

# The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual

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## Abstract

This contribution examines the problem of review of targeted sanctions imposed by the Security Council in the light of recent developments occurring in the EU context. Some recent judgments of the European Court of First Instance of the European Communities (CFI) are analysed, as rendered in the cases of *Yusuf* and *Kadi* and also in the more recent cases of the *Mujaheddeen* and *Sison*. These last two judgments show that flaws in the targeted sanctions regimes exist not only at UN level. The CFI also does not substantively review the listing when this listing is carried out by the Council of the EU. An examination of the progress made at UN level to address procedural flaws shows that, more than anything else, the real stumbling-block is the lack of a substantive review of intelligence information by an independent and impartial organ. The only conclusion that can be drawn from this is that we are on the way towards a better de-listing procedure, but are not there yet.

## Key words

effective remedy; Resolution 1267; Resolution 1373; Security Council review; targeted sanctions

One of the red threads that run through John Dugard's curriculum vitae and life is the protection of the individual against arbitrary state behaviour. Generally, international law and international institutions can be used to guarantee the basic rights of the individual against such state behaviour. However, with international institutions becoming more active, the need for protection of individuals against international institutions themselves also increases. This is precisely what is at stake with the UN Security Council's sanctions regimes targeting individuals and the need for individuals to be protected against possible arbitrary behaviour of the Security Council. Anno 2007, the call for some form of procedural protection against the Security Council has become particularly loud in the context of targeted sanctions.<sup>1</sup>

In a chapter on sanctions and judicial review in a book published in 2001, John Dugard had already forecast that the demand for judicial review of Security Council resolutions would only grow in the years to come.<sup>2</sup> As indicated by Dugard, the great increase in the number of resolutions adopted by the Security Council since the end of the Cold War makes it more likely that the legality of certain of these

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1. See, e.g., Report of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/4/88 (2007), at para. 31. And, much earlier, I. Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', (2003) 72 *Nordic Journal of International Law* 159.

2. J. Dugard, 'Judicial Review of Sanctions', in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001), at 83. See also J. Dugard, 'Judicial Review in Public International Law', in E. J. H. Schrage (ed.) *Judicial Review* (2002), at 35.

resolutions will be disputed, which might in turn expose the need for some form of judicial review. Moreover, Dugard observed that the perception of the Security Council as being 'governed and directed by an unrepresentative elite' could also encourage some states to fuel the debate on judicial review. Finally, Dugard referred to the emergence of powerful non-governmental organizations (NGOs) acting as public interest lawyers who might stir up requests to the International Court of Justice (ICJ) for judicial review.<sup>3</sup>

This contribution to the special issue of the *Leiden Journal of International Law* dedicated to Professor John Dugard examines the latest developments relating to the problem of review of targeted sanctions. First, in section 1, the concept of targeted sanctions is examined. Subsequently, various recent judgments of the Court of First Instance of the European Communities (CFI) are analysed in sections 2 and 3. In these judgments the European Court has exposed the procedural flaws of the targeted sanctions regimes. It has also shown that these do not only exist at UN level. Interestingly, the European Court of First Instance also shies away from *substantively* reviewing the listing when this listing is done by the Council of the European Union rather than the Security Council's sanctions committee. So Security Council review may not be the only obstacle that must be overcome in order to get a proper procedure in place. The progress made at UN level to address the procedural flaws is examined in section 4. The main improvements concern the listing procedure and the focal point at which individuals can lodge their requests for delisting. But still there is no possibility whatsoever of some independent substantive review at UN level. Here again it becomes clear that, more than anything else, the real stumbling block is the substantive review of intelligence information by an independent and impartial organ. The only conclusion that can be drawn from this, as is done in section 5, is that we are on the way towards a better delisting procedure, but we are not there yet.

## I. TARGETED SANCTIONS AND THE NEED FOR REVIEW

After the Cold War the Security Council entered uncharted waters on a number of occasions. Most notably in the context of its sanctions policy, it opted for a more rigorous approach after the Iraq experience in the early 1990s and developed the concept of targeted sanctions.<sup>4</sup> Targeted sanctions were considered to be more effective and to undercut the negative consequences on the population of comprehensive economic sanctions. Targeted sanctions can include travel bans, arms embargoes, or financial sanctions such as the freezing of assets. They do not aim to target the state and its population, but they rather target selected persons or sectors of the economy. This development is comparable with the emergence of 'modern' or vertical international criminal law in the 1990s, in that leading individuals are targeted directly

3. Dugard, 'Judicial Review of Sanctions', at 83–4.

4. Iraq was not the only case in which comprehensive sanctions had a devastating impact on the population; see R. Geiss, 'Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-up Assessment of Long-Term Effects', (2005) 18 *Harvard Human Rights Journal* 167, at 167. See also M. Reisman, 'Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions', (1995) 89 *American Society of International Law Proceedings* 350, at 351.

rather than through abstract state entities. However, sanctions policy and international criminal law differ in nature on a number of points, such as, in principle, their aims. A more important difference for this discussion is that whereas criminal law is a body of law that is by nature applied by a court operating on the basis of clear procedural rules, sanctions are imposed by the Security Council operating on the basis of political decision-making. The modus operandi of the Security Council posed particular problems when the Council – through its sanctions committees – started to impose measures on individuals rather than on states without simultaneously offering any recourse for individuals to complain about the measures taken against them or to be heard at some point. In addition to being a human rights problem, this issue also has vast institutional connotations and it relates directly to questions of checks and balances in the context of a system of *collective* security.

When imposing sanctions the Security Council generally also establishes a sanctions committee with the task of monitoring and reporting on the sanctions. These committees are also charged with the task of listing the individuals and corporate entities that are to be subjected to the sanctions. The committees list individuals and entities, based on proposals or information of member states. The problem here is that individuals are not heard at any time either before or after listing and, once listed, individuals do not have a proper avenue to complain directly to the sanctions committee about their listing and about the sanctions that are subsequently imposed. Individuals have no standing either before the Security Council or before the sanctions committees. National courts are reluctant to serve as an alternative forum, given Article 25 of the UN Charter, which obliges states, including national courts, to ‘accept and carry out the decisions of the Security Council in accordance with the present Charter’. A national decision condemning the listing as violating specific international law standards and ordering the state to act contrary to the sanctions committee’s lists, risks undermining the whole system of *collective* security. The same holds true for decisions of regional courts such as the CFI.

The problem of wrong listings and the apparent inability to be delisted arose, but is not confined to the context of targeted sanctions against the Taliban and al Qaeda. Also in the context of other targeted sanctions regimes, claims of wrong listings have been made. For instance, in several reports of the Panel of Experts on Liberia, the Panel noted that it had received a number of complaints from individuals claiming to be improperly listed and thus unfairly subjected to the travel ban.<sup>5</sup> The complainants asserted that they were not guilty, that they lacked information as to why they were put on the list, and that the reports from the Panel were not objective. The complainants even threatened to sue the United Nations and the Panel.<sup>6</sup> Yet

5. See, e.g., the Report of the Panel of Experts on Liberia, UN Doc. S/2002/470 (2002), at paras. 158–159 as referred to by I. Cameron, *Targeted Sanctions and Legal Safeguards, Report for the Swedish Government* (2002), at 7, n. 17 (available at <http://www-hotel.uu.se/juri/arkiv/sanctions.pdf>). These complaints concerned the Liberia Sanctions Committee established pursuant to Resolution 1343 (2001). See also another Report of the Panel of Experts on Liberia, UN Doc. S/2004/396 (2004), at para. 156, reporting that several individuals had complained about their listing and had submitted that they no longer had any ties or contact with Charles Taylor, the former Liberian leader. And see the Report of the Panel of Experts on Liberia, UN Doc. S/2004/955 (2004), at para. 171, for another claim of innocence. These latter complaints concerned the Liberia Sanctions Committee established pursuant to Resolution 1521 (2003).

6. UN Doc. S/2005/745 (2005), at para. 157.

legal avenues were only really explored in relation to the targeted sanctions against members of the Taliban and al Qaeda. This contribution will focus on these sanctions.

The sanctions were first imposed in 1999 by Resolution 1267.<sup>7</sup> This resolution imposed a limited air embargo and a funds and financial assets embargo on the Taliban. Subsequently, Resolution 1333 imposed an air and arms embargo, restricted travel sanctions on Afghanistan, and in this resolution the Security Council decided that states had to freeze funds of Osama bin Laden, the leader of al Qaeda, and his associates.<sup>8</sup> Resolution 1390 enlarged the reach of the sanctions to any person associated with the Taliban, Osama bin Laden or al Qaeda.<sup>9</sup> The special feature of the Taliban/al-Qaeda sanctions is that ever since Security Council Resolution 1390 there is no longer a territorial link to Afghanistan, and individuals of any nationality, residing anywhere in the world, have been listed on a rather large scale.<sup>10</sup> Also quite a number of individuals residing in Europe or with assets in European bank accounts have been listed and their assets frozen. Some of these individuals have lodged complaints with European courts, most importantly the CFI. This has resulted in the judgments of September 2005 in the cases of *Yusuf* and *Kadi*.<sup>11</sup> Both appealed against the judgments to the European Court of Justice.<sup>12</sup> In the meantime Yusuf has been removed from the list by the sanctions committee, but Kadi has not. The *Yusuf* and *Kadi* reasoning has been further elaborated in a July 2006 judgment in the cases of *Hassan* and *Ayadi*.<sup>13</sup> In total, nine challenges to the Taliban/al Qaeda listing have been lodged before the CFI so far, and a further 16 claims have been made at national levels both in European and other states, such as the United States and Pakistan.<sup>14</sup>

## 2. YUSUF AND KADI AND THE CONCEPT OF *JUS COGENS*

The challenges of Yusuf, the organization Al Barakaat, and Kadi before the CFI included amongst other grounds the claim that they had been wrongfully listed

7. UN Doc. S/RES/1267 (1999).

8. UN Doc. S/RES/1333 (2000).

9. UN Doc. S/RES/1390 (2002).

10. As noted by Cameron, *supra* note 5, at 7–8. The consolidated list, last updated on 9 July 2007, contained 142 individuals and one entity belonging to or associated with the Taliban, and 223 individuals and 124 entities belonging to or associated with al Qaeda. So far, 9 individuals and 11 entities have been removed from the list pursuant to a decision by the al-Qaeda and Taliban Sanctions Committee. In comparison, the lists of the Ivory Coast, Democratic Republic of the Congo, and Sudan Sanctions Committees contain respectively 3, 23, and 4 entries (lists last updated on 18 December 2006, 17 July 2007, 7 August 2007 respectively).

11. CFI, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Case T 306/01; *Yassin Abdullah Kadi v. Council and Commission*, Case T 315/01, 21 September 2005.

12. ECJ, *Yassin Abdullah Kadi v. Council*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-402/05 P, 24 November 2005; ECJ, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, Appeal against Judgment of the Court of First Instance of 21 September 2005, Case C-415/05 P, 1 December 2005.

13. CFI, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Case T-49/04, Judgment, 12 July 2006; and *Chafiq Ayadi v. Council of the European Union and Commission of the European Communities*, Case T-253/02, Judgment, 12 July 2006.

14. The cases are described in the Sixth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) concerning al Qaeda and the Taliban and associated individuals and entities; UN Doc. S/2007/132 (2007), Annex I.

and that they did not have an effective means of challenging their listing.<sup>15</sup> In first instance, the European Court respected the special priority status of the UN Charter and the binding resolutions of the Security Council taken under Chapter VII, and it indicated that it had no authority to review whether Security Council resolutions were consistent with fundamental rights.<sup>16</sup> However, in a remarkable subsequent move, the European Court empowered itself to check whether the Security Council resolutions were consonant with norms of *jus cogens*, since, the Court said, these rules have a higher status, are non-derogable, and are binding on all subjects of international law, including the organs of the United Nations.<sup>17</sup>

As such, the reasoning that the Security Council should adhere to *jus cogens* is not breathtaking. As stated by Judge ad hoc Sir Elihu Lauterpacht in the *Application of the Genocide Convention (Provisional Measures)*,

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.<sup>18</sup>

In his fine *jus cogens* separate opinion, Judge ad hoc Dugard recalled Lauterpacht's suggestion that 'a Security Council resolution will be void if it conflicts with a norm of *jus cogens*'.<sup>19</sup>

On an earlier occasion Dugard had noted that once it is accepted that the Security Council must respect the rules of *jus cogens*, 'it is a short step to finding that the Court is the appropriate body to determine whether the Council has exceeded its powers'.<sup>20</sup> Obviously, the Court that Dugard was talking about was the International Court of Justice (ICJ). Whether a regional court such as the CFI is also an appropriate court to deal with this question is quite a different matter. The way in which the European Court in the *Yusuf* and *Kadi* cases proceeded to determine whether the human rights invoked constituted *jus cogens* is in this author's view not convincing, and adds to the argument that national or regional courts are in fact *not* the proper place for the review of Security Council measures, in addition to the argument that such a review risks undermining the system of collective security. The problem is that, in the context of targeted sanctions, the ICJ cannot play a role, given that individuals

15. Initially, two other individuals joined the challenges in the case of *Yusuf*, namely Adirisak Aden and Abdi Abdulaziz Ali. However, these two individuals were struck off the list at the request of Sweden on 26 August 2002. See, in more detail, P. Cramér, 'Recent Swedish Experiences with Targeted UN Sanctions: Erosion of Trust in the Security Council', in E. de Wet and A. Nollkaemper (eds.), *Review of the Security Council by Member States* (2003), at 85.

16. *Kadi*, *supra* note 11, at paras. 209–225; *Yusuf*, *supra* note 11, paras. 260–276.

17. *Kadi*, *supra* note 11, at paras. 226–232; *Yusuf*, *supra* note 11, at paras. 277–283.

18. *Case Concerning the Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, Order of 13 September 1993 on the Request for the Indication of Further Provisional Measures, Separate Opinion of Judge Lauterpacht, [1993] ICJ Rep., at para. 100. As cited by J. Dugard, 'Judicial Review of Sanctions', *supra* note 2, at 86.

19. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, [2006] ICJ Rep. 2006, at para. 8 (Separate Opinion of Judge Dugard).

20. J. Dugard, 'Judicial Review of Sanctions', *supra* note 2, at 86.

are targeted and they have no standing before the ICJ. A general advisory opinion may have some impact on improving the procedure in general, but will not help individual persons who want to be delisted.

Therefore when the European Court was confronted with the petitions of Yusuf and Kadi, it was clear that there was a great need for some procedural protection for the individuals targeted by Security Council measures. Given the lack of any established legal avenue at UN level, the European Court may have felt the need to step in, albeit it to a very limited extent. Therefore, even though there is room for criticism as to the precise legal reasoning of the Court, its judgment has placed the need for procedural reform on the Security Council's agenda and the Court can be commended for doing so.

### 3. OTHER RELEVANT EUROPEAN PROCEEDINGS

Before evaluating the changes that have been made at UN level to address the procedural flaws highlighted by *Yusuf* and *Kadi*, it may be worthwhile to pay attention to parallel proceedings before the CFI which also concerned terrorist listing, most notably the *Mujaheddeen* case<sup>21</sup> and the *Sison* case.<sup>22</sup>

The claims in these cases were generally the same, namely improper listing and no proper delisting procedure. Yet the legal framework differed, given that the *Mujaheddeen* and *Sison* had not been listed pursuant to Security Council Resolution 1267, but pursuant to counterterrorism Resolution 1373. Like Resolution 1267, Resolution 1373 obliges states to take certain measures against individuals, such as the freezing of assets.<sup>23</sup> However, Resolution 1373 leaves it up to each state to draw up a list of people against whom the measures are to be directed, rather than a sanctions committee undertaking this task. In the context of the European Union, the lists were established by the Council of the European Union. Persons were to be included on the list on the basis of

precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds.<sup>24</sup>

According to the EU Common Position, the list has to be reviewed at least once every six months.<sup>25</sup>

Since the actual listing was not done at UN level, the complaints about improper listing did not immediately touch upon the sensitive issue of Security Council review

21. CFI, *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* (hereafter *Mujaheddeen*), Case T-228/02, Judgment, 12 December 2006.

22. CFI, *Jose Maria Sison v. Council of the European Union*, Case T-47/03, Judgment, 11 July 2007.

23. UN Doc. S/RES/1373 (2001).

24. Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, 2001/931/CFSP, L 344/93, Art. 4.

25. *Ibid.*, Art. 6.

and therefore left more room for the CFI to condemn the listing.<sup>26</sup> And so it did. In the *Mujaheddeen* case, in which judgment was rendered on 12 December 2006, the CFI annulled the decision to place the Mujaheddeen organization on the list because the Council of the European Union had not provided sufficient reasons for listing the organization and because the decision to list had been adopted in the course of a procedure during which the Mujaheddeen's right to a fair hearing had not been observed.<sup>27</sup> Subsequently, on 11 July 2007, the decision listing the Dutch resident of Philippine nationality, Sison, was equally annulled.<sup>28</sup>

In both judgments the CFI indicated that pursuant to settled case law and fundamental principles of community law, an individual who is directly and adversely affected by a community measure has the right to be notified of the evidence on the basis of which the measures against him are taken, either concomitantly or soon after the measures are taken, and that there is an obligation on the part of the Council to state reasons.<sup>29</sup> More specifically, an individual or entity must be made aware of the specific national decision on the basis of which he is listed.<sup>30</sup>

So, in both cases, the Council decision was annulled as a consequence of procedural flaws. Yet, in both cases, the CFI did not undertake a *substantive* review of the decision – that is, a review of whether it was correct that the applicants had been listed or of whether there was in fact no sufficient basis for placing them on the list.<sup>31</sup> The Council subsequently improved its procedure in line with requirements as set out by the Court. Both applicants – Mujaheddeen and Sison – have now been listed on the basis of the improved procedure.<sup>32</sup> The CFI judgments clearly exposed the procedural flaws in the decision-making process, and they send a message as to what is expected in this process. However, the most difficult issue relating to a substantive review of the decision taken was left untouched, even at EU level.

#### 4. THE SECURITY COUNCIL IMPLEMENTS PROCEDURAL CHANGES

The European judgments, the reports commissioned by governments and international organizations,<sup>33</sup> and the numerous observations of special rapporteurs and

26. The ECFI recognized the different legal framework, especially in the context of the right to a fair hearing. The Court indicated that, in the *Yusuf and Kadi* context, there was no discretion whatsoever for the Community institutions to alter the lists of the Security Council. Given that delisting could only be done at UN level, it was not necessary that the right to be heard would be exercised before the European institutions, as this could not lead to delisting in any case. *Mujaheddeen*, *supra* note 21, at para. 100 and further, *Sison*, *supra* note 22, at para. 147 and further.

27. *Mujaheddeen*, *supra* note 21, at para. 173.

28. *Sison*, *supra* note 22 at paras. 224–226.

29. *Mujaheddeen*, *supra* note 21, at paras. 93, 108, 109, 129, 161–165; *Sison*, *supra* note 22, at paras. 161–198, 212, 226.

30. *Mujaheddeen*, *supra* note 21, at paras. 166–174; *Sison*, *supra* note 22, at paras. 184, 212, 213.

31. *Sison*, *supra* note 22, at para. 226: 'The Court is not, even at this stage of the procedure, in a position to undertake the judicial review of the lawfulness of that decision in light of the other pleas in law, grounds of challenge and substantive arguments invoked in support of the application for annulment.' See similarly *Mujaheddeen*, *supra* note 21, at para. 173.

32. On the latest list, of 28 June 2007, the name of the Mujaheddeen organization reappears. Council Decision of 28 June 2007, L169/58.

33. There are three main reports: (i) the report prepared by I. Cameron commissioned by the Council of Europe, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-terrorism*

scholars regarding the inadequacy of the listing and delisting procedure clearly exposed the need for change. This was even recorded in the 2005 World Summit Outcome.<sup>34</sup> In addition, certain states showed increasing hesitation in co-operating with the al Qaeda/Taliban Sanctions Committee and submitting new names for listing, precisely because of the procedural flaws.<sup>35</sup> Hence, based on legal and pragmatic considerations, a number of procedural changes have been made since the sanctions were first imposed in 2001. Some of the most important are outlined below.

#### **4.1. Resolution 1617 concerning al-Qaeda and the Taliban**

Initially, in the context of Resolution 1267, which first imposed the sanctions on the Taliban, the Sanctions Committee did not have clear criteria on the basis of which individuals were put on the list, so that the listing procedure was rather lacking in transparency, to put it mildly. On the basis of Resolution 1390, any person associated with Osama bin Laden, al Qaeda, or the Taliban could be subjected to sanctions.<sup>36</sup> In this resolution the Security Council did call upon the Sanctions Committee to ‘promulgate expeditiously guidelines and criteria’ necessary to implement the measures.<sup>37</sup> In Resolution 1526 of 30 January 2005, the Security Council called upon states to provide information demonstrating to the greatest extent possible a link between an individual or entity and Osama bin Laden, al-Qaeda, or the Taliban when submitting a new name for listing. However, it was only in Resolution 1617, issued in 2005, that the Security Council gave clearer criteria as to what the term ‘associated with’ meant, namely that it included acts such as

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- supplying, selling or transferring arms and related material to;
- recruiting for; or
- otherwise supporting acts or activities of  
Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.<sup>38</sup>

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*Sanctions*, 6 February 2006, (ii) the report of Bardo Fassbender commissioned by the UN Office of Legal Affairs, *Targeted Sanctions and Due Process*, 20 March 2006, and (iii) the White Paper prepared by the Watson Institute commissioned by the Governments of Germany, Sweden, and Switzerland, *Strengthening Targeted Sanctions through Fair and Clear Procedures*, UN Doc. A/60/887 – S/2006/331 (2006).

34. UN Doc. A/60/1 (2005), at para. 109.

35. Sixth report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) concerning al Qaeda and the Taliban and associated individuals and entities, UN Doc. S/2007/132, 8 March 2007, para. 16.

36. UN Doc. S/RES/1390 (2002), at para. 2.

37. UN Doc. S/RES/1390, (2002), at para. 5(d).

38. UN Doc. S/RES/1617 (2005), at para. 2.



Not only were these criteria given at a very late stage and after many individuals and entities had already been listed, they also still leave considerable discretion, arguably too much.

#### 4.2. Two resolutions of December 2006

With the threat of adverse national and regional judgments hanging over it and pursuant to recommendations of the Monitoring Team, the Security Council, on the proposal of France and the United States, decided to establish a focal point within the UN Secretariat which individuals can directly petition for delisting.<sup>39</sup> From a formal point of view such a focal point undeniably facilitates access for the individual, since before this resolution an individual was dependent on his state of nationality or residence to lodge a petition for delisting on his behalf. However, it remains to be seen what the implications are in practice and whether an individual who has no backing whatsoever from a state has any chance at all of success in a political delisting procedure before a subsidiary organ of the Security Council where decisions are made on the basis of consensus.

Finally, Resolution 1735, adopted as recently as December 2006, aimed at further streamlining the listing and delisting procedure. For example, it was stressed that a state proposal for listing should include a statement of case with specific information supporting a determination that an individual or organization meet the criteria of Resolution 1617. The proposing state should indicate the nature of the information – as coming from intelligence services or from other sources – and supporting evidence should be provided if possible.<sup>40</sup> The state should also specify which parts of the statement of case can be made public for the purpose of notifying the listed individual or entity.<sup>41</sup> Furthermore, Resolution 1735 included a procedure for notification of listed individuals and entities through the Secretariat and member states.<sup>42</sup> As to delisting, the resolution explicitly stated that change of behaviour can lead to delisting.<sup>43</sup>

## 5. REMAINING CONCERNS AND CONCLUDING OBSERVATIONS

In all, it appears that much has been done to improve the listing procedure. This is important, as adequate listing reduces to some extent the need for a delisting procedure. However, that the Sanctions Committee started listing persons as early as 2001 without having in place clear criteria for the listing, and without any proper procedure for delisting, is quite a considerable error. Currently, listing criteria have been formulated and requirements have been put in place as to the statement of case and notification. However, there is still the need to have a proper delisting procedure. So the most pressing question remains: what kind of delisting procedure is required?

39. UN Doc. S/RES/1730, (2006), at para. 1.

40. UN Doc. S/RES/1735, (2006), at para. 5.

41. *Ibid.*, at para. 6.

42. *Ibid.*, at para. 10.

43. *Ibid.*, at para. 14.

There are two human rights setting procedural standards that may be relevant to answering this question, namely the right to a fair trial and the right to an effective remedy. Which particular right applies depends on how the sanctions are characterized, either as being administrative, civil, or criminal in nature. The right to a fair trial is only applicable to criminal or civil cases and not to administrative cases. A further consequence of the characterization issue concerns the standard of evidence used for listing. So far the 1267 Committee has not explicitly indicated what standard of evidence it applies. In general, characterizing the sanctions as criminal sanctions would mean that the high standard of 'beyond reasonable doubt' applies, whereas characterization of the sanctions as administrative measures would entail a lower standard, such as the 'balance of probabilities' standard.

In its guidelines the 1267 Sanctions Committee characterizes the sanctions as being administrative in nature.<sup>44</sup> In addition, the Monitoring Group established pursuant to Security Council Resolution 1526 (2004) has also consistently held that the sanctions are 'designed to prevent terrorist acts, rather than provide a compendium of convicted criminals', and that the sanctions cannot be characterized as being criminal in nature. The Monitoring Group stated, in this respect, 'after all, the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply administrative measures such as freezing assets, prohibiting international travel and precluding arms sales'.<sup>45</sup> The ECFI endorsed this qualification.<sup>46</sup> In contrast, a number of scholars as well as special rapporteurs have pointed out that the issue may not be so clear-cut.<sup>47</sup> They refer to jurisprudence of the European Court of Human Rights which has laid down criteria for an 'autonomous characterization'. The 'official' characterization is only one of these criteria. In addition, other criteria, such as the nature and severity of the sanctions, play a role. Given the link to a criminal offence – terrorism – the listing pursuant to Resolution 1267 bears a criminal-law connotation.<sup>48</sup> Moreover, based on the profound impact that long-term freezing of assets has on an individual's life, it may also be argued that sanctions should in fact be characterized as being a criminal law measure. On the other hand, the aim of the sanctions is not punitive and change of behaviour may result in delisting, as is now explicitly stated in Resolution 1735 (2006).

Regardless of the academic discussion of the nature of the sanctions, it is important to note that the right to an effective remedy is relevant in any event. Even if it is argued that the Security Council cannot be bound by human rights in precisely the same manner as are states, the core of the right to an effective remedy is a general

44. See, e.g., the Guidelines of the Committee for the Conduct of its Work, adopted on 7 November 2002 and last amended on 12 February 2007, at para. 6: 'A criminal charge is not necessary for inclusion on the Consolidated List as the sanctions are intended to be preventive in nature'.

45. UN Doc. S/2005/572 (2005), at paras. 39–44, in particular para. 39: 'The List is not a criminal list. Rather it contains the names of those who have engaged in or supported al-Qaeda or Taliban terrorism in some tangible way, regardless of whether any authority has formally charged them with a criminal offence'.

46. See, e.g., *Sison*, *supra* note 22, at 101 and 129.

47. See, e.g., Cameron, *supra* note 33, at 10; Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/61/267, (2006), at para. 35; and A. Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States', (2006) 4 *Journal of International Criminal Justice* 1044, at 1066.

48. White Paper, *supra* note 33, at 16.

and fundamental principle of the international order that the Security Council cannot just ignore.<sup>49</sup> The key elements of the right to an effective remedy require that a decision be substantively reviewed by an organ (i) that has a minimum level of independence and impartiality, (ii) which is accessible to the individual, and (iii) which has the power to indicate measures.<sup>50</sup>

With these requirements at hand, one may seriously question whether the changes that have been made so far to the delisting procedure are sufficient. Even though individuals now have direct access through the focal point, there still is no body with any level of independence to assess an application for review. On this point there must be further reform. A judicial court is not the only option for sound review, but there must be a body or a person with some level of independence and impartiality that can *substantively* review petitions for delisting. It is about striking the right balance, which is obviously very complicated. Even the European Court of First Instance does not review substantively listings done by the Council of the European Union, let alone by a Security Council sanctions committee. The European Court confined its review to the procedural aspects relating to the obligation to state reasons and the right to fair hearing.

In proposing solutions for reform, security considerations and the wish of states not to publicize all their intelligence information must be taken into account. Yet it is the state that must prove in the first instance that state security issues are at stake; this burden should not and cannot be placed on listed individuals. As observed by the CFI in the *Mujaheddeen* judgment, the general principle of the observance of the right to a fair hearing applies 'unless precluded by overriding considerations concerning the security of the Community or its Member States'.<sup>51</sup> And it was also pointed out by the Special Rapporteur on the promotion and protection of human rights while countering terrorism that 'the onus [of demonstrating that access to information must be restricted on the basis of concerns of national security] must be on the State or the institution/body refusing access to justify any limitations on access to the information used'.<sup>52</sup>

Hence security concerns cannot obstruct further reform altogether, but further reform should take into account the need to accommodate security concerns. Yet, in the end, if the Security Council or member states want no scrutiny whatsoever, then maybe the consequence should be that they cannot have the tool of targeted sanctions at their disposal at all. If one directly targets an individual, there must be a way for that individual substantively to challenge the measure taken against him; there must be an effective remedy. This is what protection of the individual is also about.

49. Bianchi gives a brief overview of theories on the basis of which it can be held that the UN, including the Security Council, must respect fundamental human rights: Bianchi, *supra* note 47, at 1061–3. See also Fassbender, *supra* note 33.

50. See also the statement of UN Legal Counsel Michel in the Security Council debate on strengthening international law, in which the issue of improving the targeted sanctions procedures was a main issue; UN Doc. S/PV.5474 (2006), at 5.

51. *Mujaheddeen*, *supra* note 21, at para. 137.

52. Protection of Human Rights, *supra* note 47, at para. 38.