

THE ESSENCE OF TERRORIST FINANCE: AN EMPIRICAL STUDY OF THE U.N. SANCTIONS COMMITTEE AND THE U.N. CONSOLIDATED LIST

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INTRODUCTION

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small¹

Purpose: This Article is a descriptive analysis of the U.N. Consolidated List that designates individuals and entities as terrorists or as terrorist financiers. Further the Article shows the lack of substantive and procedural standards in the listing and delisting process, and in turn, questions the approach of proscribing as undertaken by the supranational body.

Context: Levi and Reuter explain the anti-money laundering/terrorist finance regime as comprising two basic pillars: prevention and enforcement.² The prevention pillar is designed to deter criminals from using financial institutions, and the enforcement pillar is designed to punish criminals when, despite prevention efforts, they have successfully laundered those proceeds.³ The following analysis can be conceptually viewed as bridging the two pillars.

To further conceptualize this analysis, the KPMG research should be noted. This research polled 209 financial institutions and found that the majority, 83%, are investing an average of 61% more since September 11, 2001 on compliance costs for money laundering/terrorist financing regulation.⁴ Furthermore, they expect spending to increase by an additional 40% over the next three years and transaction monitoring activity has been the main cause of increased spending over the past three years.⁵

The National Commission on Terrorist Attacks on the United States (the "9/11 Commission") and a monograph prepared by the staff of the

1. U.N. Charter pmbl. (italics omitted).

2. Michael Levi & Peter Reuter, *Money Laundering*, 34 *CRIME & JUST.* 289, 297 (2006).

3. *Id.*

4. KPMG INTERNATIONAL, GLOBAL ANTI-MONEY LAUNDERING SURVEY 2004: HOW BANKS ARE FACING UP TO THE CHALLENGE 9 (2004), http://kpmg.com/cy/_metacanvas/attach_handler.uhtml?attach_id=48&content_type=application/pdf.

The results of the survey clearly showed that transaction monitoring, both through new automated systems and upgrades and via customization of existing systems, has made the greatest contribution to increased AML spending over the past three years; respondents also anticipate that transaction monitoring will continue to be the most significant factor in future spending on AML questions.

Id. at 22.

5. *Id.* at 5, 22.

Commission entitled Terrorist Financing Monograph⁶ explained that from a financial institution's operational perspective, transaction monitoring is done at two points: at the front-end and in the back office. In the back office, analysts are aided significantly by software that is programmed to catch "anomalies" (i.e., unusual financial transactions).⁷ The software, considered the "interdiction" or "filtering" computer software, works like a spell-check feature of a word processing program, which once installed, monitors every transaction, filtering out those that contain a name or information field (i.e., date of birth or place of birth) that matches those for which it was instructed to search.⁸ The authoritative Interlaken Process recommends that regulating agencies encourage the computer software practice by considering its use as a mitigating factor when assessing fines for violations.⁹

Thus, from the financial institution perspective, to a significant extent, *operationally*, detecting terrorist financing amounts to a process of matching names against their financial database on specific requests by the authorities,¹⁰ or routinely matching their database of customers against updated terrorist/terrorist financiers lists.¹¹

6. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 55 (2004), http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

7. *Id.*

8. THOMAS J. BIERSTEKER & SUE E. ECKERT, TARGETED FINANCIAL SANCTIONS: A MANUAL FOR DESIGN AND IMPLEMENTATION 101 (2001).

9. *Id.*

10. See Mark Pieth, *Criminalizing the Financing of Terrorism*, 4 J. INT'L CRIM. JUST. 1074, 1077, 1085 (2006) (noting similarly that for detecting terrorist financing, financial services providers have argued that, at most, they are able to check names against Lists); John Byrne, *Banks and the USA Patriot Act*, 9 ECON. PERSPECTIVES 18, 21 (2004).

For example, according to FinCEN, between April 1, 2003, and April 26, 2004, the Internal Revenue Service submitted 16 requests to FinCEN pertaining to 66 individuals and 17 businesses. These requests generated 646 positive matches with more than 1,274 financial institutions. Since Section 314(a)'s creation, the system has been used to send the names of 1,547 persons suspected of terrorism financing or money laundering to more than 26,000 financial institutions and has produced 10,560 matches that were passed on to law enforcement.

Id.

11. OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS CANADA, MONTHLY REPORTING TO OSFI ON LIST OF NAMES SUBJECT TO THE REGULATIONS ESTABLISHING A LIST OF ENTITIES MADE UNDER SUBSECTION 83.05(1) OF THE CRIMINAL CODE AND/OR THE REGULATIONS IMPLEMENTING THE UNITED NATIONS RESOLUTIONS ON THE SUPPRESSION OF TERRORISM (RIUNRST) AND/OR UNITED NATIONS AL-QAIDA AND TALIBAN REGULATIONS (UNAQTR) (2007), http://www.ofsi-bsif.gc.ca/app/DocRepository/1/eng/issues/terrorism/reminders/2007_05_31_e.pdf (showing the updated reminder regarding the designated individuals/entities as terrorist financiers is addressed to All Banks, Federally Regulated Trust & Loan Companies, Federally Regulated Life Insurance Companies, Federally Regulated Property & Casualty Insurance Companies, Federally Regulated Cooperative Credit Associations, Fraternal Benefit Societies, etc . . .).

Clearly, the most important list of our times is the U.N. Consolidated List (“Consolidated List” or “List”) since it is enforced in principle by the complete U.N. membership consisting of 192 States. This List, designating individuals and entities as terrorists or as financiers of terrorism, is formulated by the U.N. Al-Qaida/Taliban Sanctions Committee (“Committee”). The following is a detailed descriptive analysis of the Consolidated List and the process undertaken by the Committee during the formulation. Notwithstanding justifications that the listing process is confidential, being based on intelligence,¹² empirical reality finds that the listing process is simply one that lacks substantive and procedural standards. In addition, countless other tensions define the working of the Committee and in turn, have an enormous impact on its crystallized output — the Consolidated List.

Part I of this Article details the different U.N. Resolutions creating the Committee and highlights certain other relevant aspects. Part II analyzes several fundamental issues and tensions that surround the Committee: it provides a Committee overview and analyzes the dividing tensions among Committee members and the nature of the Consolidated List, the U.N. membership obligations vis-à-vis the enforcement of the instrument as of the “highest national interest,” and the evolving nature and reach of the List. Part III analyzes the procedural and substantive listing and delisting procedures. In addition, related issues such as justifications and lack of identifiers are explained. This Article concludes by stating the results of the measures and questions the approach of proscribing individuals and entities on the List.

I. HIGHLIGHTS OF THE U.N. RESOLUTIONS

A. Security Council Resolution 1267 (October 15, 1999)

The Security Council unanimously adopted Resolution 1267,¹³ demanding that the Taliban cease its activities in support of international terrorism and insisting that the Taliban turn over Usama bin Laden¹⁴ to

12. See generally Anonymous, *International Legal Developments Sub-group 1: Critical Review of Terrorist-Related Legislation and the Monitoring of New Legislation*, 6 J. MONEY LAUNDERING CONTROL 201 (2003); William Allen, *The War Against Terrorism Financing*, 6 J. MONEY LAUNDERING CONTROL 306 (2003); Steve Kiser, *Financing Terror: An Analysis and Simulation for Affecting Al Qaeda's Financial Infrastructure* (Sept. 2004) (unpublished Ph.D dissertation, Pardee RAND Graduate School), available at http://www.rand.org/pubs/rsgs_dissertations/2005/RAND_RGSD185.pdf; Fletcher N. Baldwin, Jr., *Money Laundering Countermeasures with Primary Focus upon Terrorism and the USA Patriot Act 2001*, 6 J. MONEY LAUNDERING CONTROL 105 (2002).

13. See U.N. SCOR, 4051 mtg., U.N. Doc. S/PV/4051 (Oct. 15, 1999).

14. In the following analysis, “Usama bin Laden” and “Al-Qa’idah” are spelled inconsistently because they reflect the inconsistency that exists in the various U.N. documents.

appropriate authorities to bring him to justice.¹⁵ To enforce the demands, the Security Council imposed a flight ban on any aircraft owned, leased, or operated by or on behalf of the Taliban.¹⁶ Further, it ordered the freezing of the organization's financial resources.¹⁷

The Resolution established a Sanctions Committee composed of the fifteen Security Council members to ensure implementation of measures, to designate funds or other financial resources of the Taliban, and to consider requests for exemptions from the measures imposed.¹⁸

B. Security Council Resolution 1333 (December 19, 2000)

In Resolution 1333 the Security Council imposed an arms embargo over the territory of Afghanistan controlled by the Taliban.¹⁹ Further, it expanded the air embargo and financial embargo to include freezing the funds of Usama Bin Laden and associates.²⁰ It requested the Committee to maintain an updated list of suspect individuals and entities, including Usama bin Laden and the Al-Qaida organization.²¹ On March 8, 2001, the Committee published its first Consolidated List designating terrorists and terrorist financiers.²² The Resolution further mandated the Committee to maintain a list of agencies providing humanitarian aid in Afghanistan.²³

C. Security Council Resolution 1363 (July 30, 2001)

The 1363 Resolution established a mechanism to monitor the implementation of the measures imposed by Resolutions 1267 and 1333.²⁴ Since 2001, the monitoring mechanism's configuration has changed as new

15. S.C. Res. 1267, ¶¶ 4, 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (establishing the Security Council Committee and imposing limited air embargo and financial embargo on the Taliban).

16. *Id.* ¶ 4(a).

17. *Id.* ¶ 4(b).

18. *Id.* ¶ 6.

19. S.C. Res. 1333, ¶ 5(a), U.N. Doc. S/RES/1333 (Dec. 19, 2000), (expanding the air embargo and financial embargo to include freezing the funds of Usama Bin Laden and associates, imposing an arms embargo over the territory of Afghanistan controlled by the Taliban and embargo on the chemical acetic anhydride).

20. *Id.* ¶¶ 8(c), 11.

21. *Id.* ¶ 8(c).

22. See Press Release, Security Council, Security Council Committee Concerning Afghanistan Issues List Pursuant to Paragraph 8(c) of Resolution 1333, U.N. Doc. AFG/150-SC/7166 (Aug. 10, 2001); U.N. Security Council Comm., *The Consolidated List*, U.N. Doc. SC/7028 (Mar. 8, 2001) [hereinafter *The Consolidated List*].

23. S.C. Res. 1333, *supra* note 19, ¶ 12.

24. S.C. Res. 1333, *supra* note 19, ¶ 15; see generally, S.C. Res. 1267, *supra* note 15.

members have been appointed or the mandate renewed.²⁵ For example, initially in 2001 they were called the “Committee of Experts,” and from 2001 to 2003 the mechanism was called the “Monitoring Group.”²⁶ The Committee of Experts and the Monitoring Group submitted four reports before their mandate lapsed.²⁷ Via Resolution 1526,²⁸ the experts’ title was changed to the “Analytical Support and Sanctions Monitoring Team.”²⁹ This group has submitted eight reports, the most recent dated May 14, 2008.³⁰ Regardless of the configuration or titles, all experts share the same mandate — to assist the Committee and to monitor compliance for strengthening the measures. The terms used in this analysis are “Monitoring Team” or “Experts.”

D. Resolution 1617 (July 29, 2005)

In Resolution 1617, the Security Council provided a definition of the term “associated with” and called for member States to submit checklist provisions when submitting a name to be included on the List. It requested

25. See, e.g., S.C. Res. 1455, ¶ 8, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1735, ¶¶ 1–2, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

26. See, e.g., S.C. Res. 1363, ¶ 2, U.N. Doc. S/RES/1363 (July 30, 2001); S.C. Res. 1390, ¶¶ 7, 9–10, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1455, *supra* note 25, ¶¶ 7–10, 12–14.

27. The Secretary-General, *Letter Dated 21 May 2001 from the Secretary-General Addressed to the President of the Security Council*, U.N. Doc. S/2001/511 (May 22, 2001); The Res. 1267 Chairman, *Letter Dated 14 January 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Afghanistan*, U.N. Doc. S/2002/65 (Jan. 14, 2002); The Res. 1267 Chairman, *Letter Dated 16 December 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Addressed to the President of the Security Council Containing the First Report of the Monitoring Group Pursuant to Resolution 1390*, U.N. Doc. S/2002/541 (May 15, 2002) [hereinafter *Dec. 2002 Letter*]; The Res. 1267 Chairman, *Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 and Extended by Resolution 1390*, at 5, *delivered to the Security Council*, U.N. Doc. S/2002/1050 (Sept. 20, 2002) [hereinafter *Monitoring Group Second Report*]; The Res. 1267 Chairman, *Letter Dated 19 September 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Afghanistan*, U.N. Doc. S/2002/1050 (Sept. 20, 2002) [hereinafter *Sept. 2002 Letter*]; The Res. 1267 Chairman, *Letter Dated 16 December 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Addressed to the President of the Security Council Containing the Third Report of the Monitoring Group Pursuant to Resolution 1390*, U.N. Doc. S/2002/1338 (Dec. 17, 2002).

28. S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

29. *Id.* ¶¶ 6–7.

30. The Res. 1267 Chairman, *Letter Dated 13 May 2008 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, U.N. Doc. S/2008/324 (May 14, 2008).

that the Secretary-General extend the mandate of the Monitoring Team by seventeen months.³¹

E. Resolution 1730 (December 19, 2006)

Resolution 1730 established the Focal Point within the Secretariat to receive delisting requests and directed the Committee to revise guidelines accordingly.³²

II. THE COMMITTEE AND THE CONSOLIDATED LIST

A. The Sanctions Committee

1. *Membership and Decision-Making Process*

The Committee consists of the Security Council members. Guidelines suggest that all decisions are made by complete consensus among the fifteen Committee members.³³ Although the composition of the Committee is the same as the Security Council (i.e., five permanent and ten non-permanent members), an important difference in the decision making process exists. In the Security Council, decisions can be made by majority vote that should include the concurring votes of all five permanent members (i.e., no permanent member should veto a decision). This is the rule of “Great Power Unanimity.”³⁴ However, in the Committee, consisting of the very same members as the Security Council, any member (not just a permanent member, but *any* of the fifteen members) can veto a decision or place a “hold.”³⁵

When a member places a “hold” concerning any issue, whether procedural or substantive, there is no statutory limit for resolution, though the hold ceases to have effect when a non-permanent member’s membership on the Committee expires.³⁶ Since the Resolutions are silent about the time limit, operationally, an interpretation of a two-year period is feasible (i.e., the non-permanent membership duration); alternatively, the interpretation could also indicate a lengthier period, given the affiliations and relationships among Committee members (i.e., an incoming member can continue a hold placed by an outgoing member).

31. S.C. Res. 1617, ¶¶ 1–2, 10, 19–21, U.N. Doc. S/RES/1617 (July 29, 2005).

32. S.C. Res. 1730, ¶¶ 1–2, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

33. U.N. Sec. Council, Al-Qaida and Taliban Sanctions Committee, *Guidelines of the Committee for the Conduct of Its Work*, Dec. 9, 2008, http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf [hereinafter *Guidelines*].

34. See *Membership in 2009*, <http://www.un.org/sc/members.asp> (last visited Sept. 5, 2009).

35. *Guidelines*, *supra* note 33, ¶ 4.

36. *Id.*

Decisions are made during regular meetings, by special meetings, or by a written “no-objection” process within a fixed time period, five days or shorter if decided by the Chairman.³⁷ All meetings of the Committee are closed sessions.³⁸ The Committee meets formally or informally.³⁹ Decisions are adopted in formal meetings only; whereas the informal meetings, undertaken regularly, serve as a forum for debate and discussions.⁴⁰ Also, an extra cost is involved in the formal meetings due to the use of interpreters in the six official U.N. languages.

2. *Scope and Duties*

Initially, the Committee was merely a conduit of information. It reported to the Security Council the U.N. member States’ actions undertaken in compliance with the sanction measures.⁴¹ However, over time, conforming to the widening scope of the sanction measures, the Committee’s scope evolved. For example, initially the Resolution 1267 was limited to targeting the Taliban.⁴² Resolution 1333 widened the scope to include Usama bin Laden and individuals and entities associated with Al-Qaida.⁴³ On July 29, 2005, by Resolution 1617, the Security Council further widened the scope by providing a definition of “associated with.”⁴⁴ Concurrent with the evolving Resolutions, the Committee mandate magnified, from originally reporting issues regarding the Taliban, to maintaining a list designating individuals and entities associated with Al-Qaida, and finally, to designating terrorists globally.

The duties of the Committee can be divided into listing and delisting; monitoring sanctions, compliance, and “capacity building” among U.N. members; accepting reports from States and formulating reports for the Security Council; and advising.⁴⁵

The Committee’s mandate includes the formulation and maintenance of various lists, all of which are evolving and open. An “open list” empowers States to act before the issuance of the Committee list within the categories

37. *Id.* at 4(a).

38. *Id.* at 3(b).

39. *Id.* at 3(a).

40. Some kinds of meetings and procedures followed by the U.N. organs include (1) ‘Open meetings’ that are formal and open to the public, (2) ‘Arria meetings’ that are un-minuted and considered “non-meetings”, (3) ‘Closed meetings’ wherein the Chatham House Rule applies. At Closed meetings, participants do not disclose specific positions taken by others and details of the meeting are not given; broad points are merely stated. Reforming the United Nations, High Level Panel on UN-Civil Society: Security Council Relations with Civil Society, <http://www.un.org/reform/civilsociety/pdfs/sc.pdf> (last visited Sept. 24, 2009).

41. *See* S.C. Res. 1267, *supra* note 15, ¶ 6.

42. *See id.* ¶¶ 1–4.

43. S.C. Res. 1333, *supra* note 19, ¶ 8.

44. S.C. Res. 1617, *supra* note 31, ¶ 2.

45. *Guidelines*, *supra* note 33, ¶¶ 4(a)–(d), (k).

of targets established by the resolution or to go beyond when a State suspects that targeted assets are within its jurisdiction.⁴⁶ Some controversy and criticism is attached to most lists. Primarily, concerns relate to the lack of transparency, the secrecy surrounding the rationale for designations, and the violation of human rights.⁴⁷

Perhaps the least controversial is the list maintained for all landing areas for aircraft within the territory of Afghanistan under control of the Taliban⁴⁸ or the list detailing agencies and organizations that provide humanitarian aid and assistance in Afghanistan.⁴⁹ A somewhat controversial list is the humanitarian exceptions list.⁵⁰ Conceivably, the most controversial is the Consolidated List that lists and delists individual or entities as terrorists or the financiers of terrorism.⁵¹ Lastly, the Committee is required to make periodic reports, every 120 days, to the Security Council regarding all lists.⁵²

3. *Dividing Tensions Reflected in the Consolidated List*

Severe tensions among members define the work of the Committee. Because the Committee makes decisions by *complete* consensus, due to members' differing priorities or interests, often it is unable to make *any* decision.⁵³ The consensus process, therefore, can be viewed as serving as an effective restraint or check in the decision making process, since every

46. BIERSTEKER & ECKART, *supra* note 8, at 7–8.

47. See generally José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. OF INT'L L. 873 (2003); Jane Stromseth, *The Security Council's Antiterrorism Role: Continuity and Innovation*, 97 AM. SOC'Y INT'L L. PROC. 41 (2003); Elin Miller, *The Use of Targeted Sanctions in the Fight Against International Terrorism: What About Human Rights?*, 97 AM. SOC'Y INT'L L. PROC. 46 (2003); E. Alexandra Dosman, *For the Record: Designating 'Listed Entities' for the Purpose of Terrorist Financing Offences at Canadian Law*, 62 U. TORONTO FAC. L. REV. 1 (2004); Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda / Taliban Sanctions*, 97 AM. J. INT'L L. 333 (2003).

48. S.C. Res. 1333, *supra* note 19, ¶ 16(a).

49. *Id.* ¶ 16(d).

50. S.C. Res. 1267, *supra* note 15, ¶ 6(a).

51. *Id.* ¶¶ 4, 6.

52. *Guidelines*, *supra* note 33.

53. See U.N. Sec. Council, *Letter Dated 1 December 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, U.N. Doc. S/2005/761 (Dec. 6, 2005) [hereinafter *Dec. 2005 Letter*]. "As at 1 November 2005, the addition of 139 individuals and 1 entity, submitted to it over the past years, is pending Committee approval. The Committee is also still considering more than 500 technical corrections submitted to it by the Monitoring Team." *Id.* at 2; see generally U.N. Sec. Council, *Comm. Established Pursuant to Res. 1267, Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2006/22 (Jan. 17, 2006) [hereinafter *Sec. Council Committee Report Concerning Al-Qaida*].

Committee member must be satisfied, or conversely, can hijack the Committee's work, for precisely the same reason.

Contrasting stances among the Committee members, and by extension, the U.N. member States, are highly visible. While no State wants to seem soft on issues regarding terrorism, and all 192 U.N. members concur that it is a serious global threat,⁵⁴ the Consolidated List, considered the core or "the operational centerpiece"⁵⁵ of sanctions measures, is viewed differently by various Committee members.

On one side of the spectrum are those that take a hard-line stance and do not want to seem accommodating or soft on any issue,⁵⁶ and at the other end are those member States that attempt to deal with issues regarding terrorism within the framework of human rights.⁵⁷ The first group views the Consolidated List as a punishing and repressive instrument, whereas the second, as a reformatory and progressive measure.

The group taking a hard-line stance views the List as exemplary, with the obligation to impose restrictions on all persons and entities they have identified as members of Al-Qaida or the Taliban, even *prior* to being added by the Committee to the List.⁵⁸ Additionally, the group focuses on placing individuals on the List, is opposed to delisting an individual on the assumption that an individual would return to terrorism if delisted. The group is against delisting a deceased person's name on the assumption that the deceased's funds or travel documents may be misused for future criminal activity.⁵⁹

54. The U.N. Global Counter-Terrorism Strategy, G.A. Res. 60/288, at 1, U.N. Doc. A/RES/60/288 (Sept. 20, 2006).

55. U.N. SCOR, 59th Sess., 5104th mtg., at 8, U.N. Doc. S/PV.5104 (Dec. 17, 2004) (statement of Mr. Pleuger, Germany).

56. See U.N. SCOR, 61st Sess., 5375th mtg., U.N. Doc. S/PV.5375 (Feb. 21, 2006); U.N. SCOR, 61st Sess., 5446th mtg., U.N. Doc. S/PV.5446 (May 30, 2006); U.N. SCOR, 61st Sess., 5538th mtg., U.N. Doc. S/PV.5538 (Sept. 28, 2006).

57. U.N. SCOR, 60th Sess., 5168th mtg., at 23, U.N. Doc. S/PV.5169 (Apr. 25, 2005).

Briefings by Chairmen of Subsidiary Bodies of the Security Council, Statement of Mr. Hoscheit, Luxembourg, on behalf of the European Union: The EU is convinced that efforts to combat terrorism must respect human rights and fundamental freedoms. Counter-terrorism actions must at all times be accompanied by the respect of due process and the rule of law. There can be no trade-off between human rights and effective security measures. Indeed, respect for human rights must remain an integral part of any global counter-terrorism strategy.

Id.

58. *Sept. 2002 Letter*, *supra* note 27, ¶ 21.

59. *Id.* ¶¶ 21–43; see generally The Res. 1267 Chairman, *Letter Dated 20 December 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals*, ¶ 10, U.N. Doc. S/2006/046 (Dec. 28, 2006) [hereinafter *Dec. 2006 Letter*].

The second group, which views the List as a reformatory and progressive measure, considers human rights and fundamental freedoms as an integral part of any global counter-terrorism strategy; they restrict the application of measures only to the specific person or entity identified in the List.⁶⁰ Furthermore, they support the delisting of individuals who have renounced terrorism, the removal of the names of the deceased, and the removal of names that lack sufficient identifiers.⁶¹

An example demonstrating this stance was the German terrorist trial, wherein a court in Düsseldorf convicted four Arab men of planning attacks on Jewish sites in Germany.⁶² The media report suggests most of the evidence came from a fifth member of al-Tawhid, who admitted to plotting the attacks after the men were arrested in April 2002, and described links with Al-Qaida.⁶³ In return, he got a reduced sentence in 2003 and was then released into Germany's witness-protection program.⁶⁴ Further, in December 2004, the U.N. Committee delisted the individual at the request of the German government.⁶⁵

Quite clearly the dividing tensions among Committee members have a profound impact on the implementation of the Consolidated List. Perhaps the most obvious result of tensions is the confusion regarding the nature of the instrument. Another is the nature of obligations imposed on the U.N. membership due to the instrument. The following analysis explores these issues and explains how the List is interpreted diversely amongst the U.N. membership. Moreover, it is shown that, though the nature of the instrument is unclear, in stark contrast is the clarity vis-à-vis the instrument's enforcement obligations placed on the entire U.N. membership. The analysis also explores the List's layout, scope, and reach.

B. The Consolidated List

1. *Structure and Composition*

The Consolidated List is composed of five sections, as described below. Each section arranged in alphabetical order. Each name is numbered; however, numbers are not permanently assigned to a proscribed name. The numbers change with every new addition or deletion because new names are

60. *Sept. 2002 Letter*, *supra* note 27, ¶ 19; U.N. SCOR, 61st Sess., 5375th mtg., at 5, U.N. Doc. S/PV.5375 (Feb. 21, 2006).

61. U.N. SCOR, 60th Sess., 5168th mtg., at 20–23, U.N. Doc. S/PV.5168 (Apr. 25, 2005).

62. *Germany Convicts Terror Plotters*, BBC NEWS, Oct. 26, 2005, <http://news.bbc.co.uk/2/hi/europe/4377808.stm>.

63. *Id.*

64. *See id.*; Janie Ho, *Germans Cut Deal with Terrorist*, CBS NEWS, Nov. 26, 2003, <http://www.cbsnews.com/stories/2003/11/26/terror/main585734.shtml>.

65. *See The Consolidated List*, *supra* note 22.

inserted based upon alphabetical order.⁶⁶ Until December 2006, the Consolidated List was printed in only one of the six official U.N. languages — English. As the results of the measure shows, these apparently trivial details have serious consequences for both the proscribed individuals on the List and those obligated with enforcing the measure.

As of December 12, 2006, the Consolidated List was comprised of 487 entries: Section A listed 142 individuals belonging to or associated with the Taliban; Section B showed 1 entity belonging to or associated with the Taliban; Section C named 220 individuals belonging to or associated with Al-Qaida; Section D listed 124 entities belonging to or associated with Al-Qaida; and Section E included 19 individuals and entities previously belonging to any of the above four categories, but now removed from the list(s).⁶⁷

Following each update, a listing, delisting, or amendment, the Committee issues a press release, circulates a *Note Verbale* to the State missions, e-mails changes to U.N. member States, and transmits a hard copy of the List on a quarterly basis.⁶⁸ Currently, e-mails are sent to 342 contact points provided by member States and relevant international and regional organizations.⁶⁹

2. *Nature of the Instrument*

The Consolidated List is an unusually complex (in derivation and use) instrument of significant symbolic value. The Monitoring Team views it as

66. U.N. Sec. Council, *Second Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, in letter dated 14 February 2000 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, U.N. Doc. S/2005/83 (Feb. 15, 2005) [hereinafter *Second Report*].

67. Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them, <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf> (source is updated as the list is updated, last updated Jan. 25, 2010).

68. The Res. 1267 Chairman, *Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, ¶ 18, in letter dated 20 December 2002 from the Chairman of the Security Council Committee Established Pursuant to Individuals and Entities Addressed to the President of the Security Council, U.N. Doc. S/2004/1039 (Dec. 31, 2004).

69. *Dec. 2005 Letter*, *supra* note 53, ¶ 15; The Res. 1267 Chairman, *Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, ¶ 14, in letter dated 29 January 2007 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities addressed to the President of the Security Council, U.N. Doc. S/2007/59 (Feb. 7, 2007) [hereinafter *Jan. 2007 Letter*].

“an expression of the resolve of the international community to defeat terrorism Alongside the twelve thematic conventions against terrorism, and in the absence of a universally agreed definition of terrorism, the List stands both as a symbol of international resolve and as a practical measure to address the global challenge to international peace and security.”⁷⁰ Indeed, “in the absence of an agreed upon definition of terrorism, the Consolidated List provides the only consensus on what Al-Qaida comprises.”⁷¹ Moreover, the Monitoring Team states that the List acts as a deterrent as well as a preventative measure.⁷²

Some U.N. members add that the List is not a political tool,⁷³ but a legal one.⁷⁴ Others note that it is “designed to serve as an operational tool for the enforcement of the assets freeze, the travel ban, and the arms embargo.”⁷⁵ Yet others view it as the most effective instrument in the Security Council’s campaign against threats to international peace and security stemming from terrorism.⁷⁶ Seemingly, all agree that the Consolidated List is the most essential instrument implementing the sanctions regime.⁷⁷ However, none of the Resolutions clarify its nature or purpose.

3. *Debate Between Administrative or Punitive Nature of the List*

The Resolutions are silent about the nature and purpose of the instrument; however, the Monitoring Team insists that the List is not a criminal instrument. It interprets it as a deterrent, preventive, and administrative measure.⁷⁸ It suggests that the List is an administrative

70. *Second Report, supra* note 66.

71. *Id.*; see generally The Res. 1267 Chairman, *Letter Dated 23 August 2004 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, ¶ 35, U.N. Doc. S/2004/679 (Aug. 25, 2004) [hereinafter *Aug. 2004 Letter*].

72. U.N. Sec. Council, *Third Report of the Analytical Support and Sanction Monitoring Team, in letter dated 2 September 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities addressed to the Present of the Security Council*, U.N. Doc. S/2005/572 (Sept. 9, 2005) [hereinafter *Third Report*].

73. U.N. SCOR, 59th Sess., 5104th mtg., at 8, U.N. Doc. S/PV.5104 (Dec. 17, 2004) (see German statement).

74. U.N. SCOR, 61st Sess., 5538th mtg., at 22, U.N. Doc. S/PV.5538 (Sept. 28, 2006) (see Qatar statement).

75. U.N. SCOR, 59th Sess., 5104th mtg., *supra* note 73, at 18 (see German statement).

76. U.N. SCOR, 59th Sess., 4976th mtg., at 12, U.N. Doc. S/PV.4976 (May 25, 2004) (see Russian Federation statement).

77. U.N. SCOR, 61st Sess., 5538th mtg., at 18, U.N. Doc. S/PV.5538 (Sept. 28, 2006) (see Russian Federation statement.).

78. *Third Report, supra* note 72, ¶ 41 (“After all, the sanctions do not impose a criminal punishment or procedure, such as detention, arrest or extradition, but instead apply

measure, not a criminal instrument.⁷⁹ “A criminal conviction or indictment is *not* a prerequisite for inclusion on the Consolidated List; the actions of an individual or entity in support of Al-Qaida or the Taliban — whether or not criminalized or admissible as evidence in a particular State — will continue to provide the basis for inclusion on the List” and “regardless of whether any authority has formally charged them with a criminal offence.”⁸⁰

The interpretation is shared by the Committee in virtually the same words:

There seems to be a general misunderstanding in some Member States that national criminal proceedings are necessary in order to freeze assets The Committee also notes that criminal conviction or indictment is not a prerequisite for inclusion on the consolidated list, and member States need not wait until national administrative, civil or criminal proceedings can be brought or concluded against an individual or entity before proposing a name for the [C]onsolidated [L]ist.⁸¹

[Hence t]he Committee strongly believes that no reason is good enough to justify delays in the submission of new names or further identifying information on the names already on its list. In this regard, the Committee wishes to stress again that no criminal conviction is required for the submission of names to its List.⁸²

Regardless of these interpretations, the Consolidated List is clearly a punitive instrument due to the serious consequences for the listed and the U.N. member States enforcing the List.⁸³ Certain U.N. members have expressed serious concerns and noted that while the measures are intended to be preventive in nature, they are punitive in effect, for the rights of individuals are severely affected. In particular, the application of measures against individuals without possibility of review or appeal has the real potential to violate individual due process rights guaranteed by relevant instruments of international law.⁸⁴ Similar concerns have been raised by the U.N. High Commissioner for Human Rights in a report dated March 9, 2007, wherein the Commissioner explicitly stated that the instrument is punitive in character.⁸⁵ Based on these statements, it follows that the List is interpreted differently among U.N. members.

administrative measures such as freezing assets, prohibiting international travel and precluding arms sales.”).

79. *Id.* ¶ 41.

80. *Id.* ¶¶ 41, 39.

81. *Dec. 2005 Letter, supra* note 53.

82. *Dec. 2006 Letter, supra* note 59.

83. U.N. SCOR, 60th Sess., 5229th mtg., U.N. Doc. S/PV.5229 (July 20, 2005).

84. *Id.*

85. U.N. High Comm’r for Human Rights, *Implementation of General Assembly Resolution 60/241 of 15 March 2005 Entitled “Human Rights Council,”* ¶ 25, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007).

The reason for the diverse interpretations deserves consideration. A possible explanation for the classification of the instrument as an administrative and preventive measure, as opposed to a criminal and penal instrument, could be that the Security Council is a political institution, not a court of law; therefore, it lacks the necessary qualifications for properly conducting criminal proceedings.⁸⁶

Moreover, as the landmark Fassbender study⁸⁷ noted, the classification as a criminal and penal instrument would have significant consequences not only in terms of the comparatively higher standards relating to criminal offences but also of human rights to be guaranteed by the Security Council in international law. In particular, the listed individuals would be entitled to a fair and public hearing by an independent and impartial court or tribunal established by law.⁸⁸ And still further, the right not to be tried or punished twice for the same criminal offence would have to be respected.⁸⁹

However, a severe contradiction exists even in the administrative classification. Presumably, the purpose of the measures when taken against individuals or entities is the same as when undertaken against a State under Chapter VII (i.e., to influence the listed individuals'/entities' conduct for the purposes of maintaining or restoring international peace and security).⁹⁰ The corollary, of course, is that a person must be offered an opportunity to demonstrate that such a change of attitude and conduct has indeed taken place because of the listing⁹¹ — a practice somewhat similar to that offered to sanctioned States.⁹² That is to say, minimally, from *either* classification flows review or some independent assessment regarding the listed's conduct post-listing — currently, *all* of which are entirely absent from the measures.

For now the debate regarding the nature of the Consolidated List is put aside, though it is concluded that the List is interpreted differently among U.N. members and it has significant symbolic value. However, the nature remains unclear, although theoretically *either* classification (administrative or penal) should entail some review mechanism.

86. BARDO FASSBENDER, TARGETED SANCTIONS AND DUE PROCESS: THE RESPONSIBILITY OF THE UN SECURITY COUNCIL TO ENSURE THAT FAIR AND CLEAR PROCEDURES ARE MADE AVAILABLE TO INDIVIDUALS AND ENTITIES TARGETED WITH SANCTIONS UNDER CHAPTER VII OF THE UN CHARTER 1 (2006), http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf.

87. *Id.*

88. *Id.*

89. *Id.*

90. U.N. Charter arts. 39–51.

91. FASSBENDER, *supra* note 86.

92. *See, e.g.*, DAVID CORTRIGHT & GEORGE A. LOPEZ, THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S 13–36 (2000); GARY C. HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (2d ed. 1990).

4. *Evolving Scope and Reach*

Recall that the scope of the Committee has been evolving since 1999. Concurrent with the Committee's evolving scope, the scope and reach of the Consolidated List evolved. Professor Cameron notes that the definition of "associated with" provided by Resolution 1617,⁹³ has resulted in the scope of the Consolidated List being qualitatively different from its previous scope. The scope is now "open-ended" and dramatically widened, unbound by geography.⁹⁴ The Monitoring Team justifies the evolution as reflecting the "geographic diversity of the threat posed by Al-Qaida, the Taliban, and associated groups" while observing that "the most recent additions to the List include Al Qaida-associated terrorists and terrorist groups operating in Central, South and South-east Asia and the Middle East, including Iraq."⁹⁵

5. *Obligations Imposed on U.N. Member States*

Professor Fassbender authored the study entitled *Targeted Sanctions and Due Process*,⁹⁶ commissioned by the U.N. Office of Legal Affairs. One purpose of the study was to analyze the nature of obligations imposed on U.N. member States under Chapter VII of the U.N. Charter.⁹⁷ In addition, the study addressed a significant number of procedural and substantive issues regarding listing of individuals and entities by the U.N. In the context of the nature of obligations placed on U.N. member States under Chapter VII, the study concluded that U.N. member States do not possess any discretionary rights. They must comply with the terms of the Council resolutions as they stand.⁹⁸

Perhaps the interpretation is necessary to maintain or restore international peace and security as the U.N. Charter states.⁹⁹ However, a strict interpretation could also be problematic since the primary responsibility for enforcing the measures lies with the U.N. members.

93. S.C. Resolution 1617, *supra* note 31, ¶ 2.

94. IAIN CAMERON, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS 4 (2008), available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_& Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf ("in contrast to earlier targeted sanction, involves a qualitative difference in that there is no connection between the targeted group/individuals and any territory or state").

95. *Third Report*, *supra* note 72, ¶¶ 10, 21–22.

96. FASSBENDER, *supra* note 86.

97. The Fassbender study addressed the following question: "Is the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process, or 'fair and clear procedures,' are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?" *Id.* Having answered this question in the affirmative, it further identified the rights and the options available to the Security Council to secure them. *Id.*

98. *Id.*

99. U.N. Charter art. 39.

Indeed, different sanction cases have shown that a lack of consensus among the enforcing States results in undermining the measures.¹⁰⁰ Thus, from an operational perspective, a modest argument could be made that consent is important for the effective implementation of the measures. Furthermore, employing a counterfactual reasoning while considering the consequences of lack of consent, it is suggested that the absence of consent may prove problematic because, operationally, even non-consenting States are obligated to enforce the measures.¹⁰¹ Therefore, by themselves, mandatory obligations are insufficient to ensure enforcement. Neither does it follow from the mandatory nature alone that U.N. member States, or even an overwhelming majority of the member States, would enforce the instrument effectively, or, crucially, that enforcement would be uniform among them. Additionally, it should be noted that mandatory obligations have put some States in positions that, despite best intentions, have compelled their non-compliance.¹⁰²

The Fassbender study also concluded that member States have no authority to review the names of individuals and entities specified by the responsible committee of the Security Council with the aim of ascertaining whether the persons and entities indeed fall under the categories defined by the respective Council resolution.¹⁰³

The point is that theoretically Chapter VII obligations are mandatory and no discretion by U.N. membership is permitted while enforcing the List. The assumption is re-enforced by the Committee's explicit statement: "It must be stressed that Member States are under an obligation to freeze assets as soon as an individual or entity is added to the List and that no discretion is left with, e.g., national courts in this regard."¹⁰⁴ Moreover, the Committee has stressed that it expects all member States to enforce sanctions "with the same vigour with which they approach their highest national interests."¹⁰⁵ Against this background we analyze the reach of the List.

It is observed that the Consolidated List has a wide global reach. States are required to circulate it as widely as possible and use it as "an authoritative and key reference document."¹⁰⁶ They are required to disseminate it as widely as possible to all competent authorities, including,

100. See, e.g., HUFBAUER ET AL., *supra* note 92.

101. See, e.g., R.T. NAYLOR, *ECONOMIC WARFARE: SANCTIONS, EMBARGO BUSTING, AND THEIR HUMAN COST* (1999).

102. *Sept. 2002 Letter*, *supra* note 27, ¶ 39 (citing the legal difficulties experienced by Luxembourg in implementing mandatory freezing of financial and economic assets of listed terrorists — Luxembourg has recently released assets for individuals and linked to al-Barakaat due to lack of access to pertinent information relating to the case).

103. FASSBENDER, *supra* note 86.

104. *Dec. 2005 Letter*, *supra* note 53, at 3.

105. U.N. Sec. Council, Comm. Established Pursuant to Res. 1267, *Written Assessment Pursuant to Paragraph 17 of Security Council Resolution 1617*, ¶ 20, U.N. Doc. S/2006/1046 (Dec. 28, 2006).

106. *Sept. 2002 Letter*, *supra* note 27, ¶ 126.

but not limited to, financial institutions, border control authorities, arms control authorities, and administrative and judicial departments responsible for the identification of individuals, including the changing of names.¹⁰⁷

In particular, the List is circulated to banks; financial institutions; non-banking financial institutions (such as pension, insurance, financial leasing companies, foreign exchange bureaus, money transmitters, securities firms, and credit unions); businesses; and professionals (such as accountants, attorneys, trust administrators, business registrars, financial advisers, precious commodities dealers, and real estate, tax, and travel agents); as well as to border points, consulates, customs agents, intelligence agencies, alternative remittance systems, and charities.¹⁰⁸

As of December 2004, of the total 191 U.N. membership, 131 States had submitted reports regarding compliance measures developed by the states to meet the U.N. requirements.¹⁰⁹ All of these reporting States claim to have incorporated the List and its sanctions into their legal or administrative regimes.¹¹⁰ Furthermore, “[a]nalysis of the 131 reports shows that the Consolidated List has been circulated to banks and non-bank financial institutions by 125 (95%) and 107 (82%) Member States respectively.”¹¹¹ A report dated December 2006 notes that the number of States that circulate the Committee’s List to relevant authorities and agencies had reached 169.¹¹²

Additionally, the List is incorporated into the databases of several international organizations, including the INTERPOL database, the Basel Committee,¹¹³ the International Civil Aviation Organization, and the International Air Transport Association.¹¹⁴

The checklist provisions of Resolution 1617¹¹⁵ further ensure compliance among U.N. member States. These provisions create a general reporting requirement that requires “all States to complete and return to the Committee a brief checklist within sixty days of its notification that a new

107. *Id.*

108. *Second Report*, *supra* note 66, ¶ 14.

109. The Res. 1267 Chairman, *Letter Dated 16 December 2004 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, ¶ 10, U.N. Doc. S/2004/1037 (Dec. 31, 2004) [hereinafter *Dec. 2004 Letter*].

110. *Id.* ¶ 19.

111. *Id.* ¶ 24.

112. *Dec. 2006 Letter*, *supra* note 59, ¶ 7.

113. Charles Freeland, *How Can Sound Customer Due Diligence Rules Help Prevent the Misuse of Financial Institutions in the Financing of Terrorism?*, in FINANCING TERRORISM 41–48 (Mark Pieth ed., 2002).

114. See generally *Dec. 2005 Letter*, *supra* note 53; U.N. SCOR, 61st Sess., 5538th mtg., *supra* note 57, at 4; U.N. SCOR, 59th Sess., 5104th mtg., at 17 U.N. Doc. S/PV.5104 (Dec. 7, 2004) (statement of Mr. Sardenberg, Brazil).

115. S.C. Res. 1617, *supra* note 31, ¶ 2, annexes I–II.

name(s) has been added to any internal national list or registry of terrorists.”¹¹⁶ As of September 30, 2006, fifty-five States had submitted their checklists conforming to these provisions.¹¹⁷

Leaving aside the perplexing question concerning the nature of the instrument, it can be concluded that the reach of the Consolidated List is extremely wide. Indeed, it is the widest among all lists currently enforced globally.¹¹⁸ Although U.N. members have used different methods to incorporate it into the domestic regulatory systems,¹¹⁹ most have done so (i.e., 169 member States out of the total U.N. membership of 192). These issues are extremely relevant within the context of the following analysis, which details the process whereby individuals are proscribed on this widely enforced measure.

III. PROCEDURAL AND SUBSTANTIVE LISTING AND DELISTING

A. Implementation of the Consolidated List

Substantively, there is an absence of listing standards, with the exception of a subjective “associated with” defined in 2005 (whereas the first List was formulated in 2001). Additional problems such as lack of justifications and identifiers plague the listing process. Equally problematic, the delisting process lacks definition in terms of criteria and process. As a result, the delisting process is reduced to diplomatic maneuvering among States.

116. *Second Report, supra* note 66.

117. *Dec. 2006 Letter, supra* note 59, ¶ 5.

118. See Statewatch’s comparative analysis of the United States, the United Kingdom, United Nations, and the European Union “terrorist lists” at Statewatch Comparison of Lists, <http://www.statewatch.org/terrorlists/terrorlists.html> (last visited Sept. 6, 2009) (“This website was launched in June 2005 by Statewatch in association with the Campaign Against Criminalising Communities and the Human Rights and Social Justice Institute, London Metropolitan University, to monitor the largely secret development of the policy of ‘proscribing’ groups and individuals connected with ‘terrorism.’”). According to this project, the following four lists proscribe individuals and entities, are globally recognized and enforced, and have a considerable overlap:

First, by the United Kingdom that introduced proscription in 1974 for organizations in Northern Ireland and then extended it to foreign organizations in 2000; Second, by the United States that introduced proscription of foreign terrorists groups in 1995; Third, by the United Nations that introduced the practice through the Consolidated List in the Taliban/Al-Qaeda Sanctions regime; Fourth, by the European Union, that incorporated the UN Consolidated List into the EU framework and then went a step further and introduced its own ‘terrorist’ list.

Statewatch Analysis, *Terrorizing the Rule of Law: The Policy and Practice of Proscription*, <http://www.statewatch.org/terrorlists/terrorlists.pdf> (last visited Sept. 14, 2009); *see also* “Terrorist” Lists Monitoring Proscription, Designation and Asset-Freezing, <http://statewatch.org/terrorlists/listsmain.html> (last visited Sept. 6, 2009).

119. *See Third Report, supra* note 72, ¶ 8, annex 3.

Perhaps the most problematic aspect of these processes is that the Committee is the sole and final authority with reference to all listing and delisting issues because no independent review mechanism exists despite the creation of the Focal Point.

1. Listing Procedure

The process of designating an individual or entity as a terrorist or a terrorism financier on the Consolidated List is straightforward. The Guidelines suggest that any country or multiple countries can propose a name to be included on the List.¹²⁰ The consensus of all fifteen Committee Members is required for listing.¹²¹ The *standards* for inclusion on the List are a bit more complicated.

2. Standards and Justification

Resolution 1617¹²² determines the evidentiary standard for inclusion on the Consolidated List as “associated with” Al-Qaida or the Taliban.¹²³

“Associated with” is defined by clause 2 of Resolution 1617 to include:

[P]articipating 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 materiel 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 a derivative thereof.¹²⁴

Several issues plague the definition. First, “associated with” is a subjective criterion, not one defining a minimum standard; therefore, it is subject to diverse interpretations among the U.N. members. In other words, different member States interpret the definition narrowly or broadly as applicable to their context, thereby setting their own standard for classifying individuals as associates of terrorists. Some note that it has led to the criminalizing of entire communities.¹²⁵ Connected to the broad definition is the issue of the ever-widening scope of the List. Recall that initially the

120. See The Res. 1267 Chairman, *Letter Dated 16 December 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Addressed to the President of the Security Council*, ¶ 18, U.N. Doc. S/2002/1338 (Dec. 17, 2002) (stating over 50 U.N. Member States supported listing the Jemaah Islmaiyah organization).

121. *Guidelines*, *supra* note 33, ¶ 3(a).

122. S.C. Res. 1617, *supra* note 31.

123. *Id.* ¶ 1.

124. *Id.* ¶ 2.

125. Ben Hayes, *Terrorizing the Rule of Law: The Policy and Practice of Proscription*, STATEWATCH, June 2005, <http://www.statewatch.org/terrorlists/terrorlists.html>.

Committee's mandate included listing individuals and entities associated with the Taliban, which was then increased to include the Al-Qaida organization, and lastly, by "associated with," the scope widened further, unbound by geographic limitations. The steadily widening scope has led U.N. members to express strong concerns.¹²⁶ Some even caution that the notion of "associates of terrorists should not be interpreted too expansively."¹²⁷ Yet others insist that the criteria for identifying the individuals or entities targeted by sanctions should be further developed and refined.¹²⁸ In view of these differences, the interpretation given by the Monitoring Team regarding "associated with" is of particular significance. It explicitly advises that U.N. member States interpret the "associated with" language *broadly* in submitting names, leaving it up to the Committee ultimately to ensure that each case fits within the scope of the sanction program.¹²⁹

It is noteworthy that the standard of "associated with" was clarified in 2005 by Resolution 1617,¹³⁰ whereas the first resolution, Resolution 1267, was passed in 1999,¹³¹ and the first Consolidated List was published on March 8, 2001.¹³² Unfortunately, the Resolutions and Guidelines are ominously silent regarding any other evidentiary standard. And issues of confidentiality have been raised to deny listed individuals the right to know the basis of their designation.¹³³

Further complicating the listing issue, justifications (i.e., statement of the case) were *not* a prerequisite for listing individuals. Given the serious implications of designating an individual as a terrorist or as a supporter of terrorism, it could be assumed that a proposal for inclusion on the List would be accompanied by a statement of the case providing some

126. See U.N. SCOR, 61st Sess., 5446th mtg., at 28, U.N. Doc. S/PV.5446 (May 30, 2006) ("First, the listing criteria must be further refined. In recent years, the scope of targeted sanctions has been extended considerably to include broad categories of individuals and entities . . . [W]e believe that the criteria for identifying the individuals or entities targeted by sanctions could be further developed and refined.").

127. See, e.g., U.N. SCOR, 59th Sess., 5104th mtg., at 9, U.N. Doc. S/PV.5104 (Dec. 17, 2004).

128. See generally U.N. SCOR, 61st Sess., 5446th mtg., U.N. Doc. S/PV.5446 (May 30, 2006).

129. Press Release, Security Council, Security Council Briefed by Chairmen of Anti-Terrorism Committees; Calls for Strengthened Cooperation, Enhanced Information Sharing, U.N. Doc. S/2005/83 (Feb. 15, 2005).

130. S.C. Res. 1617, *supra* note 31, ¶ 2.

131. See generally, S.C. Res. 1267, *supra* note 15.

132. *The Consolidated List*, *supra* note 22.

133. Linked to this is the issue of confidentiality. Can the Committee raise the issue of confidentiality to deny a listed individual the right to know the basis of his designation? It is clear that the Committee will have to find a way to balance carefully the need for confidentiality and the requirements of due process. See The Res. 1267 Chairman, *Briefings by Chairmen of Subsidiary Bodies of the Security Council*, at 20, U.N. Doc. S/PV.5375 (Feb. 21, 2006).

justification, reason, basis, cause, or connection supporting the designation. Seemingly, providing a statement of the case when proposing a name for inclusion has not always been a practice; alternatively, if such a practice existed, the information provided was probably not adequate or sufficient. The continuous insistence by the Monitoring Team in most reports supports the observation. Frequently it insists “that States provide, to the extent possible, a narrative description of the information that forms the basis or justification for adding a name to the List”¹³⁴ Simply, the statements demonstrate an absence of the practice.

The listing process is perhaps best put into context by way of an example.

3. *Al-Barakaat: A Case Study Elaborating the Listing Process*

A European diplomat assigned to the Security Council acknowledged: “In the aftermath of 9/11, there was enormous goodwill and a willingness to take on trust any name that the US submitted.”¹³⁵ Based on trust and goodwill, 200 names were added to the Consolidated List post 9/11.¹³⁶ This could be considered a significantly high number, given that over the following six years since 9/11 fewer than 300 were added.¹³⁷ Among those initial 200 names three Somali-born Swedish citizens were added to the Consolidated List on November 9, 2001, and three days later they were included in the European Union’s terrorist list.¹³⁸ Soon thereafter, Swedish

134. See The Res. 1267 Chairman, *Letter Dated 14 February 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council*, ¶ 55, U.N. Doc. S/2005/83 (Feb. 15, 2005); The Res. 1267 Chairman, *Letter Dated 7 July 2003 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Addressed to the President of the Security Council*, ¶ 142, U.N. Doc. S/2003/669 (July 8, 2003) [hereinafter *July 2003 Letter*] (“[S]tressed to States the importance of submitting to the Committee the names and identifying information, to the extent possible, of and about members of al-Qa’idah, the Taliban The Group believes that the provision of such information is essential to assure that the list remains an effective instrument.”).

135. Christopher Cooper, *Shunned in Sweden: How Drive to Block Funds for Terrorism Entangled Mr. Aden – U.S. Cited Him, and the U.N. Added Economic Sanction With Little Public Evidence – His Checks Stop, Bills Don’t*, WALL ST. J., May 6, 2002, at A1.

136. Rosand, *supra* note 47, at 749.

137. List composition as of May 14, 2007 was 468 (487 listed minus 19 de-listed). Consolidated List, 1267 Committee, *The Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them*, Sept. 1, 2009, <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>; De-listed, 1267 Committee, *Individuals, Groups, Undertakings and Entities that Have Been Removed from the Consolidated List Pursuant to a Decision by the 1267 Committee*, Aug. 10, 2009, <http://www.un.org/sc/committees/1267/docs/Delisted.pdf>.

138. Rosand, *supra* note 47, at 749.

financial institutions froze over \$100,000 of their assets.¹³⁹ The United States alleged that they were associated with the international hawala network Al-Barakaat.¹⁴⁰ At roughly the same time, Al-Barakaat was also added to the Consolidated List.

Started in 1989, Al-Barakaat was a financial and telecommunications organization involved in telecommunications, wire transfer services, internet service, construction, and currency exchange operating in over forty countries.¹⁴¹ The U.S. President, in November 2001, described the owner of Al-Barakaat as a “friend and supporter of Usama bin Ladin”, and the U.S. Secretary of Treasury described Al-Barakaat offices as “the money movers, the quartermasters of terror [are] . . . a principal source of funding, intelligence and money transfers for bin Ladin.”¹⁴² Other allegations included bin Laden using Al Barakaat’s 60 offices in Somalia and 127 offices abroad to transmit funds, intelligence, and instructions to terrorist cells.¹⁴³

Thereafter, federal agents entered eight Al-Barakaat offices in Minneapolis, Minnesota; Columbus, Ohio; Alexandria, Virginia; Seattle, Washington; and Boston, Massachusetts and seized the businesses and froze all accounts.¹⁴⁴ Investigations conducted by several authorities against the individuals and entity took different forms.

In the United States alone, investigations were conducted by the Federal Bureau of Investigation, the U.S. Customs Service, the Internal Revenue Service (“IRS”), and the Office of Foreign Asset Control.¹⁴⁵ The Senate Finance Committee also undertook extensive investigations, during which the IRS turned over tax and financial records, including donor lists of a dozen Muslim charities and foundations.¹⁴⁶ Notwithstanding the unprecedented cooperation and complete and unfettered access to Al-Barakaat’s financial records, the 9/11 Commission found that the links between Al-Barakaat and terrorism could not be substantiated. Moreover,

139. *Id.* at 750; Cooper, *supra* note 135, at A1.

140. *See generally* Saul M. Froomkin, *Money Laundering, Corruption and the Proceeds of Crime: An International Reality Check*, 4 ASPER REV. INT’L BUS. & TRADE L. 155 (2004).

141. *See generally* Bruce Zagaris, *The Merging of the Counter-Terrorism and Anti-Money Laundering Regimes*, 34 L. & POL’Y INT’L BUS. 45 (2004).

142. JOHN ROTH ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 4, 80 (2004) [hereinafter MONOGRAPH].

143. *See generally* Zagaris, *supra* note 141; Jonathan M. Winer, & Trifin J. Roule, *Fighting Terrorist Financing*, 44 SURVIVAL 87 (2002).

144. MONOGRAPH, *supra* note 142, at 80.

145. *Id.* at 87.

146. Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Mohamed Nimer, *Muslims in America After 9-11*, 7 J. ISLAMIC L. & CULTURE 1, 28–29 (2002).

investigations failed to reveal the “smoking gun” evidence — either testimonial or documentary — showing that Al-Barakaat was funding Al-Qaida.¹⁴⁷ Furthermore, the government was unable to produce any evidence of any terrorist involvement with the charities or financial institutions, and by August 2002 the Minneapolis-based Al-Barakaat was cleared of terrorism connections.¹⁴⁸ Last but not least, the 9/11 Commission Staff Report concluded that although Al-Barakaat has been commonly called a hawala, it is not one.¹⁴⁹

The Swedish authorities similarly undertook investigations, and upon reviewing the information, they concluded that nothing would warrant a criminal charge against the three individuals.¹⁵⁰ The deputy director of Sweden’s Foreign Affairs Ministry stated, “We discovered the sanctions committee didn’t have any information whatsoever when they took their action, just a list of names.”¹⁵¹

The Swedish government requested further information from both listing authorities.¹⁵² The U.S. Treasury responded by sending Sweden twenty-seven pages of information to prove the allegation: the twenty-three pages consisted of news release material, a packet of background documents on Al-Barakaat, a statement by President Bush on Al-Qaida, a transcript of a briefing led by Secretary of State Powell, and four other pages, in all of this evidence the Somali Swedes were mentioned only in the flowchart of Al-Barakaat’s structure.¹⁵³ Regarding the last four pages, the Swedish government, without disclosing their contents, stated that it had found nothing in them that warranted a criminal charge against the three proscribed individuals.¹⁵⁴

The government of Sweden objected to the inclusion of its citizens’ names on the Consolidated List and undertook the delisting process.¹⁵⁵ In February 2002, twelve of the fifteen U.N. Committee members voiced a no-objection to removing the three listed individuals; however, the United

147. MONOGRAPH, *supra* note 142, at 82.

148. Akram & Karmely, *supra* note 146; Nimer, *supra* note 146, at 29.

149. Monograph, *supra* note 142.

150. Cooper, *supra* note 135, at A1.

151. *Id.*

152. The individuals were listed on the U.S. OFAC list, which is a U.S. domestic list, a few days before they were listed on the U.N. list. See Dosman, *supra* note 47, at 15. Dosman notes that in October 2001, sixty-two names were added on the U.N. list. *Id.* These were the same names that were added to the OFAC List two days before, the point being that a considerable overlap between the two lists exists. *Id.*

153. Cooper, *supra* note 135, at A1.

154. *Id.*

155. U.N. Sec. Council, Comm. Established Pursuant to Res. 1267, *Report of the Security Council Committee Established Pursuant to Resolution 1267*, ¶ 11, in letter dated 20 December 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 addressed to the President of the Security Council, U.N. Doc. S/2002/1423 (Dec. 26, 2002).

States, the United Kingdom, and Russia blocked and objected to their removal.¹⁵⁶ After intensive bilateral discussions between the United States and Sweden, in August 2002 two of the three Somali Swedes were de-listed from the Consolidated List because they signed an undertaking with the U.S. government.¹⁵⁷

According to U.S. government officials the two were delisted not because of the error in listing them in the first place, but because “[they] submitted information, evidence, sworn statements first that they had no knowledge that the al-Barakaat business that they were associated with were being used, either directly or indirectly, to finance terror.”¹⁵⁸ And second, they submitted evidence, documents and sworn certification that they had severed all ties with Al-Barakaat and that they had disassociated themselves fully and completely with Al-Barakaat.¹⁵⁹

The matter of the third proscribed individual who refused to sign the undertaking was adjudicated at the Court of the First Instance. The Court gave its decision in October 2005.¹⁶⁰ Meanwhile following the initial allegations, all offices of Al-Barakaat shut down, and the entity ceased operations due to the enforcement actions, freezing of funds, and adverse publicity.¹⁶¹

A similar case involved two Swiss citizens of Egyptian origin — Mohamed and Zeinab Mansour. In 2001 they were listed because they were executive board members of Al-Taqwa, a company alleged by U.S. authorities to be connected with financing of terrorism.¹⁶² Upon investigation, the Swiss authorities determined that the allegations were

156. See generally Bruce Zagaris, *Somali Swedes Challenge to Recent Terrorism Freeze Procedures* 18 INT’L ENFORCEMENT L. REP. 277 (2002).

157. Dilshika Jayamaha, *U.S. Requests Removals Off U.N. List*, AP ONLINE, Aug. 22, 2002, available at <http://www.ap.org> (“The U.S. government asked that three men and three companies be taken off the [U.N. Sanctions] list, said Jimmy Gurule, the U.S. Treasury Department’s undersecretary for enforcement He said the men were removed from the list because they signed pledges saying that ‘they have severed and disassociated themselves in every conceivable way from the Al-Barakaat-related businesses.’”).

158. THOMAS J. BIERSTEKER & SUE E. ECKERT, *STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES* 36 (2006).

159. *Id.*

160. See Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649. For the details of the judgment, see discussion of “Delisting” *infra* discussion pertaining to notes 197–214.

161. Akram, *supra* note 146, at 619; Nimer, *supra* note 146, at 29; MONOGRAPH, *supra* note 142, at 103.

162. NOAH BIRKHÄUSER, *SANCTIONS OF THE SECURITY COUNCIL AGAINST INDIVIDUALS: SOME HUMAN RIGHTS PROBLEMS* 1 2005, <http://www.statewatch.org/terrorlists/docs/Birkhauser.pdf>.

unfounded, and were not supported by any evidence.¹⁶³ However, it took over six years of bilateral diplomatic initiatives to have them delisted.¹⁶⁴

Yet another case involved an Italian citizen and Swiss resident of Egyptian origin whom the Committee proscribed during the first wave of listing posts — September 11, 2001. Investigations by the Swiss Confederation failed to prove any charges and were closed after four years because “no elements exist to charge him . . . and the Swiss state is condemned to pay his lawyers and that of one of his co-workers the equivalent of 80,000 Euros.”¹⁶⁵ Unfortunately, the individual remains proscribed on the Consolidated List.

These are just a few instances that demonstrate the absence of standards or justifications in the listing process. The Committee acted on goodwill and solidarity towards one Committee member to the detriment of those included on the List. The deputy legal counselor of the United States mission to the United Nations conceded, “[T]he creation of the list was based largely on political trust; the committee had no particular guidelines or standards for States to follow in proposing names” and that, of the “some four hundred names on the list, the vast majority . . . were submitted by the United States, either alone or in conjunction with other U.N. members.”¹⁶⁶

Evidence, such as cases and diplomatic statements, coupled with the Resolutions’ silence, quite clearly demonstrates the absence of standards for proscribing names on the Consolidated List. As the March 30, 2006 White Paper presented by the Watson Institute for International Studies at Brown University, commissioned by the governments of Germany, Sweden, and Switzerland, entitled *Strengthening Targeted Sanctions Through Fair and Clear Procedures*,¹⁶⁷ stated: “The current procedures not only lack specific guidance from the respective committees on justifications for delisting, but they are also complicated *since the criteria and concerns of the state originally proposing the listing are generally unknown.*”¹⁶⁸ The study elaborated:

[R]ecent statements of case presented to the 1267 Committee reportedly vary in length and quality. At one end of the continuum, a joint submission

163. *Id.*

164. Press Release, Security Council, Security Council Committee Removes Two Individuals from Consolidated list, Clarifies Corrections Made to List, U.N. Doc. SC/8613 (Jan. 19, 2006); *Jan. 2007 Letter*, *supra* note 69, at 11.

165. EUR PARL. ASS., *UN Security Council Black Lists: Introductory Memorandum*, Doc. No. 14, ¶ 2 (2007).

166. Rosand, *supra* note 47, at 748; *see generally* Press Release, U.S. Dept. of Treasury, Treasury Statement on UN Terrorism Report (August 29, 2002), available at <http://www.ustreas.gov/press/releases/po3382.htm>; *Testimony of Daniel Glaser, Deputy Assistant Secretary (Terrorist Financing and Financial Crimes) U.S. Department of the Treasury Before the S. Comm. On Banking, Housing and Urban Affairs*, 109th Cong. (2006).

167. *See generally*, BIERSTEKER & ECKERT, *supra* note 158.

168. *Id.* at 38 (italics added).

from two Member States recommending the listing of three individuals allegedly included a general background on the organization with which they were affiliated, followed by six detailed paragraphs on each individual, with specific information relating to actions they have allegedly taken. Another statement of case proposing the listing of six individuals included 70 pages of faxed material, including copies of arrest warrants. At the other end of the spectrum was a statement of case that purportedly included 74 names, with only a single, general paragraph of justification¹⁶⁹

The 2006 report commissioned by the Council of Europe and prepared by Professor Iain Cameron entitled *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*¹⁷⁰ made similar observations. Upon considering the information that served as the basis of listing, it concluded, “the sanctions committees as such have rarely, or ever, evaluated the ‘evidence’ that the named person is engaged in activities involving a threat to international peace and security.”¹⁷¹

Recall that, to assist in the proscribing process, the Monitoring Team clarifies that administrative, civil, or criminal proceedings need not be brought or concluded against an individual or entity before a name is proposed for inclusion.¹⁷² Furthermore, neither is a criminal conviction or indictment a prerequisite.¹⁷³ Indeed, because no evidentiary or substantive standards exist, the Committee, encouraging the general U.N. membership, States that “no reason is good enough to justify delays in the submission of new names.”¹⁷⁴

The above was a description of the situation that existed in the aftermath of 9/11. However, over the following six years, goodwill and the political trust wore thin. And slowly, concerns emerged including the violations of human rights, due process, fairness, and transparency, in turn changing the situation. As the different interests and concerns crystallized, the law, reflecting divisions, was amended.

4. *Amending the Law According to Demarked Interests*

Resolution 1526,¹⁷⁵ when compared to Resolution 1617,¹⁷⁶ supports the observation about differences among States. While both Resolutions grapple with the same issue, their language is radically different. In

169. *Id.* at 28.

170. CAMERON, *supra* note 94.

171. *Id.* at 5.

172. *Dec. 2005 Letter, supra* note 53, at 3.

173. *Id.*

174. *Dec. 2006 Letter, supra* note 59, ¶ 10.

175. *See generally*, S.C. Res. 1526, *supra* note 28.

176. S.C. Res. 1617, *supra* note 30.

Resolution 1526,¹⁷⁷ the language is exhortative in nature: “*Calls upon* all States, when submitting new names to the Committee’s list, to include identifying information and background information, to the greatest possible extent, that demonstrates the individual(s)’ and or entity(ies)’ association with”¹⁷⁸ Whereas in Resolution 1617,¹⁷⁹ the language is mandatory in nature: “*Decides* that, when proposing names for the consolidated list, [S]tates shall . . . henceforth also provide to the Committee a statement of case describing the basis of the proposal; and further encourages [S]tates to identify any undertaking and entities owned or controlled, directly or indirectly, by the proposed subject”¹⁸⁰

The distinction between mandatory and exhortative language lies in the obligatory or voluntary nature underlying the provisions.¹⁸¹ The wording of Resolution 1526 provides that obligations are voluntary in nature (i.e., discretion is permitted), whereas that of Resolution 1617 is mandatory and binding, and calls for strict compliance (i.e., States forwarding names have a mandatory obligation to submit a statement of case).

5. *Persistence of Severe Problems Concerning Standards and Justifications*

Although the mandatory obligations are certainly a positive step, the Resolution falls short of creating a threshold standard for justifications and evidence. The listing process still lacks any substantive or evidentiary standards. Equally problematic, the new guidelines essentially apply to new listings and do not address the previous ones; no specific mechanism has been established to review old listings to ensure that they meet the new standard.¹⁸² The first List was formulated in 2001 and published on March

177. See S.C. Res. 1526, *supra* note 28.

178. *Id.* ¶ 17 (emphasis added).

179. S.C. Res. 1617, *supra* note 31.

180. *Id.* ¶ 4 (emphasis added).

181. BIERSTEKER & ECKART, *supra* note 8, at 39–40.

182. Security Council Report, *Response in the 1267 Committee: Listing, Monthly Forecast*, Jan. 2007, http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2294423/k.3920/January_2007BRTargeted_sanctions_ListingDeListing_and_DueProcess.htm [hereinafter Security Council Report].

Security Council Report is an independent not-for-profit organisation in affiliation with Columbia University’s Center on International Organization. Security Council Report was founded with the encouragement of the former UN Secretary-General, Kofi Annan, and with the support of the governments of Canada and Norway, the Rockefeller Foundation, the John D. and Catherine T. MacArthur Foundation, and the William and Flora Hewlett Foundation

Security Council Report, *Mission and Purpose in Full*, <http://www.securitycouncilreport.org> (last visited Sept. 7, 2009).

8, 2001.¹⁸³ Therefore, for the earlier listings, from 2001 to 2005, the mandatory clause is inapplicable. Indeed, a general review of all the listings would be a major undertaking because many designated individuals and entities were placed on the Consolidated List without the designating country providing the Committee with adequate supporting information and evidence.¹⁸⁴

Because the Resolutions are silent regarding any other evidentiary standard or justification (apart from the subjective “associated with”), the listing process permits prosecution without stated cause. As the Court of First Instance in the Swedish trial noted, “in circumstances of this case . . . it makes it possible for the Council to freeze the applicant’s funds indefinitely without giving him any opportunity to make known his views on the correctness and relevance of the facts and circumstances alleged and on the evidence adduced against him.”¹⁸⁵

6. A Key Issue Tied to Standards: Access to Information for Enforcement of Measures

Equally alarming as the absence of evidentiary standards, the List enforcement requires strict compliance by the entire U.N. membership against their citizens without giving cause. A feasible explanation, as noted previously, is that Chapter VII operations are mandatory, and therefore, theoretically do not require consent or approval of all U.N. members. However, studies have proven that operationally the practice is problematic,¹⁸⁶ especially since “States often have to take action against parties with little or no understanding of what wrongful conduct occurred (or is occurring),” as the Monitoring Team notes.¹⁸⁷

The Watson White Paper specifically identified this serious problem when it observed that there is typically little advance consultation with affected member States of residence or nationality of the listed individual, particularly if they are not currently serving on the Security Council.¹⁸⁸ Only current Security Council member States, which are also the member States of the Sanctions Committee, receive and review statements of case, not the general U.N. membership¹⁸⁹ — but, of course, it is these general members that are required to enforce the measure.

183. Press Release, Sec. Council, Security Council Comm. Concerning Afghanistan Issues List Pursuant to Paragraph 8 (c) of Resolution 1333 (2000), U.N. Doc. AFG/150-SC/7166 (Aug. 10, 2001).

184. Security Council Report, *supra* note 182.

185. Case T-315/01, *Kadi v. Comm’n*, 2005 E.C.R. II-03649.

186. See generally DAVID CORTRIGHT & GEORGE A. LOPEZ, SANCTIONS AND THE SEARCH FOR SECURITY: CHALLENGES TO THE UN ACTION (2002).

187. *Third Report*, *supra* note 72, ¶ 30.

188. See generally BIERSTEKER & ECKERT, *supra* note 158.

189. *Id.*

Since U.N. member States are expected to enforce sanctions “with the same vigour with which they approach their highest national interests,”¹⁹⁰ without the statement of case or any evidence against the listed, States are facing legal challenges to blocking actions they have undertaken in compliance with their obligations to enforce the measures. Faced with challenges, they have demanded that the Committee *must* provide them with the information to which they are entitled concerning persons whose names are listed and anything relevant to their listing or delisting.¹⁹¹ The Monitoring Team similarly advised the Committee, although for a different reason, “so allowing States, depending upon the scope of their laws, to impose criminal penalties for any subsequent violations.”¹⁹²

In a positive, *albeit* narrow, development, Resolution 1617 authorized the release of statements of case under certain circumstances.¹⁹³ Acknowledging the development — i.e., its importance vis-à-vis fairness, transparency, and effective implementation of measures — the Watson study urged the preparation of a redacted statement of case, which does not disclose confidential information but provides the requesting party (a State or the proscribed person or entity) with information regarding the basis of the measures imposed.¹⁹⁴ However, it is unclear if the recommendation has been accepted.

Intrinsically connected to the above-noted limitations, from the perspective of enforcement of the List, is another problematic issue — that of identifiers.

7. *Lack of Specific Identifiers for Individuals*

Linked to the issue of justifications is the contentious issue of identifiers to distinguish individuals. A serious deficiency with the Consolidated List is that numerous names lack identifiers. Enforcement, as required by States and the previously noted reporting entities, is based on providing information about the listed individuals. Theoretically, it may be assumed that if a name is included on the List, it is accompanied by the information required to enforce the measure. However, the assumption is incorrect, since identifiers are *not* a prerequisite for listing.

The Monitoring Team elucidates the problem — of the 182 individuals on the Consolidated List who are deemed associated with Al-Qaida, only 92 (51%) are clearly linked by address to any State; of the 116 listed entities belonging to or associated with Al-Qaida, only the location of 75 (65%) is recorded. The List also contains twenty entities with addresses in Somalia,

190. *Dec. 2006 Letter*, *supra* note 59, ¶ 20.

191. U.N. SCOR, 61st Sess., 5446th mtg., *supra* note 56, at 25.

192. *Third Report*, *supra* note 72, ¶ 29.

193. S.C. Res. 1617, *supra* note 31, ¶ 6; *Third Report*, *supra* note 72.

194. BIERSTEKER & ECKERT, *supra* note 158, at 29.

where there is no central authority capable of implementing the sanctions nor a banking system able to freeze assets.¹⁹⁵

The lack of identifiers is a serious obstacle to enforcement. Quite simply, it is impossible to enforce the List without the relevant identifying information. Numerous U.N. member States have expressed this concern. As the Monitoring Team reports, “Sixty-five member States have said that sanctions cannot be implemented against certain entries on the List without sufficient identifiers.”¹⁹⁶

Notwithstanding the consistent requests and encouragement from the Committee,¹⁹⁷ the reluctance of the general membership to forward names for the List (being overcome by a “reporting-fatigue”),¹⁹⁸ or alternately, to provide identifiers for already listed names, evidences evolving relationships among U.N. members and/or differing views of dealing with issues of terrorism, apart from tensions arising from the absence of substantive standards, justifications, identifiers, and the lack of transparency surrounding the complete listing process.

The above description makes clear the serious issues and limitations of the List and listing process. However, formidable as these issues are, they pale in comparison to the profoundly problematic issues that engulf delisting, as the following analysis elaborates.

B. Delisting Process

1. Standards

Similar to the listing process (with the exception of the subjective “associated with”), the Resolutions and Committee Guidelines are ominously silent regarding the standards and criteria for delisting. Quite simply, the process is devoid of standards.

The Watson study noted that the criteria for delisting is “[u]nspecified.” Furthermore, it stated, “[m]ore specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available The current procedures not only lack specific guidance from the . . . [Committee] on justifications for delisting, but they are also

195. *Third Report*, *supra* note 72, ¶ 65.

196. *Dec. 2005 Letter*, *supra* note 53, at 2; *see also* U.N. SCOR, 61st Sess., 5375th mtg., *supra* note 56; *July 2003 Letter*, *supra* note 134, ¶ 164.

197. U.N. Sec. Council, Comm. Established Pursuant to Res. 1267, *Recommendations Contained in the Fifth Report of the Analytical Support and Sanctions Monitoring Team*, ¶ 4, in letter dated 20 December 2006 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities addressed to the President of the Security Council, U.N. Doc. S/2006/1047 (Dec. 28, 2006); *see* U.N. SCOR, 61st Sess., 5538th mtg., *supra* note 56, at 4; U.N. SCOR, 60th Sess., 5168th mtg., at 4, U.N. Doc. S/PV.5168 (Apr. 25, 2005) (statement of Security Council President Guangya, China).

198. *See* U.N. SCOR, 61st Sess., 5375th mtg., *supra* note 56.

complicated since the criteria and concerns of the State originally proposing the listing are generally unknown.”¹⁹⁹

2. Procedure

The delisting process is immeasurably arduous and problematic. To delist an individual or entity, States “negotiate bilaterally”²⁰⁰ among themselves. That is to say, the process is a confidential and bilateral (State-to-State) delisting procedure that relies on diplomatic protection of individuals as the sole remedy for initiating delisting requests.²⁰¹

According to Committee Guidelines, the procedure for delisting is as follows: a petitioner first requests the government of citizenship or residence to review the case. The petitioned government, upon review (e.g., independent investigations), holds bilateral consultations with the originally proposing State (assuming it is not the proposing State itself), and then forwards the request to the Committee. Decisions to delist are then made by consensus of all fifteen members.²⁰²

Some controversial aspects of the process are: (a) until 2006 the delisting process could be undertaken *only* by a State of residence or citizenship and not by any other State (i.e., only residence or citizenship States had standing) and (b) the listed individuals or their legal representatives had no standing.²⁰³ Perhaps the most contentious issue is that the Committee is the sole and final authority pertaining to all delisting issues — no independent review mechanism exists (i.e., even to review a delisting request).

The issue of standing is complicated. If a State of residence or citizenship was originally the State that proposed the listing, or if a State is not sympathetic for any reason, quite naturally, a proscribed individual’s or entity’s request may fail to receive fair or adequate consideration. Neither are U.N. member States obligated by any Resolution to assist, ascertain, or forward petitions to the Committee. Nor do any Resolutions require U.N. member States to inform the Committee about receiving a delisting request.

It is commendable that U.N. members have undertaken the delisting process and certain individuals and entities have been delisted (nineteen as of April 20, 2007); however, no information is available regarding the number of requests received or declined, or about investigations conducted by any U.N. member. Perhaps a feasible explanation for the lack of the information is that no Resolutions address this issue. However, due to the Resolutions’ omissions, coupled with the lack of mechanisms to ensure that

199. BIERSTEKER & ECKERT, *supra* note 158, at 38.

200. *Id.* at 37.

201. *Id.*

202. *Guidelines*, *supra* note 33, ¶ 3(a).

203. However, on December 19, 2006, via Resolution 1730 (2006) the Security Council established a Focal Point to receive de-listing requests. See S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

U.N. members forward petitions for delisting to the Committee, the proscribed are resorting to the conventional forums of justice. For example, in 2005 a Brussels court directed the government of Belgium to petition the United Nations for delisting because two listed applicants had not been criminally indicted after a lengthy investigation.²⁰⁴

Theoretically, it may be argued that the delisting process is narrowly defined to prevent the listed individuals from forum shopping (i.e., approaching another State that is sympathetic, assuming the lack of support from the country of citizenship/residence). But the counter-argument from an operational perspective is clearly more persuasive. Because the consent of all fifteen Committee members is required for delisting, without the support of the country of citizenship, delisting is simply infeasible. In any case, the Monitoring Team has proposed that petitions always be forwarded to the Committee, with an approval, objection, or neutral position from the relevant State.²⁰⁵ It is unclear if the recommendation has been accepted.

More problematic is the fact that the Committee is the exclusive entity exercising absolute authority vis-à-vis the listed and *no* other forum exists for the listed to be heard.²⁰⁶ Committee decisions are not subject to any review on any grounds (procedural or substantive) by *any* independent forum. Thus, the narrow process could be one of the many reasons for the mere nineteen delistings by the Committee from 1999 to 2007, and also for the numerous cases pending in various courts and different jurisdictions regarding the measures.²⁰⁷ Essentially, the process offers the listed *no* options for review of the Committee's decision.

204. See Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649; Human Rights Comm., *Sayadi & Vinck v. Belgium* (Comm'n No. 1472.2006), U.N. Doc. CCPR/C/94/D/1472/2006 at 5 (2008).

205. *Second Report*, *supra* note 66.

206. It should be clarified that, as previously mentioned, the 120-day reports to the Security Council are merely updates involving the work of the Committee. They are not a forum for debate or even one where decisions are reviewed. In any case, the membership of the Committee is congruent with the Council to which reports are submitted.

207. As of 2005, cases in the European Union included *Kadi v. Council*, Case T-315/01; *Yusuf & Al Barakaat Int'l Found. v. Council*, Case T-306/01; *Faraj Hassan*, Case T-49/04; and *Chafiq Ayadi*, Case T-253/02. In the United States, six lawsuits have been filed by entities and individuals listed by the United Nations and by the United States. See *Benevolence Int'l Found. Inc. v. Ashcroft*, 200 F. Supp.2d 935 (N.D. Ill. 2003); *United States v. Arnaout*, No. 02-CR-892, U.S. Dist. LEXIS 1635 (N.D. Ill. Feb. 3, 2003); *Global Relief Found. Inc. v. O'Neill*, 207 F.Supp.2d 779 (N.D. Ill. 2002) *aff'd.*, 315 F.3d 748 (7th Cir. 2002); *Aaran Money Wire Service Inc. v. United States*, 2003 U.S. Dist. LEXIS 16190 (D. Minn., Dec. 8, 2003); *ACLU v. United States Office of Pers. Mgmt.*, 1:2004cv01958 (D.D.C. Nov. 10, 2004). The United States report pursuant to Resolution 1455 (2003) listed another case; see U.N. Sec. Council, Sec. Council Comm. Established Pursuant to Res. 1267, *Report of the Government of the United States Called for Under Security Council Resolution 1455*, 4, U.N. Doc. S/AC.37/2003/(1455)/26 (Apr. 17, 2003) (citing *Holy Land Found. for Relief and Dev. v. Ashcroft*, 219 F.Supp.2d 57 (D.D.C. 2002).

The Team is aware of 15 lawsuits filed in five Member States, as well as before the European Court of Justice, challenging Member

The lack of options was further stressed in the Somali Swedish case, wherein the Court of the First Instance observed that the applicant had first approached the Committee directly, then sought the assistance of the Saudi Arabian Ministry of Foreign Affairs in asserting his rights before the Committee, and finally, took steps to make representations to the U.S. Office of Foreign Asset Control. In each instance, the Court noted, the matter was deferred to the Sanctions Committee. Furthermore, it reiterated that the U.N. Security Council Resolutions were consonant with norms of *jus cogens* and that these rules have a higher status, are nonderogable, and are binding on all subjects of international law, including U.N. bodies. Therefore, the Court itself was bound by the U.N. Charter and, in principle, the matter was beyond its scope.²⁰⁸

Additionally, apart from the proscribed having no options, U.N. member States, too, have limited options in the delisting process. Those familiar (e.g., Swedish authorities) with the process describe it as very difficult and “unacceptably drawn out.”²⁰⁹ The Cameron study elaborates that the delisting procedure contains no possibility for the petitioning State to compel the production of sufficient information, or any information whatsoever, justifying the blacklisting of one of its nationals or residents. The designating State can refuse to provide any information and continue to block the removal from the List, and the petitioning State cannot force a determination of the issue before an objective body.²¹⁰

Lastly, the delisting procedure is problematic for yet other reasons — none of which, unfortunately, are addressed in the Resolutions or Guidelines. For example, the procedure does not extend to deceased individuals. Should the name of a deceased person be removed from the List or not? Since it is a contentious issue (i.e., it may be argued that the estate of the deceased maybe used for criminal purposes; or conversely, that since the person is no longer alive it is appropriate to delist the deceased), a gridlock exists. A State proposed, in September 2004, that the Committee delist an individual who was reported dead, but the request failed, apparently owing to the lack of an agreed procedure on whether and how to delist persons who are deceased.²¹¹ Neither do any reports reveal if the Committee has dealt with issues regarding ownership of assets or the effect on beneficiaries of the listed. Importantly, the delisting process does not

States’ implementation of some aspect of the sanctions. Other cases have been filed or decided in several other countries that, while not challenging the sanctions, involve individuals or entities on the Consolidated List.

Dec. 2005 Letter, supra note 53, ¶ 37.

208. Case T-306/01, *Yusuf & Ali Bakaraat Int’l Found. v. Council*, 2005 E.C.R. II-3533, at 17; Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649.

209. *Second Report, supra* note 66, ¶ 60.

210. CAMERON, *supra* note 94, at 6.

211. *Second Report, supra* note 66.

extend to issues of wrongful listing or even ancillary issues regarding payment of compensation for damages. Finally, designations are open-ended, lacking any option for periodic reviews, making the listing a punitive “*de facto* confiscation of assets.”²¹²

Perhaps in response to these issues, on December 19, 2006 the Focal Point was created by Security Council Regulation 1730 to receive delisting requests.²¹³ Initially the mechanism effectuated the impression of an introduction of due process rights and, equally relevant, of limiting the exercise of absolute discretion by the Committee in delisting issues, since the U.N. Secretariat is formally involved in the delisting process.²¹⁴ However, the reality is vastly different because in practice the Focal Point mechanism is devoid of any purpose or power apart from being a mere conduit for the exchange of information between parties — the listed individual and the Committee — with absolute control over the process and decisions retained exclusively by the Committee. In any case, administratively, the function — that is, forwarding delisting petitions to the Committee — was informally vested with the Secretariat prior to the creation of the Focal Point. The only new development concerning the Focal Point is that a listed individual has standing to request delisting, but as noted previously, without the essential support of a State, little can be achieved by standing *per se*. Apart from these core limitations, several additional problems surround the Focal Point mechanism.

Some U.N. members note that the Focal Point fails to “meet the minimum standard required to ensure fair and clear procedure.”²¹⁵ Others question the mechanism’s “independence, effectiveness, neutrality[,] and ability to provide effective recourse” to a petitioner²¹⁶ because “legal principles and procedures, transparency, applicable legal standards, the rule of law, human rights and peremptory norms” have been largely ignored while creating this mechanism.²¹⁷

The foregoing explains the severe limitations of the listing and delisting process. Simply, both processes are devoid of substantive and procedural standards. And despite the creation of the Focal Point mechanism, operationally, the situation remains unchanged.

212. BIERSTEKER & ECKERT, *supra* note 158, at 44.

213. See S.C. Res. 1730, *supra* note 203.

214. U.N. SCOR, 62d Sess., 5779th mtg., at 10, U.N. Doc. S/PV.5779 (Nov. 14, 2007).

215. *Id.* at 25.

216. U.N. SCOR, 62d Sess., 5679th mtg., at 21–22, U.N. Doc. S/PV.5679 (May 22, 2007).

217. *Id.* at 22.

CONCLUSION

I have described the fundamental problems with the Consolidated List and the U.N. Sanctions Committee that formulates the instrument. The Consolidated List is an extremely powerful, punitive, far-reaching, and statutorily limitless tool with profoundly severe consequences for the proscribed, the indirectly affected, and the enforcing States. The evolving reach and scope highlight the importance of the instrument. Unfortunately, unlimited problems plague virtually *all* aspects of the listing and delisting process.

Perhaps the most critical is an absence of listing and delisting standards and lack of due process rights, as aptly stated by the U.N. Human Rights Commissioner:

– *Respect for due process rights*: Individuals affected by a United Nations listing procedure effectively are essentially denied the right to a fair hearing;

– *Standards of proof and evidence in listing procedures*: While targeted sanctions against individuals clearly have a punitive character, there is no uniformity in relation to evidentiary standards and procedures;

– *Notification*: Member States are responsible for informing their nationals that they have been listed, but often this does not happen. Individuals have a right to know the reasons behind a listing decision, as well as the procedures available for challenging a decision;

– *Time period of individual sanctions*: Individual listings normally do not include an “end date” to the listing, which may result in a temporary freeze of assets becoming permanent. The longer an individual is on a list, the more punitive the effect will be;

– *Accessibility*: Only States have standing in the current United Nations sanctions regime, which assumes that the State will act on behalf of the individual. In practice, often this does not happen and individuals are effectively excluded from a process which may have a direct punitive impact on them; and

– *Remedies*: There is a lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process.²¹⁸

218. U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 25, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007).

As the Fassbender study noted, the United Nations would contradict itself by constantly admonishing its member States to respect human rights, but refusing to respect the same rights in relation to its own actions.²¹⁹ Unfortunately, the contradiction remains unsolved.

Given the severity of the measure and *infinitum* issues that surround its formulation, the approach of compiling a terrorist and terrorist-financing list is itself questionable, more so given the results of the measure. Notwithstanding the frequently used justification, namely that the Committee and the List function for “the greater public good of preventing funding of terrorism,”²²⁰ the result stands in stark contrast, further demonstrating the profound limitations of the instrument.

A December 31, 2004 report concerning the result states that “the assessment gives a nuanced picture of the current level of implementation.”²²¹ Regarding the travel ban, the report states: “In the five years the travel ban has been in place, not a single individual is reported to have been stopped at a border as a consequence of being on the Committee’s list.”²²² Regarding the arms embargo, the report states: “As with the travel ban, the Committee notes that no cases of enforcement of the arms embargo have been reported to the Committee.”²²³

Another report was equally unimpressive:

[Although] thirty-four Member States have reported freezing assets under the financial and economic assets sanctions imposed by the Security Council, in some cases it has been hard to tell what this means. It is not clear from all reports of asset freezing, for example, what those assets are, their value, or who owns them. No State has reported stopping anyone on the Committee Consolidated List from traveling, or reported taking action against them in respect of the arms embargo.²²⁴

The September 2006 Report followed the familiar pattern:

According to information provided by Member States, as of late July 2006, \$91.4 million, mainly in the form of bank accounts, had been frozen by 35

219. FASSBENDER, *supra* note 86.

220. *Third Report*, *supra* note 72, ¶ 31.

221. *Dec. 2004 Letter*, *supra* note 109.

Although 32 Member States (24%) reported freezing assets, their reports gave little detail of the assets concerned. It is difficult to know therefore whether the frozen assets are bank accounts or whether they include assets of another form, such as shares or other property. It is not possible from the reports to identify trends with regard to the kind of assets being held for the direct or indirect benefit of Al-Qaida and the Taliban.

Id. ¶ 30.

222. *Id.* at 4.

223. *Id.*

224. *Aug. 2004 Letter*, *supra* note 71.

Member States under the Al-Qaida/Taliban sanctions regime [T]here have been two very distinct periods in the history of the assets freeze: the initial crackdown following the terrorist attacks in the United States on 11 September 2001, and the subsequent period from mid-2002. The great majority of the assets reported as frozen were identified in the initial period; since then the amount has hardly changed, despite several additions and amendments to the List.²²⁵

Given these dismal results and the unlimited unresolved issues that encase all formulation aspects, any achievement is debatable. Though proscribing is a relatively recent unprecedented practice in the history of the United Nations, due to the enormous negative consequences and infinite limitations of the practice, it is highly desirable that the international community revisit the approach and practice.

225. U.N. Sec. Council, Comm. Established Pursuant to Res. 1267, *Fifth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolutions 1526 and 1617 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, ¶¶ 59, 61, U.N. Doc. S/2006/750 (Sept. 20, 2006).