political Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Charter on Human and Peoples' Rights.<sup>8</sup>

The lack of human rights protections in Security Council listing/de-listing procedures has prompted legal challenges in regional and national courts. Most of the court cases have been brought by individuals who were added to the list in the weeks immediately after the 9/11 attacks in the United States, when the 1267 Committee hastily added more than 250 names to the list, mostly at the behest of the U.S. government.<sup>9</sup> The legal challenges have not questioned the Council's authority to impose sanctions, but they have complicated implementation efforts, generating concerns about the legitimacy of targeted sanctions and the effectiveness of the tool. Although the challenges have focused on the al-Qaida/Taliban sanctions regime, the controversy over due process rights could impede the implementation of sanctions in other cases as well.

The inadequacies of the listing regime and the resulting controversies and actions of the last few years have led to numerous reports and proposals for remedying the flaws of the current targeted sanctions regime. Some of these reports are reviewed in Appendix B. Many concrete suggestions have been developed by governments and independent analysts for fulfilling the requirements of international human rights law and assuring full due process rights in listing/de-listing procedures. However, most of the proposals for meeting legal standards have been dismissed as politically infeasible by the permanent members of the Security Council (P5), while proposals that may gain support from the P5 contain most of the same shortcomings on due process rights that led to the ECJ ruling last year. The impasse results from fundamental differences between permanent members of the Council and many member states regarding the listing enterprise. The permanent members consider this an administrative and preventive political act, beyond judicial review, aimed at constraining potential terrorist actions. Member states consider that all Council actions to preserve peace and security, including listing for counterterrorism purposes, should be consistent with the highest standards of international law, especially human rights.

This paper begins by highlighting the importance of providing due process and respecting other fundamental human rights when countering terrorism. It then offers some background on Security Council procedures for listing/de-listing as well as



efforts by the Council to review and improve current procedures. An overview of the key legal challenges in Europe precedes a concluding section focused on determining choices and possible solutions going forward. Finally, a set of recommendations is offered for CSOs to consider in their efforts to support and sustain human rights as priority rather than postscript for measures to enhance security.

### **Security and the Rule of Law**

Support for human rights principles is essential for sustaining political support for the fight against terrorism in democratic societies. Nothing undermines support for antiterrorism measures more than the perception that such programs are eroding basic 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 legal 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>10</sup> UN 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>11</sup>

At its ministerial meeting in January 2003 the Security Council adopted Resolution 1456 urging greater international compliance with UN 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>12</sup>

The UN Global Counter-Terrorism Strategy, adopted unanimously by the General Assembly in 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>13</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 Need for Due Process**

Targeted economic sanctions are widely accepted as appropriate means of countering terrorism. The Eminent Jurists Panel acknowledged in its recent report, *Assessing Damage, Urging Action*, that freezing the assets of those involved in terrorism is “clearly an acceptable, and indeed necessary, tactic in effectively combating terrorism.”<sup>14</sup> Acceptance of this policy, however, depends upon confidence in the basic fairness of the sanctions process and listing/de-listing procedures. Targeted sanctions such as travel restrictions and the freezing of assets have substantial impacts on the freedom and property rights of those subjected to such measures. Some contend that sanctions are temporary administrative measures, but the denial of financial assets and the indefinite duration of the 1267 sanctions constitute punitive actions that entitle those affected to legal and human rights protections. The absence of such standards undermines the political legitimacy and support that are necessary for effective implementation of counterterrorism sanctions. The major powers remain fully committed to the 1267 regime, but

criticisms of blacklisting procedures have eroded political support in some European states. As the May 2008 report of the monitoring team observed, problems associated with the lack of due process in listing/de-listing procedures pose challenges that can “seriously undermine implementation.”<sup>15</sup> Unless these “defects” are remedied, “the sanctions regime will continue to fade.”<sup>16</sup>

The current system lacks transparency regarding which state took action to proscribe a particular individual or organization and why a listing action was taken. The U.S. and the UK have been responsible for adding many of the names that are on the Consolidated List, but the burden of dealing with de-listing problems rests with the UN and the 1267 Committee. UN officials are handicapped in responding to de-listing requests, however, because designating states are unwilling to share all the information used to make a listing determination and in any case the decision to remove a name must be approved by the members of the committee.

In some cases an organization may remain on a blacklist even after it has been exonerated of criminal wrongdoing. A case in point is the Palestinian Relief and Development Fund, Interpal, an officially registered charity in the UK. The United States listed the organization in 2003 as a “specially designated global terrorist” entity and froze its financial assets. The UK Charity Commission conducted a thorough investigation at the time and cleared the organization of any wrongdoing, although Interpal remained on the U.S. list. The Charity Commission had examined similar charges against Interpal in 1996 and found them without merit. Interpal faced renewed charges of supporting terrorism in 2006, and once again the Charity Commission investigated and “could not verify” the claims. The commission’s February 2009 ruling found “insufficient evidential value” to support the allegation that “certain local partners funded by the charity may be promoting terrorist ideology or activities.” It said that the charity did “maintain clear financial audit trails in their delivery of aid for humanitarian purposes,” although the commission ordered Interpal to change some of its operations to avoid inadvertent indirect support for terrorist organizations in the future.<sup>17</sup> As part of its investigations the Charity Commission asked U.S. officials to provide evidence supporting the decision to list the organization as a supporter of terrorism, but authorities in Washington failed to do so. This was the third time the organization was investigated and exonerated of terrorism-related charges in the UK, yet it remains on the U.S. terrorist list.<sup>18</sup>

At times the decisions of national courts and law enforcement agencies are disregarded in listing decisions. This was the case with Mr. Yassin Abdullah Kadi, who has filed the most high profile legal challenge to the EU listing regime (see the *Kadi* case descriptions below). The Saudi businessman and benefactor was sued in Swiss courts by American victims of the 9/11 attacks for allegedly helping to finance the terrorist operation. Swiss law enforcement officials conducted an extensive investigation and found no evidence of criminal wrongdoing. The Swiss attorney general dropped charges in the case, and in December 2005 a Swiss court formally cleared Kadi of any links to the 9/11 terrorist attacks. Despite the judgment of the Swiss court, Kadi has remained on the UN and EU terrorist list and has spent the better part of the past decade fighting in court to clear his name.<sup>19</sup>

The crisis over due process rights involves both listing and de-listing. The two processes are linked, of course, but each has distinct features. Current procedures for designating names on sanctions lists lack guarantees of basic legal rights. Until 2005 individuals and entities placed on Security Council lists were not even notified and often learned about their designation only when they attempted to travel or access funds. The improvements adopted in recent years now provide minimal notification rights, but the options for judicial review are limited and exist only at the national level and in the case of Europe at the regional level.

The ability to seek removal from a blacklist in the event of wrongdoing or mistaken judgment is crucial to the exercise of basic legal rights. In the current system, the process can be a nightmarish experience of failure and frustration. As the *Economist* magazine noted recently, it is easy to get on the UN list but very difficult to get off.<sup>20</sup> In 2008, the 1267 Committee added thirty-two entries to the list, but removed only three names (out of a total of more than 500 names), including one who was

deceased.<sup>21</sup> Any UN member state can submit a name to be added to the list, which is accepted unless a member of the Security Council objects. Removal from the list, on the other hand, requires unanimous consent, which gives any Security Council member the ability to block such action. The burden of proof lays with the petitioner, who must convince those who previously rendered a guilty judgment to accept a plea of innocence—a particularly onerous task when the petitioner has no access to the information that led to inclusion on the list in the first place.

In 2006, the Security Council established a “focal point” within the UN Secretariat responsible for processing submissions by listed persons requesting the lifting of sanctions. This change followed recommendations from the monitoring team as well as proposals from several countries including France. As legal scholar Christopher Michaelsen has noted, the focal point provides a mechanism for affected persons to submit petitions directly and independently of diplomatic protection through their governments, but it does not give them the right to participate or be heard in the review process. The focal point does not constitute an independent review mechanism. The 1267 Committee is not obligated to grant a de-listing request even if specific conditions are met.<sup>22</sup> The decision to de-list remains a political choice requiring the consent of the members of the committee.

The creation of the focal point has had little impact on due process rights. Since the focal point became operative in March 2007, the Committee has received a mere thirty-six de-listing requests (as of 2 April 2009). It appears that eight individuals and twelve associated entities have been de-listed through the focal point process.<sup>23</sup>

### **Legal Challenges in Europe**

In recent years individuals placed on the Consolidated List have questioned the evidentiary basis for being placed on the list and, failing to receive adequate responses to such query, have sought redress in the courts of several nations, especially within the EU system. As of May 2008, the number of past and present legal challenges to the al-Qaida/Taliban sanctions numbered twenty-six, with more legal applications likely to be lodged in the future.<sup>24</sup>

The EU maintains two separate categories of counterterrorism sanctions, internal and external. As Oldrich Bures and other scholars have noted, this has created structural complexity and challenges for implementation.<sup>25</sup> For the first group of designated persons or organizations (EU internal), the EU Council merely calls upon member states to enhance their cooperation in order to prevent terrorist acts. The actual freezing of assets has to follow national rules in individual EU member states. For the second group (EU external), EU Council regulations require the European Community itself to execute the freezing of terrorist assets. As of July 2008, the EU internal list contained forty-six individuals and forty-eight organizations, compared to approximately 500 names on the external list, which duplicates the Consolidated List. EU internal procedures accord greater due process rights to those affected, including a review and renewal of names every six months, while those on the EU external sanctions list have fewer legal protections. The lack of due process rights for those affected by sanctions has been the principal source of political and legal difficulty and has prompted challenges in court from those seeking removal from the Consolidated List.

The most far-reaching case has been that of *Kadi and Al Barakaat International Foundation*, first filed before the European Court of First Instance in December 2001.<sup>26</sup> In their claim the plaintiffs charged that European implementation of the sanctions violated their right to use property, the right to a fair hearing, and the right to seek effective judicial remedy. In September 2008, the ECJ issued a landmark ruling in favor of *Kadi and Al Barakaat*, in which it effectively annulled the 2002 European Council regulation imposing restrictive measures on the appellants. The Court also ruled that due process rights embodied in the European Court of Human Rights (ECHR) take precedence over other international obligations, including acts of the Security Council. Counterterrorism expert Jonathan Winer described the judgment as a “devastating blow” to the present system for imposing financial sanctions against terrorist groups.<sup>27</sup> The effect of the decision has been to generate additional pressure on European states and the international system to strengthen due process rights in listing/de-listing procedures.

The ECJ ruling declared that the due process and property rights in the case of *Kadi and Al Barakaat* had been violated: “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>28</sup> The ECJ decided that the earlier regulation did not provide a procedure for hearing the complaints of listed individuals and the European Community was required to communicate the basis for listing to listed individuals.<sup>29</sup> The ruling underscored the ECJ’s adherence to the basic due process standards of (a) adequate communication/notification of the listing decision, and (b) the right to pursue a legal remedy via independent review.<sup>30</sup> The ECJ qualified its interpretation of the right of notification by acknowledging that prior communication of the grounds for listing would jeopardize the effectiveness of a financial assets freeze. The ECJ stated that notification could take place either when the measure is decided or as swiftly as possible after the decision, so that the affected parties could exercise the right to seek redress.

The ECJ delayed the implementation of the annulment resolution for three months to give the Council of the European Union time to respond to the ECJ’s concerns and to avoid serious and irreparable harm to the effectiveness of the overall sanctions regime. The three-month delay also was an acknowledgement that the justification for listing the plaintiffs could prove valid after all.<sup>31</sup> At the request of the EU, the 1267 Committee then submitted narrative summaries explaining the justification for listing both *Kadi* and *Al Barakaat*, to which both appellants then responded with written comments. The European Commission “carefully considered” both sides’ narratives and issued a Commission regulation on 28 November 2008 declaring that both listings were justified.<sup>32</sup> In February 2009, *Kadi and Al Barakaat* brought new annulment actions against the new implementing regulation before the European Court of First Instance, which the Court is likely to take up shortly.

If the European courts decide to look into the evidence behind the reasons for the listing provided by the 1267 Committee, this will create additional problems. As the committee’s monitoring team noted in its most recent report, there are “limits to the ability of the Committee to reveal the reasons behind its decisions, even to a reviewing body, when these are based on intelligence or law enforcement information which belongs to a particular State.”<sup>33</sup> A decision to annul the sanctions by the ECJ has the potential of bringing members of the EU into a situation where they will have to choose between implementing a Security Council decision and following an ECJ decision. Although such a decision would only affect the implementation of the sanctions in the case of *Kadi and Al Barakaat*, its deleterious impact could be far greater if states become more reluctant to submit names for listing out of concern that this might lead to legal problems at the domestic level.

### Choices and Solutions

In its *Kadi* ruling of September 2008 the ECJ established essential legal conditions that must be met for listing procedures to fulfill the requirements of European due process and human rights law. As noted, these conditions are: notification of the actions taken, and the right to be heard in an independent judicial review. To these conditions must be added the right of an accused to examine and challenge the information upon which charges and punitive actions are based. These requirements constitute key elements of what the UN General Assembly and other bodies have described as “clear and fair procedures.” They are necessary components of a universal standard for guaranteeing basic legal rights.

The Eminent Jurists Panel defined a set of international legal principles that should apply to listing/de-listing procedures and to all policies related to counterterrorism and human rights:

- The criteria leading to 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>34</sup>

These conditions and principles together define what could be considered the gold standard for due process rights. They constitute ideals to which public policy should aspire.

A number of proposals for remedying the crisis of blacklisting have been offered in recent years. Some have emerged in the studies and reports summarized in Appendix B; some from interviews with members of the diplomatic, legal, and expert communities; and others from recent conferences and consultations.

Before considering discrete advocacy options, it is important to evaluate the political climate in which any of the proposals will be considered. Two contradictory trends are evident. On the one hand, the momentum created by European court rulings and the actions of like-minded states have started to turn the tide toward new respect for due process rights, although actual modifications have been modest so far. On the other hand, the P5 and other states so far have shown no signs of being willing to consider more substantive structural changes to fix the fundamental flaws in the UN system.

The crux of the dilemma is this: The P5 and other Security Council members believe that the sanctions regime represents an essential tool for the prevention of terrorist acts and they insist on holding adamantly to the centrality of the 1267 regime as an essential element of the struggle against global terrorism. However, the fallibility of the 1267 system and its Consolidated List has undermined support for the UN counterterrorism mandate. Notwithstanding the improvements that have been made to the system, the listing/de-listing mechanism continues to raise serious concerns in relation to internationally recognized requirements of due process.

The discourse on appropriate review mechanisms of the listing/de-listing procedure thus appears to be trapped in a quandary. Proposals that would fulfill the due process requirements of international human rights law are politically infeasible, whereas proposals that may gain support from the Council contain shortcomings as far as internationally guaranteed due process rights are concerned. Overcoming these dilemmas will require the involvement of additional states, especially from the global South, and greater efforts to enhance due process and human rights protections.

The strategy for achieving greater due process rights involves three parallel paths—legal challenges, advocacy of structural change, and lobbying for incremental improvements.

The first approach, already underway and bound to continue, is the pursuit of additional challenges in national and regional courts, especially in Europe, to uphold international human rights standards in listing/de-listing procedures. A second approach involves advocacy for fundamental changes in the current system, especially the creation of a mechanism to guarantee the right of judicial review. A third path is the pursuit of incremental reform, building on the momentum created by Resolution 1822, to continue the current process of gradually expanding legal rights and improving procedures so that the resulting system, while not adhering fully to international legal standards, is less arbitrary and able to provide at least some basic rights of notification and appeal.<sup>35</sup>

Legal challenges are continuing in the courts of several nations and in the European Union. The *Kadi* case is the most closely watched, and its outcome is likely to have the greatest political and legal significance for the overall listing/de-listing system. If European courts rule in favor of *Kadi* and European implementation of the sanctions is annulled again, the fundamental challenges posed by the previous ruling will return and probably intensify.

## ***Review mechanisms, binding and advisory***

Several options have been proposed for the creation of effective review mechanisms.<sup>36</sup> In general, the proposals fall into two categories: a binding arbitral panel that would operate independently of the Security Council, or a more advisory review mechanism that would be created by and function under the authority of the Council.

An independent arbitral panel would fulfill the requirements of effective judicial review as required by international human rights law, but it faces insurmountable political and legal obstacles. It is “difficult to imagine,” said the monitoring team, “that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security.”<sup>37</sup> Under no circumstances will the Council agree to a panel that has more than merely an advisory role. Nor will the Council agree to a review panel over which it does not have authority to select and approve members.

Among the many challenges a review panel would face is the problem of using classified data and information drawn from sensitive intelligence sources. As the monitoring team noted, information based on intelligence and confidential exchanges among law-enforcement officials “could not easily be made available to reviewers.”<sup>38</sup> The protection of sensitive sources and intelligence information is a legitimate state interest to which courts traditionally have deferred.

Legal mechanisms are available for protecting sensitive information and intelligence sources while enabling plaintiffs to exercise due process rights. Options include the use of closed court proceedings and vetted or security-cleared counsel. The latter option was emphasized by Martin Scheinin, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, in his 2006 report to the General Assembly. His report recommended that “consideration should be given to means through which a listed entity can still challenge the evidence against it” when sensitive information is involved.<sup>39</sup> Any use of special evidentiary procedures should be on a limited basis and should not set a precedent for creating parallel legal justice systems for terrorism-related cases. Because of the Security Council’s firm opposition to any type of formal legal review, even the most carefully structured system for protecting sensitive information would have little chance of being implemented.

Proposals for more informal and advisory review mechanisms have a slightly better chance of success, although these too are opposed by many members of the Council. Nonetheless, it may be possible to gain support for the establishment of an ombudsman office, or the creation of an advisory review panel under the authority of the Council.<sup>40</sup>

In 2006, Denmark proposed that the 1267 Committee establish an ombudsman mechanism, which could accept petitions directly from listed parties claiming to be unjustly listed and seeking de-listing. The ombudsman office would have the authority to consider petitions, as well as to raise issues on its own initiative, and to make recommendations for action to the committee, which would be free to endorse or disregard the recommendation.<sup>41</sup> The ombudsman’s decisions would not be binding on the 1267 Committee. Procedurally, the ombudsman would be accessible by listed individuals, but there would not be a formal hearing, nor would the ombudsman have access to non-redacted statements of the case for listing. This ombudsman proposal did not win formal approval from the Security Council, but some features of the concept were incorporated into the focal point mechanism established by Resolution 1730.

In 2008, the group of like-minded reform-oriented European states put forward a proposal, inspired by the example of World Bank inspection panels, to establish an advisory review panel of three to five independent, impartial, and judicially qualified persons to review listing decisions. The panel would be governed by “general principles of international law concerning fair procedure” and would include eminent persons with experience in handling confidential information.<sup>42</sup> The review panel members would be appointed by the Security Council upon nomination by the Secretary-General and would review de-listing requests and render opinions within a certain timeframe, i.e. three months.<sup>43</sup> Decision-making authority would rest with the 1267 Committee.<sup>44</sup>



The like-minded states presented their proposal during a meeting of the Security Council in May 2008, but no decision was taken. Members of the Council have been reluctant to consider any option or mechanism that would dilute their absolute and inviolable decision-making authority. The like-minded states are reaching out to other countries as they work to refine their proposals in the hope of garnering future consideration from the Council of an independent review mechanism.

Proposals for limited review mechanisms such as an ombudsman office or an advisory panel have encountered problems on both sides of the argument—rejected by the Security Council as an unacceptable intrusion on its decision-making authority, but also criticized by independent analysts and human rights groups as unlikely to fulfil the requirements of effective due process. Amnesty International wrote an open letter in June 2008 criticizing the proposal of the like-minded states for not going far enough in meeting “minimum guarantees of fairness and transparency.”<sup>45</sup> Neither the proposed ombudsman nor an advisory review panel would have the power to grant effective relief. Neither would satisfy the requirements for effective judicial review established in the ECJ decision in the *Kadi* case.

### ***Incremental change***

The option of pursuing incremental change offers the greatest possibility for achieving concrete improvements in listing/delisting procedures. This scenario recognizes that the Security Council listing system is on an evolutionary path toward modestly improved due process procedures. The incremental approach acknowledges that the Council has entered a period of system response and adjustment. After an initial period in which listing decisions were made hastily and with little regard for human rights, the Security Council has adopted an approach of greater responsibility and sensitivity to due process rights. Under these circumstances, and with a more human rights-oriented government in the United States, the most effective strategy may be to apply continuous pressure for the system to adapt further, and to mount additional efforts to move the reform process forward.

The near-term focus of incremental reform efforts involves working with Security Council members to develop a new resolution that builds upon the changes established in Resolution 1822. The opportunity to make such changes may emerge when the mandate for the monitoring team comes up for renewal in December 2009. Specific proposals should be developed to expand the notification procedures established in Resolution 1822 and previous resolutions. Options also should be offered for expediting the comprehensive review of the Consolidated List and for subjecting the 1267 Committee’s internal review to an independent outside evaluation that includes an assessment of due process considerations.

Enhancing the focal point mechanism offers another option for building upon current mechanisms. Proposals should be developed for making the office more robust and visible so that a greater number of those listed could have their cases reassessed.

### **Toward Effective Action and Advocacy by CSOs**

Consistent with the human rights agenda they have enthusiastically championed, CSOs must continue to articulate how, why, and where the existing sanctions regime has tended to sacrifice rights to security and intelligence concerns. In so doing, CSOs both reinforce and draw strength from the growing body of independent assessments that show how listing CTMs have been counterproductive and that offer concrete suggestions for improvement. The Eminent Jurists Panel stated the task clearly, “it is vital that governments and the international community now engage in a stock-taking process designed to ensure that respect for human rights and the rule of law is integrated into every aspect of counter-terrorism work.”<sup>46</sup>

CSOs should take encouragement from the fact that political consciousness has changed slowly but considerably in their favor in recent years. The tide is gradually turning, with greater public recognition of the need for enhanced due process rights.

This is reflected in the centrality of human rights in the counterterrorism strategy adopted by the General Assembly in 2006, in the increased commitment to transparency and procedural rights embodied in Resolution 1822 and other recent Security Council resolutions, and in the bold affirmation of judicial rights established by the ECJ in the *Kadi* ruling. Many challenges and obstacles lie ahead, however, and action is needed at the UN level, regionally, and with national governments to pursue greater due process rights.

To address these challenges CSOs should coordinate with other stakeholders to intensify efforts for achieving greater due process rights by pursuing three approaches: legal challenges, advocacy of structural change, and lobbying.

### ***Pursue More Legal Challenges***

- Press national and regional courts to review and hear more cases pertaining to names and entities listed within their jurisdiction.
- Convene the appropriate legal and political actors in the European arena who can both interpret and influence the ongoing evolution of a regional framework for dealing with listing/de-listing. Identify “best of best practices” that can be highlighted as potential models for states and international organizations. Highlight examples of due process practices that have met the requirements of international human rights law.
- Engage civil society actors in the legal community to articulate alternative means of establishing protective and preventive security from terrorism without resort to measures that lack due process and the right of appeal.

### ***Support Advocacy for Structural Change***

- Empower the like-minded reform oriented states at the UN with as much case data as possible regarding the dysfunctions of the current regime and the need to establish some form of judicial review mechanism.
- Support efforts to engage additional national governments, especially in the global South, in a broader international effort to strengthen due process rights in listing/de-listing procedures.

### ***Lobby***

- Raise awareness among relevant national, regional, and UN stakeholders about negative impacts of blacklisting on CSOs that support development and mediation efforts. Explain how the lack of due process on listing/de-listing has caused some aid and philanthropic organizations in the United States, Canada, and Europe to become risk averse and more reluctant to support development and peace dialogue activities.
- Lobby for the effective implementation of Resolution 1822, especially regarding the review and “cleaning” of the Consolidated List. Articulate what a subsequent resolution should achieve in light of the structural realities of the Security Council as noted above.
- Work with human rights NGOs to conduct independent assessments of developments in listing/de-listing practices, with special reference to court cases. Conduct an independent review of the comprehensive review of the Consolidated List mandated in Resolution 1822.



## Appendix A<sup>†</sup>

### **The al-Qaida/Taliban Consolidated Sanctions List: Status, Rights, and Procedural Improvements**

On 15 October 1999 the Security Council adopted Resolution 1267 which requires all states to: freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale and transfer of arms and military equipment, or to provide advice related to arms use to any individual or entity associated with al-Qaida, Osama bin Laden, and/or the Taliban as designated by the 1267 Committee. This sanctions regime has since been modified and strengthened by subsequent resolutions.<sup>47</sup> In addition to overseeing the implementation of Resolution 1267 and subsequent resolutions, the 1267 Committee also maintains the Consolidated List of individuals and entities with respect to al-Qaida, Osama bin Laden, the Taliban, and other individuals, groups, undertakings, and entities associated with them. States may request the committee to add names to this list and the committee also considers submissions by states to delete names. Consistent with the practice of other Security Council committees, the Chairman of the 1267 Committee submits annual reports to the President of the Security Council.

As of 13 March 2009, 507 individuals or entities appear on the Consolidated List, which consists of the following four sections:

- (a) Individuals associated with the Taliban (142 individuals)
- (b) Entities and other groups and undertakings associated with the Taliban (none)
- (c) Individuals of the al-Qaida organization (247 individuals)
- (d) Entities and other groups and undertakings associated with al-Qaida (118 entities).

An estimated 400 individuals comprise those listed under other UN sanctions committees, with nearly 75 percent of these on the Iraq (Resolution 1518) list. The general understanding was that such a listing decision would be reversed (and thus travel rights restored, assets unfrozen, etc.) when the sanctions were lifted by the Council in a subsequent resolution, or via special appeal. For example, by late 2008, twenty-seven of thirty individuals placed on the Sierra Leone list (Resolution 1132) had been de-listed by appeal of the president of that nation.

Throughout the first years of operation of the 1267 sanctions regime, targeted individuals or entities were not informed of being listed. In November 2002, the 1267 Committee adopted guidelines for inclusion in and removal from the list. These guidelines provided, in the words of legal scholar Gabriele Porretto, “that submission of names should, to the extent possible, include a statement of the basis for the designation, generally focusing on the connection between the individual and al-Qaida, the Taliban, or Osama bin Laden, together with identifying information for use by the national authorities who must implement the sanctions.” In late 2002, the Security Council adopted Resolution 1452 (2002), “which provided for a number of derogations from, and exceptions to, the freezing of funds and economic resources imposed by its previous resolutions. Such derogations and exceptions were to be decided by member states on ‘humanitarian grounds’ and with the Sanctions Committee’s consent.”<sup>48</sup> The guidelines were subsequently updated in April 2003, December 2005, November 2006, and February 2007.

<sup>†</sup>. Legal scholar Christopher Michaelsen provided the bulk of the background information for Appendices A and B.

The UN Secretariat circulated to the committee in March 2007 a list of 115 names that had not been updated in four or more years. Very few were selected for review, however, and the review ended without any changes to the list.<sup>49</sup>

As observed by Bardo Fassbender, member states are required to comply with Security Council counterterrorism resolutions, and they can offer listed individuals and entities only limited possibilities to “challenge a listing before a national court or tribunal.”<sup>50</sup> The obligations of member states are stipulated by Articles 25, 103, and 105 of the UN Charter. Article 25 obliges member states to comply with Chapter VII resolutions by the Security Council (like Resolution 1267 and subsequent resolutions).<sup>51</sup> Article 103 clarifies that obligations under the UN Charter—including binding obligations under Article 25—prevail over “any other international agreement” unless obligations contained therein constitute general principles of international law.<sup>52</sup> This also includes national law implementing international obligations under international human rights treaties such as the International Covenant on Civil and Political Rights or the European Convention on Human Rights. In addition, even in the event that recourse to national courts is available, the UN “enjoys absolute immunity from every form of [domestic] legal proceedings,” as stipulated by Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations, and other agreements.<sup>53</sup>

In response to mounting public criticisms and the concerted lobbying efforts of the group of European like-minded states, the Security Council has adopted a number of resolutions and procedural measures to improve due process rights and address shortcomings in the listing/de-listing system. As concerns about listing/de-listing have mounted, the Council has devoted an ever increasing amount of time and effort to addressing these issues. Several of the resolutions identified below contain a greater number of operative paragraphs relating to listing procedures than to the substance of the actual sanctions measures. Of the thirty-four paragraphs in Resolution 1822, for example, eight deal with sanctions measures, while eighteen address various listing and de-listing issues.

The following is a brief summary of the major procedural changes instituted by the Council since 2005:

Security Council Resolution 1617 (2005) specified that UN member states must henceforth provide to the committee a statement of case when submitting names for the Consolidated List. The resolution requested but did not demand that, when possible, states should provide written notice to individuals or entities of the measures imposed on them and of the available listing/de-listing procedures.<sup>54</sup>

Resolution 1730 (2006) established a focal point within the Secretariat’s Subsidiary Organs Branch to handle de-listing requests according to the procedures outlined in an attached annex. The short three-point resolution defined the purpose of the focal point as facilitating requests for de-listing. It was tasked with ensuring that requests are considered and submitted in a timely manner and with managing all communications between member states, sanctions committees, and petitioners.<sup>55</sup>

Resolution 1735 (2006) established detailed specifications for the kind of information states must provide when submitting a name to be added to the Consolidated List, including identifying information, the basis for listing, and a narrative statement of case. It also asked states to specify information that can be released for notification purposes and that can be provided to other states upon request. The resolution required that the Secretariat notify the permanent mission of the country of origin and/or residence of newly listed individuals within two weeks of the listing. The notification must include the releasable public information in the statement of case and explain the committee’s procedures for considering de-listing requests.

Resolution 1735 was the first measure to require notification of those listed. It also was the first to establish formal de-listing criteria. The resolution specified the factors the 1267 Committee may consider when determining whether to remove names from the Consolidated List, including mistaken identity, whether an individual or entity no longer meets the listing criteria, and if the individual is deceased or has severed all association with al-Qaida, the Taliban, and/or Osama bin Laden.<sup>56</sup>

Resolution 1822 (2008) contained extensive procedural improvements. It has been referred to as the “mother of all listing resolutions.” Its provisions have been replicated in other targeted sanctions resolutions, including in the cases of Somalia, Resolution 1844 (2008), and the Democratic Republic of Congo, Resolution 1857 (2008). Resolution 1822 specified the kind of information that states must provide for release to the public and as notification to the affected individual or entity. These requirements were made mandatory. The resolution also directed the 1267 Committee to post this information and the statements of the case for listing on the committee’s website. The resolution reduced the time frame for the Secretariat to notify member states from two weeks to one week and demanded that states receiving notification take all possible steps to notify the listed individuals or entities in a timely manner. Resolution 1822 also urged states to review de-listing petitions and respond to the committee with their indication of support or opposition to such petitions in a timely manner.

Resolution 1822 directed the 1267 Committee to conduct a review of all names on the Consolidated List by 30 June 2010, and thereafter directed the committee to conduct an annual review of all names not reviewed in three or more years.<sup>57</sup> After several months of preparation to establish standards and procedures for the review, the committee began the comprehensive review process in the first quarter of 2009. To assist with the review process, states were requested to submit continually updated information in order to ensure the accuracy of the list. The committee was also requested to conduct a yearly review of the names of the deceased to ensure accuracy and to confirm that the listing remains appropriate.

## Appendix B

### Reports and Studies on Due Process Rights in Listing/De-listing

In March 2006, the Watson Institute for International Studies at Brown University published a 58-page report entitled “Strengthening Targeted Sanctions through Fair and Clear Procedures.”<sup>58</sup> The study, which had been commissioned by the Governments of Germany, Sweden, and Switzerland, contained a detailed analysis of the human rights concerns in the 1267 sanctions regime as well as a set of recommendations to enhance transparency and due process. Some of the recommendations of the 2006 Watson Institute study have since been taken up by the committee and were subsequently incorporated into the committee’s guidelines. These include the establishment of the administrative focal point within the Secretariat to handle de-listing and exemption requests, an extension of time for review of listing proposals from two to five days, and increased transparency of committee practices through an improved website.

Another comprehensive study was undertaken by Bardo Fassbender of the Humboldt University of Berlin, Germany. This study was commissioned by the Office of the Legal Counsel of the UN Office of Legal Affairs (OLA) and published on the OLA website in April 2006, although without UN endorsement.<sup>59</sup> Fassbender pointed out that there is a duty for the Security Council, when imposing sanctions on individuals under Chapter VII of the UN Charter, to balance its principal duty to maintain or restore international peace and security while respecting the human rights and fundamental freedoms of targeted individuals to the greatest possible extent. 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>60</sup> Fassbender further argued that the rights of due process to be guaranteed by the Security Council in the case of sanctions imposed on individuals and entities under Chapter VII of the UN Charter should include the following elements:

- (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>61</sup>

According to Fassbender, these rights constituted the minimum standards of “fair and clear procedures in a legal order committed to the rule of law.”<sup>62</sup> Fassbender also argued that the Security Council has a legal obligation to guarantee these minimum standards which directly resulted from the UN Charter and general principles of international law protecting fair trial rights of individuals.<sup>63</sup>

In June 2006, Secretary-General Kofi Annan, in a non-paper presented to the Security Council on the occasion of a meeting on “strengthening international law: rule of law and maintenance of international peace and security,” set out his views concerning the listing/de-listing of individuals and entities on sanctions lists.<sup>64</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/de-listing of individuals and entities on targeted sanctions lists.<sup>65</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>66</sup>

The listing/de-listing procedure was also addressed by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. In his August 2006 report to the UN General Assembly, the Special Rapporteur pointed out that all international and national executive bodies in charge of including groups or entities on lists needed to be bound by a clear and precise definition of what constitutes terrorist acts and terrorist groups and entities.<sup>67</sup> He expressed concern that there was a risk that listings become open-ended in duration, thereby making temporary sanctions such as asset freezing equivalent to the confiscation of funds, a permanent measure. In order to ensure that listings remain a temporary measure the names on the lists needed to be reviewed after six- or twelve-month periods.<sup>68</sup>

The Special Rapporteur also pointed out that the confiscation of funds generally was “a very serious criminal sanction which call(ed) for proper safeguards.”<sup>69</sup> These safeguards included the right to be informed of inclusion on a list, the right to be informed of a possible procedure for de-listing, the right to be informed of the existence of humanitarian exemptions and how to obtain them, and the right to be informed of the reasons for inclusion on the list.<sup>70</sup> The Special Rapporteur stressed that the nature of the sanctions—civil or criminal—determined the procedural safeguards, including the applicable standards of proof.

The Special Rapporteur also addressed the suggestion put forward by the monitoring team that the Consolidated List was not a criminal list and that indictment by a court of law was not a precondition for inclusion on the list as the sanctions did not impose a criminal punishment or procedure such as detention, arrest, or extradition, but instead applied administrative measures. The Special Rapporteur clarified that in the event that sanctions linked to inclusion on the list were permanent—regardless of their actual classification—they were likely to fall within the scope of criminal sanctions for the purposes of international human rights law.<sup>71</sup>

Like other commentators, the Special Rapporteur also emphasized the right to judicial review which was “necessary” given that the effect of inclusion was the freezing of assets.<sup>72</sup> Since “no proper or adequate” review was available at the international level, national review procedures—even for international lists—were indispensable.<sup>73</sup>

In March 2006, the Council of Europe Committee of Legal Advisors on Public International Law discussed a report by Iain Cameron of the University of Uppsala, Sweden, which was released publicly in July 2006.<sup>74</sup> Cameron’s report analyzed the

problems caused for due process by sanctions introduced by the Security Council and examined the case-law of the ECHR relevant to the issue.<sup>75</sup> The report also addressed whether the ECHR standards can be said to represent general human rights principles in the field and examined the extent to which Council of Europe states bear a residual responsibility under the ECHR for the adoption and implementation of Council targeted sanctions.<sup>76</sup>

Cameron concluded that “the adoption by ECHR state parties acting in the Security Council of targeted anti-terrorist sanctions containing no equivalent safeguards . . . was contrary to general human rights principles.”<sup>77</sup> The same held true with regard to the implementation by ECHR state parties of these sanctions in their territories. Cameron clarified that this did not mean that the sanctions were invalid, only that the relevant state parties incurred state responsibility for violation of the ECHR.<sup>78</sup> He concluded that the “process of improving legal safeguards at the level of the Security Council . . . involves some difficulties,” but that it was nonetheless “possible to create an equivalent level of protection at the UN level while maintaining security concerns.”<sup>79</sup>

Cameron contributed another major set of ideas to the discussion of listing/de-listing in a study commissioned by the European Parliament’s Subcommittee on Human Rights and published in October 2008. In the report Cameron examined the interplay among international, EU, and national legal systems regarding their conception, legislation, and implementation of targeted sanctions.<sup>80</sup> In addition to specifying some stringent conditions for the success of targeted sanctions, he noted with strong criticism that two fundamental dilemmas remain unresolved in the implementation of such CTMs in Europe—and by extension elsewhere. First, the number of people and entities criminalized by such measures has increased, but these people have no recourse to standard due process afforded other “criminals” in the EU system—regional or national. Second, blacklisting has become widely accepted as a preventive tool, but it is a technique so intensely punitive that it cannot be considered merely preventive. Cameron also noted that no systematic policy evaluation has been conducted of the utility of blacklisting as an effective counter-terrorism measure. In a word, policymakers do not know when or why targeted sanctions achieve their objectives.<sup>81</sup>

The issue of UN black lists and due process also has been addressed by Dick Marty of the Parliamentary Assembly of the Council of Europe. In March 2007 Marty presented an “Introductory Memorandum” entitled “UN Security black lists” to the Assembly’s Committee on Legal Affairs and Human Rights (Marty was appointed Rapporteur at the Committee’s meeting in June 2006).<sup>82</sup> The report expressed serious concerns about the UN listing/de-listing procedure and rights of due process. It concluded that the current listing/de-listing procedure violated fundamental rights “by doing flagrant injustice to many persons against whom there is no proof of any wrongdoing” and that this also destabilized “the whole of the international fight against terrorism, which (was) badly needed and ought to be able to rely on the widest possible support from the international community and public opinion.”<sup>83</sup> Marty also presented a commissioned study by Symeon Karagiannis of Robert Schuman University (Strasbourg III). The study proposed that courts specializing in international human rights protection examine the role of states, particularly those that are members of the Security Council, when it comes to drawing up Security Council resolutions that may infringe on human rights.

The human rights implications of the UN sanctions regime have also been discussed within the framework of the Organization for Security and Co-operation in Europe (OSCE). Most notably, the OSCE Office for Democratic Institutions and Human Rights, together with the Office of the High Commissioner for Human Rights, organized an expert workshop on human rights and international cooperation in counterterrorism in Liechtenstein in November 2006. One of the thematic sessions was dedicated specifically to the problem of due process in listing/de-listing. Various experts at the workshop noted that a clear distinction needed to be made between listing and de-listing.<sup>84</sup> While much attention has focused on de-listing, equal attention is needed to ensure good listing procedures, which should be transparent, based on clear criteria, and with appropriate, explicit, and uniformly applied standards of evidence. They stressed further that with better listing procedures, the importance of de-listing procedures would diminish.<sup>85</sup>



## Notes

1. United Nations Security Council, *Security Council Resolution 1267 (1999)*, S/RES/1267, New York, 15 October 1999; United Nations Security Council, *Security Council Resolution 1373 (2001)*, S/RES/1373, New York, 28 September 2001.
2. 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), 116–17.
3. United Nations General Assembly, *Resolution Adopted by the General Assembly 60/1: 2005 World Summit Outcome*, A/RES/60/1, New York, 24 October 2005, para. 109.
4. The like-minded states include Denmark, Germany, Liechtenstein, the Netherlands, Sweden, and Switzerland. See United Nations General Assembly–Security Council, *Enclosure: Improving the Implementation of Sanctions Regimes Through Ensuring “Fair and Clear Procedures,”* A/62/891—S/2008/428, New York, 2 July 2008.
5. *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).
6. United Nations Security Council, *Security Council Resolution 1822 (2008)*, S/RES/1822, New York, 30 June 2008.
7. United Nations Security Council, *Security Council Resolution 1822 (2008)*, para. 22.
8. See Committee on legal affairs and Human Rights Rapporteur, Dick Marty, Council of Europe, *Provisional Draft Report on UN Security Council and European Union Blacklists*, Part A. Draft Resolution paras. 4 and 5-5.3, 9, 12. For an in-depth discussion of the embodiment of human rights in international treaties and agreements see Larissa van den Herik and Nico Schrijver, “Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law,” Section Two in *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, Watson Institute Targeted Sanctions Project, 9–23 (Providence: Watson Institute for International Studies, Brown University, March 2006). Available online at *Watson Institute for International Studies*, [http://www.watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf) (accessed 14 April 2009). Christopher Michaelsen contributed to this analysis.
9. E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, in his testimony to Congress on 26 March 2003, stated, “A key weapon in this effort has been the President’s Executive Order 13224, which was signed on September 20, 2001, just 12 days after September 11. That Order initiated an unprecedented effort in history to identify and to freeze the assets of individuals and entities associated with terrorism across the board. Under that Executive Order, the Administration has frozen the assets of some 267 individuals and entities.” Wayne continued in his testimony to indicate that the UN Consolidated List was “proving invaluable in helping to internationalize asset freezes and to underscore the global commitment against terrorism,” and that because of it “people around the world do not need to have the United States telling them and their Governments to take actions against specific targets; these names are listed in the UN; these are UN obligations.” E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, “International Dimension of Combating the Financing of Terrorism,” Testimony to House Committee on International Relations, Subcommittee on International Terrorism, Nonproliferation and Human Rights, 108th Cong., 1st sess. Washington, D.C., 26 March 2003.
10. 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.
11. 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.
12. United Nations Security Council, *Security Council Resolution 1456 (2003)*, S/RES/1456, New York, 20 January 2003, para. 6.
13. 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).
14. International Commission of Jurists, *Assessing Damage*, 113.
15. United Nations Security Council, *[Eighth] Report of the Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, S/2008/324, New York, 14 May 2008, para. 2.
16. United Nations Security Council, *[Eighth] Report of the Analytical Support and Sanctions Monitoring Team*, para. 23.
17. Charity Commission (UK), “Inquiry Report: Palestinian Relief and Development Fund (Interpal)” registered charity number 1040094, Liverpool, 27 February 2009, esp. paras. 59–61, 151, 153. Available online at *Charity Commission*, [http://www.charity-commission.gov.uk/recent\\_changes/printerpal.asp](http://www.charity-commission.gov.uk/recent_changes/printerpal.asp) (accessed 22 April 2009).

18. Charity Commission (UK), "Inquiry Report: Palestinian Relief and Development Fund (Interpal)," paras. 8, 9, 17.
19. Carter-Ruck, "Swiss Court Clears Saudi Businessman of 9/11 Links," Press Release, 22 December 2005. Available online at *Carter-Ruck*, [http://www.carter-ruck.com/recentwork/Kadi\\_PressRelease22Dec05.html](http://www.carter-ruck.com/recentwork/Kadi_PressRelease22Dec05.html) (accessed 21 April 2009).
20. "Coming up Trumps," *The Economist (US)* 386, no. 8565 (2 February 2008): 66–67.
21. United Nations Security Council, *Report of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities*, S/2008/848, New York, 31 December 2008, para. 6.
22. Resolution 1735 (2006), para. 14, states that the Committee "may consider, among other things, (i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List." See United Nations Security Council, *Security Council Resolution 1735 (2006)*, S/RES/1735, New York, 22 December 2006.
23. United Nations Security Council Sanctions Committees, "Focal Point for De-listing established pursuant to Security Council Resolution 1730 (2006)." Available online at *United Nations Security Council Sanctions Committees*, <http://www.un.org/sc/committees/dfp.shtml#> (accessed 17 April 2009).
24. United Nations Security Council, *[Eighth] Report of the Analytical Support and Sanctions Monitoring Team*. Number of and identification of cases known to the monitoring team are found in Annex I, pp. 36–37.
25. Oldrich Bures, "EU's Fight against Terrorist Finances" (paper presented at the annual meeting of the ISA's 50th Annual Convention, "Exploring The Past, Anticipating The Future," New York, 15 February 2009).
26. *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, case T-315/01 (judgment of the Court of First Instance of the European Communities [Second Chamber, Extended Composition], Luxembourg, 21 September 2005), para. 37. Available online at *EUR-Lex*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CE:EX:62001A0315:EN:HTML> (accessed 17 April 2009); *Ahmed Ali Yusuf and Barakaat International Foundation* were added in a 9 November 2001 addendum by the Sanctions Committee to the Consolidated List first initiated on 8 March 2001. *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, case T-306/01 (judgment of the Court of First Instance of the European Communities [Second Chamber, Extended Composition], Luxembourg, 3 September 2008), 8. Available online at *EUR-Lex*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CE:EX:62001A0306:EN:HTML> (accessed 17 April 2009). Judgement on the cases was rendered jointly in *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.
27. Jonathan Winer, "EU High Court Invalidates Sanctions Against Al Qaeda," 3 September 2008. Available online at *Counterterrorism Blog*, [http://counterterrorismblog.org/2008/09/eu\\_high\\_court\\_invalidates\\_sanc.php](http://counterterrorismblog.org/2008/09/eu_high_court_invalidates_sanc.php) (accessed 17 April 2009).
28. *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.
29. Council of the European Union, Information Note: *Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P (Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission)*, 13358/08, Brussels, 22 September 2008, para. 16, (paras. 336 and 345 of the original ruling).
30. Court of Justice of the European Communities, "The Court Annuls the Council Regulation Freezing Mr Kadi and Al Barakaat's Funds," Press Release No 60/08, Luxembourg, 3 September 2008, pp. 2-3. Available online at *CURIA*, <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080060en.pdf> (accessed 17 April 2009).
31. Court of Justice of the European Communities, "The Court Annuls the Council Regulation," p. 3.
32. Commission of the European Communities, "Commission Regulation (EC) No 1190/2008 of 28 November 2008: amending for the 101st time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban," *Official Journal of the European Union* 51, L 322 (2 December 2008): 25-26.
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35. United Nations Security Council, *Security Council Resolution 1822 (2008)*.



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38. United Nations Security Council, *[Eighth] Report of the Analytical Support and Sanctions Monitoring Team*, para. 41.
39. UN General Assembly, *Report of the Special Rapporteur [Martin Scheinin] on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/61/267, New York, 16 August 2006, para. 39.
40. See, e.g. Watson Institute Targeted Sanctions Project, *Strengthening Targeted Sanctions*, 44–46.
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42. Discussion Paper prepared May 2008, “Improving the Implementation of Sanctions Regimes through Ensuring ‘Fair and Clear Procedures’” (on file with author; this discussion paper was prepared by the countries of Denmark, Liechtenstein, Sweden, Switzerland, Germany, and The Netherlands for a meeting at the United Nations on 13 June 2008), 2.
43. Discussion Paper prepared May 2008, “Improving the Implementation of Sanctions Regimes,” 2–3.
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47. Subsequent Security Council resolutions include: 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008), so that the sanctions now cover individuals and entities associated with Al-Qaida, Osama bin Laden and/or the Taliban, wherever located. See United Nations Security Council, *Security Council Resolution 1333 (2000)*, S/RES/1333, New York, 19 December 2000; United Nations Security Council, *Security Council Resolution 1390 (2002)*, S/RES/1390, New York, 16 January 2002; United Nations Security Council, *Security Council Resolution 1455 (2003)*, S/RES/1455, New York, 17 January 2003; United Nations Security Council, *Security Council Resolution 1526 (2004)*, S/RES/1526, New York, 30 January 2004; United Nations Security Council, *Security Council Resolution 1617 (2005)*, S/RES/1617, New York, 29 July 2005; United Nations Security Council, *Security Council Resolution 1735 (2006)*; and United Nations Security Council, *Security Council Resolution 1822 (2008)*.
48. Gabriele Porretto, “The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection,” in *Fresh Perspectives on the ‘War on Terror’*, ed. Miriam Gani and Penelope Mathew, 235–268 (Canberra: Australian National University E Press, 2008), 243.
49. United Nations Security Council, *[Seventh] Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities*, S/2007/677, New York, 29 November 2007, para. 40.
50. Fassbender, *Targeted Sanctions and Due Process*, 4.
51. Fassbender, *Targeted Sanctions and Due Process*, 4. Article 25 of the UN Charter reads: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” United Nations, *Charter of the United Nations*, San Francisco, 24 October 1945, art. 25. Available online at *United Nations*, <http://www.un.org/aboutun/charter> (accessed 15 April 2009).
52. Article 103 of the UN Charter reads: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” United Nations, *Charter of the United Nations*, art. 103.
53. Fassbender, *Targeted Sanctions and Due Process*, 5. This point has also been made by Dick Marty, Rapporteur of the Parliamentary Assembly of the Council of Europe who cited a Swiss case in which an individual was acquitted of terrorism-related charges in a domes-

tic criminal proceeding and the Swiss state ordered to pay compensation. Nonetheless the person in question still remained on the 1267 list with his assets frozen; Dick Marty (Rapporteur), “UN Security Council Black Lists: Introductory Memorandum,” Committee on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, AS/Jur (2007) 14, Strasbourg, 19 March 2007, para. 2. Available online at *Council of Europe*, [http://assembly.coe.int/CommitteeDocs/2007/20070319\\_ajdoc14.pdf](http://assembly.coe.int/CommitteeDocs/2007/20070319_ajdoc14.pdf) (accessed 13 April 2009).

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60. Fassbender, *Targeted Sanctions and Due Process*, 7.
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