

A Critical Assessment of the 1267 Sanctions Committee

Written by Agnieszka Grossman

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AGNIESZKA GROSSMAN, MAR 3 2012

A Proper Shake or Just a Stir?

Critical assessment of changes in the 1267 Sanctions Committee procedures with a focus on the mandate of the Ombudsperson in light of due process rights

Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning.

— Franz

Kafka, *The Trial*

INTRODUCTION

Although the definition and nature of human rights are contested concepts –John Locke (1948) sees them as natural because of our human character, while Ronald Dworkin (1977) argues they are but ‘trumps’ – most scholars would agree that their role is to protect individuals against arbitrary government interference. While the 1990s could be described as a decade of human rights, with the concept gaining significance and legitimacy after the Cold War, it seems that in the immediate aftermath of September 11th, they have become to be perceived as a no longer relevant luxury in the global fight against terrorism.

Indeed, as pointed out by Lawrence Freedman (2002: 1), with 9/11 “a new seriousness was introduced into our lives, a sense of danger and a sense of purpose at the same time”. Politicians spoke about an earthquake which can “shift the tectonic plates of international politics” (C. Rice, cited in Good & Lazarus, 2007: 3-4), changing rules of the game (T. Blair; *ibid.*) and emergency being the “new normalcy” (D. Cheney; *ibid.*), while intellectuals, many of them liberal, provided normative justifications for political solutions to be introduced in these new times. Consequently, a policy of “lesser evils” (Ignatieff, 2004), “torture warrants” (Dershowitz, 2004) or the introduction of an “emergency constitution” (Ackerman, 2007) were all suggested. The Western world seemed to see itself as enduringly vulnerable, even if militarily strong, with the notion of risk becoming a central organising principle and “a crisis paradigm” being the most appropriate concept to think about law and society (Gearty, 2008; Poole, 2008).

In perspective, it can be said there was much exaggeration in the months after 9/11 in seeing terrorism as an existential threat. In his 2005 report, the UN Special Rapporteur on Counter-Terrorism and Human Rights noticed with worry that terrorism has largely replaced drug-related crime as the primary justification for ever broadening powers of the police (Scheinin, 2005, para.56). Many have pointed to the fact that it has been socially created as the defining problem of our age. As Applebaum (2003: 29) aptly observed in the Washington Post: “now that we’ve eliminated most of the things that the human race once feared, we’ve just invented new ones to replace them”. In this context, it is necessary to state that although terrorism is explicitly threatening and requires a co-ordinated response,

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it is hardly existential, if compared to the annual number of deaths from car accidents or diseases, or the threat posed by Nazism or communism before (Krueger & Laitin, 2004; Mueller 2005; Wilkinson 2006; Mueller & Stewart, 2010).

As a consequence of that exaggeration, respect for human rights, especially of people allegedly involved in terrorist behaviour, became “a significant casualty” of the war against terrorism (Foot, 2007: 490). Although the idea that a balance between security interests and individual rights has to be struck in order to effectively tackle terrorism is a reasonable one, the two are not mutually exclusive and there is no need to sacrifice civil liberties at the altar of security. Moreover, Dworkin (2003:38) has made a powerful comment that, in reality, the only balance in question is the one between majority’s security and *other* peoples’ rights – Western countries have been ready to introduce counter-terrorist measures which often discriminate against individuals from immigrant communities. From the normative perspective of universal, inalienable human rights, this is clearly unacceptable.

Soon after 9/11, international consensus arose that, as a global phenomenon, terrorism demands a global response. The United Nations seemed a perfect place to tackle this new threat transcending national borders because involvement of the Security Council theoretically provides the measures with legitimacy needed for universal implementation (Gutherie, 2004: 536). With resolution 1373, the Council broke new ground, acting – probably for the first time – as a world government rather than a mere peace enforcer and putting on all states obligations of a general character (Szasz, 2002: 901; Bianchi, 2006: 1046).

One of the key tools in the fight against terrorism at the UN level was the 1267 sanctioning regime which will be the focus of this essay. Named a “financial Guantanamo” (Carter-Ruck Solicitors, 2010: 2), this so-called “blacklisting” is one of the most controversial aspects of the war on terror, but, paradoxically, also one of the least understood (ECCHR report, 2010: 6). The system of targeted sanctions, created in 1999 as a response to bombings in Kenya and Tanzania, was hugely extended in 2000 and after 9/11. As of February 2011, there were 487 entries on the consolidated list, which includes names of those targeted (Monitoring Team, 2011: para.10).

In general, sanctions represent a middle ground in international politics; they are more severe than a mere verbal condemnation, yet less than the use of force (Bossuyt report, 2000: para.9). Targeted sanctions constitute an improvement upon comprehensive ones but it has to be appreciated that this move does not come without a price – it has generated new issues, especially concerning the rights of those listed (Watson Report, 2006: 5). Because of that, the relatively high number of individuals and entries listed and the lack of territorial limitations, the 1267 sanctioning regime has increasingly been seen as problematic. This is all the more so as the Security Council has used it as a model to be applied to other situations – since its creation five other sanctioning committees with nearly identical powers have been established (Hudson, 2007: 225).

The issue of human rights-compliance of this sanctioning regime is of utmost importance to guarantee the success of the war on terror. Indeed, theoreticians of terrorism underline that terrorists often seek to provoke an oppressive reaction by state authorities with the aim of creating a climate of fear and dissatisfaction among the public (von Schorlemer, 2003: 274). Just as the invasion of Iraq played into the hands of AlQaeda by confirming that the US was an imperialist force (Reidel, 2007), so panic and harsh counter-measures are what they want to prove the hypocrisy of the West and its use of double standards. Yet, Kofi Annan (2003) stated, “to compromise on the protection of HR would hand terrorists a victory they cannot achieve on their own”.

Purpose

Taking a legal approach, the purpose of this thesis is to track the changes in the procedures of the 1267 sanctioning regime, focusing in particular on the most recent development – creation of the Office of the Ombudsperson pursuant to resolution 1904. The questions the thesis aims at answering are: Is it the most significant improvement, the introduction of which makes the system compliant with international human rights standards and is capable of silencing the main criticisms which have arisen – as the Security Council imagined it? Is it an improvement at all? The analysis is carried out in the framework of the right to due process, which is considered fundamental as it is a prerequisite for contesting the extent to which other rights have been violated.

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As it will be shown, the creation of the Office is the most substantial improvement of the procedures to date; yet it is much too little to rescue the legitimacy of these sanctions and provide those put on the list with effective judicial review and remedy. Because the Ombudsperson does not have access to all information and the decisions are not binding, ultimately the review of the listing is a political decision based on a political process. Creation of the Office cannot, thus, be seen otherwise than but another fig-leaf introduced to save face. Given the severity of the sanctions, the regime damages the legitimacy and effectiveness of international counter-terrorist efforts.

Structure

In Chapter 1 the shape of the original 1267 regime, as it was in 1999, will be presented and analysed from the perspective of the international human rights regime and various rights involved. It will become clear that the procedural requirement of due process is the most pressing. However, the Security Council has the main responsibility for maintenance of international peace and security and, when acting under Chapter VII of the UN Charter, can issue resolutions binding on all states. In virtue of that, a question of whether it can at all be held accountable for human rights violations arises. This will be the focus of Chapter 2, which will also elaborate on the content of the right to due process in the light of this particular sanctioning regime. Chapter 3 will concentrate on the international response to the 1267 system and the changes introduced as a result of numerous challenges and criticisms. In addition, a case study will be presented. Because of the word-limit, merely the situation just before resolution 1904 will be shown, while a more detailed, chronological analysis of the development of the procedures is omitted. This will prepare the ground for the assessment of the mandate of the Ombudsperson and the extent to which it constitutes a substantial enhancement, presented in Chapter 4. A conclusion stressing the importance of human rights-compliance of any counter-terrorist measures and delineating authors' personal impressions about the way forward will follow.

Methodology

The methodology consists mainly of library-based research, utilising both primary and secondary sources. In addition to critical literature on sanctions, counter-terrorism and the 1267 regime itself, various reports of NGOs, jurists and international organizations were looked into. Moreover, the Security Council resolutions (SCRs) are analysed, as well as their voting histories, along with reports of the 1267 Monitoring Team, the Special Rapporteur, Martin Scheinin, and the Ombudsperson, Kimberly Prost. Additionally, case-law was researched, utilising the most significant court decisions that have been rendered to date.

Primary research was attempted since late July, by contacting people at the UN, as well as at European and national levels, in order to conduct "interviews" through email. A list of questions was sent which they were asked to answer. Although most of them replied and agreed to help, because of the summer period some were on holiday, and returned only after the submission deadline of this dissertation. Had it not been for the holiday period, more primary resources could have been collected, which would have provided the personal perspectives of the key people involved. Transcripts of these "interviews" that materialised can be found in Annexes 3 and 4.

Terminology

For the purpose of clarity the main concepts used in this essay have been defined and a background given. These include: sanctions, smart sanctions and the 1267 Sanctioning Committee. However, because of space constraints this is to be found in Appendix 1. The concept of due process obviously needs elaboration, too, but as it is central for the whole dissertation, it will be analysed in the main body of this paper.

CHAPTER 1. THE ORIGINAL 1267 REGIME

I would say that, for a lawyer trained in the idea of Reichsstaat, blacklisting strikes at such a basic level of his or her understanding of what is law that it calls into question why it should be obeyed.

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-lan

Cameron

Beginnings

Following the 1993 World Trade Centre bombings, the 1998 embassy bombings, and the attack on the USS Cole in 2000, international terrorism moved up both the US and UN security agenda (Foot, 2007: 492). Yet, after the experience of comprehensive sanctions against Iraq in the 1990s, it has been generally acknowledged that the theory behind them is both legally and practically bankrupt (Bossuyt report, 2000: para. 48). Consequently, a move toward smart sanctions could have been observed. Resolution 1267, which together with SCR 1333, constitutes the core regulatory framework of the regime, was adopted under Chapter VII in October 1999. As pointed out by Genser & Barth (2010: 9), not all Chapter VII resolutions are *per se* legally binding – a three-pronged test is to be met, but 1267 satisfied these criteria. Because of that, states were placed under legal, but also political and moral obligation to act.

The resolution determined that failure of the Taliban authorities to respond to demands in earlier resolutions constituted a threat to international peace and security, urged all states to impose a travel ban and freeze all funds and other financial resources of the Taliban, and created the 1267 Committee. With resolution 1333 (2000), the blacklist was extended to include individuals and groups allegedly associated with Osama bin Laden, while SCR 1390 (2002) introduced an additional travel ban and arms embargo on all those listed. In addition, with the fall of the Taliban in Afghanistan in autumn 2001, no territorial link with any state or even territory was needed for the targeted sanctions any more. As a result, a blacklisting system of “global reach” was created (Dewulf & Pacquée, 2006: 609) and states were left with no discretion regarding implementation.

Initially there were no guidelines or procedures on placing people on the Consolidated List and state suggestions were based on political trust with no need to present the Committee with credible information about the personal details of those to be listed or their connection with the Taliban, bin Laden or AlQaeda. The justification behind this was the need to protect secret intelligence and sources and, especially after 9/11, a desire to rapidly include the suspected “bad actors” (Rosand, 2004: 749). A single state could suggest adding a name to the list, while a consensus of all would have been needed to remove it. Yet, at the outset, no judicial safeguards were present – no mechanisms for people to be informed of their listing, to know the allegations against them, or to challenge their inclusion on the list. Not only were there no de-listing criteria until 2006, but individuals also had no standing before the Committee and, in order to be removed, had to ask for diplomatic protection in their country of residence or citizenship. Needless to say, some states were more willing to act on such a request than others, with some not even passing it on to the Committee (Feinäugle, 2008: 1529).

The first Consolidated List, published in March 2001, included 162 individuals and 7 entities, but it grew rapidly after the attacks of 9/11. A brief and unprecedented consensus on a global scale was born and, in the words of a Security Council diplomat, there was an “enormous goodwill and willingness to take on trust any name that the US submitted” (Cooper, 2002: A1). Within days around 200 names, proposed by America, were added.

It seems that consternation arose for the first time with the case of Swedish Somali-born Mr Aden, Yusuf and Ali who worked for the Al-Barakaat Foundation, allegedly an international terrorist-financing network (Rosand, 2004: 11-20). After their inclusion on the list in November 2001, they publicly protested against it. The de-listing process included a national Swedish investigation, the country’s attempts to have them removed at the 1267 Committee level and long bilateral negotiations with the US during which the individuals had to provide signed pledges that they have severed and disassociated themselves from Al-Barakaat related businesses. It was not until 2006 that Mr Yusuf was finally de-listed. This incident led to a public outcry in Sweden, the sanctions regime was perceived as opaque and the very credibility of the UN questioned (Miller, 2003: 47-49). Yet also at the international level the lack of a formal appeal mechanism and required, transparent evidentiary standards were highlighted. Seeking to strike a right balance, after Sweden as well as other states began to oppugn the methodology used, the Committee was led to introduce guidelines on the conduct of its work. This was the first improvement of the regime, however, it has to be noticed that the criteria were “more of an encouraging than obliging nature” (*ibid.*: 50).

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Despite that change, it also became apparent around that time that the 9/11 attacks were used as a pretext for domestic political campaigns and some states have sought to include names of their domestic political enemies on the Consolidated List in an effort to label them as 'international terrorists' even if their links with AlQaeda were tenuous at best. Russia argued that the Chechen fighters were part of bin Laden's international jihadi front (Caryl, 2009), while China tried to present its response to political agitation in Xinjiang province as an anti-terrorist measure (von Schorlemer, 2003: 265). That this continues to be the case was stressed in 2010 by the UK Supreme Court (*Ahmed and Others*, 2010: para.181).

In general, it is shocking that within three years, UN blacklisting developed from "a system which targeted political elites of a problem state to one aimed at ill-defined terrorist networks" (ECCHR report, 2010: 12), especially taking into account the lack of a universally-agreed, comprehensive definition of terrorism. Needless to say, the system suffered from significant human rights deficiencies.

Human Rights Implications

Despite being much different from comprehensive sanctions, targeted measures can have a comparatively devastating impact upon enjoyment of fundamental rights of those targeted. As was aptly pointed out by Dick Marty, "if the SCRs were taken seriously – and normally they should be – then blacklisted persons would no longer be able even to shop in supermarkets, draw their wages or collect rent from tenants" (2008: para.18). Indeed, the substantive rights which could possibly be infringed are right to property, freedom of movement, right to private and family life, and right to work, not to mention reputation and the stigmatising power of an 'international terrorist' label. Although there is a property right implicated in asset freezes, it is not absolute and the important aims of combating terrorism are sufficient to override it, at least in European human rights jurisprudence, considered the most well-developed regional system. This was confirmed in the most far-reaching successful challenge to the regime so far, where the European Court of Justice stated that given the fundamental general interest to fight against terrorism, the freezing of funds "cannot *per se* be regarded as inappropriate or disproportionate" (*Kadi and AlBarakat*, 2008: para.363).

Though many rights can be violated by the 1267 sanctioning regime, the strongest criticism can be made on the basis of due process rights and that explains the focus of this thesis on the system's disregard for fair trial guarantees and the principle of separation of powers. Indeed, in "legislating by list" the Security Council acts as legislature, judiciary and the executive, preventing review of cases before an impartial and independent tribunal.

CHAPTER 2. SECURITY COUNCIL POWERS UNDER CHAPTER VII AND DUE PROCESS RIGHTS

International human rights law was formulated in the wake of genocide and war; it is grounded in an understanding of the challenges states face in time of crises.

-Eminent Jurists Panel Report

Is the Security Council Bound by Human Rights?

Before challenging the 1267 regime for its lack of human rights compliance it seems reasonable to assess whether the Security Council is bound by human rights law in the first place. After all, the UN has for a long time seen itself as a benevolent promoter of human rights, and never seems to have found itself capable of violating them (Megrét & Hoffman, 2003: 315).

The Security Council has the main responsibility for maintenance of international peace and security and, under Chapter VII, the power to impose resolutions binding on all states. Moreover, art.103 of the UN Charter makes obligations under it prevail over any other obligations of a state, while art.105 provides for absolute immunity of the UN before domestic proceedings. All that could suggest that the power of the Security Council is huge and unlimited by human rights provisions because its sole purpose is the maintenance of peace and security (Vrandenburg,

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1991-2). The argument is bolstered by the fact that the UN is not formally a party to any international human rights instruments.

Yet the case for an opposite view seems even more persuasive. We live in an era of a move towards actually holding accountable those responsible for human rights and humanitarian law violations, as the *Pinochet* and *Genocide Convention* cases or the Holocaust litigations prove. Indeed, human rights guarantees are increasingly becoming “an expression of the common constitutional traditions of states” (Bothe, 2008: 543) and thus can become binding upon international organizations as general principles of law. It would be a strange contradiction if the UN constantly rebuked its members for their human rights compliance but then refused to respect those same guarantees when applied to its own action (Willis, 2010: 49-50). This is all the more so given that the Security Council is bound by UN principles and purposes, one of the main ones being promotion of human rights (UN Charter, art. 1(3), 24(2) and 55(c)). Finally, the strongest argument would be that the Security Council is also bound by *jus cogens* rules which incorporate at least some human rights standards. In the words of Judge Lauterpacht, “*jus cogens* operates as a concept superior to both customary international law and treaty” (*Genocide Convention*, 1991: para.99), and that it limits the power of the Security Council was confirmed in many blacklisting cases, also those cautious ones before the Court of First Instance (CFI) (*Kadi*, 2005; *Yusuf and AlBarakaat*, 2005) or national courts (*Nada*, 2007).

Thus, it can be concluded that “neither the text nor the spirit of the UN Charter conceives of the Security Council as *legibus solutes*” (*Tadic*, 1996: para.28), and as human rights now form part of the concept of international public order, it cannot be said provisions of human rights treaties are inoperative solely because of considerations of international peace and security (Committee on Economic Social and Cultural Rights, 1997: para.7). At the same time, it needs to be stressed that the fact of legal constraints on Security Council powers does not in itself establish jurisdiction of regional or national authorities to review its decisions (Reich, 2008: 514).

Character of the Sanctions

Before discussing the extent and nature of the right to due process, it is necessary to point to the character of sanctions. This is because due process is not a static right, but varies depending on the nature of proceedings (Guthrie, 2004: 503). Hence the importance of the debate of whether blacklisting can be qualified as civil or criminal in nature, or whether it is merely administrative and preventative, thus falling beyond the scope of due process provisions. Characterising sanctions as criminal would mean the high standard of “beyond reasonable doubt” is required, while seeing them as civil would entail a lower threshold of “balance of probabilities” (van der Herik, 2007: 806). Yet, according to the Committee, inclusion on the lists is not a legal determination at all, but rather a political finding of association not dependent on any criminal findings (Monitoring Team, 2005: para.40; SCR 1735, 2006: preambular para. 10). For Kimberly Prost, it is a unique mechanism of a *sui generis* character, which makes the criminal-civil terminology wholly inappropriate (Prost, 2010a), because what is decisive is “whether there is sufficient information to provide a reasonable and credible basis for the listing” (Ombudsperson website). As a consequence, several listed people have been found not guilty of having links with terrorism in national courts, yet their names remain on the 1267 list.

It seems, however, that the argument of the Security Council is circular – because a fair trial in the legal sense is “impossible”, the proceedings *must* be classified as administrative (Cameron, 2006: 10). This is not convincing, and the nearly permanent character of the sanctions together with their severity, suggest that due process standards should, despite the official nomenclature, apply. This is the opinion of the UN High Commissioner for Human Rights (Pillay, 2009: para.42), UN Special Rapporteur on Human Rights and Counter-Terrorism (Scheinin, 2006: para.35) and the General Court of the EU, which has recently suggested a reconsideration of the classification of the measures imposed (*Kadi II*, 2010: para.150). Indeed, the European case law in general implies that what is decisive is the gravity of consequences of a decision, not their formal classification (Cortright & de Wet, 2010: 9).

Thus, there seems to be a general consensus that due process standards should be applied to the blacklisting measures. Yet, because disagreement on whether they are civil (Cameron, 2006; Watson report, 2006) or criminal persists (de Wet, 2003), it is suggested an assumption that they are civil should be made. In that way, due process standards for civil proceedings are taken into account as the absolute minimum to be provided, and this can only

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increase, should it be decided sanctions amount to a criminal charge.

Due Process

Principles of due process are of utmost importance because they allow for the protection of other human rights. Their observance is not “in itself sufficient to protect against human rights abuses, but it is the foundation stone for ‘substantive protection’” (Clayton and Thomlinson, 2000: 550). The requirements of due process are now part of a solid body of customary human rights law (Bothe, 2008: 550), protected by general principles of law in the meaning of art. 38 of the ICJ statute (Fassbender, 2006: 6). They have been codified in the provisions of, among others, Universal Declaration on Human Rights (art. 8, 10 & 11), International Covenant on Civil and Political Rights (art. 14) or European Convention on Human Rights (art. 6). As elaborated by jurists, scholars and academics, the main elements of the right to due process are:

- a) Right to be informed of the measures taken, and to know the case against him/her.
- b) Right to be heard by a relevant decision-making body within a reasonable time, and ability to directly access the body.
- c) Right to effective review by a competent and independent review mechanism.
- d) Right to counsel.
- e) Right to an effective remedy.

(Annan, 2005: para.5; Fassbender, 2006: 9-16; Human Rights Committee, 2007: para.15-29; Scheinin, 2008: para.7-42).

It is worth pointing out that as the review and remedy need not be judicial, an ombudsperson or other administrative or non-judicial procedures may qualify as appropriate as long as they are effective.

A question that also needs to be asked is whether the due process requirements mentioned above constitute part of *jus cogens*, being thus universally binding and underogable. In the first cases concerning 1267 sanctions before the CFI, it decided that the right to access to court is not absolute and there are inherent restrictions. Consequently, having acknowledged that there is no judicial remedy available to applicants due to art. 103 and 105 of UN Charter, the CFI stated that “any such lacuna in law is not in itself contrary to *jus cogens*” (Kadi, 2005: para.284-5), because their interest in having a court hear their case is not enough to outweigh the essential public interest in maintenance of international peace and security in the face of the terrorist threat (Yusuf & AlBarakaat, 2005: para.344). Despite the fact that fair trial provisions of ICCPR and ECHR are derogable, the Human Rights Committee has consistently argued that ICCPR art.4 on derogations cannot be invoked as justification for acting in violation of peremptory norms of international law by, for instance, deviating from fundamental principles of fair trial (Human Rights Committee, 2001: para. 11) and that fundamental requirements of fair trial must be respected even during a state of emergency (*ibid*: para.16). Also the jurisprudence of the European Court of Human Rights suggests that even national security considerations do not allow for a complete negation of due process rights (Marty, 2007: para.52).

Thus, even if the guarantees of due process are not unequivocally part of *jus cogens*, they seem to belong to the customary human rights law and, as general principles of law, bind also the Security Council, even in its actions under Chapter VII. Consequently, the main elements enumerated above must also apply to the 1267 sanctions.

CHAPTER 3. CHALLENGES, CHANGES, AND CHALLENGES AGAIN

We cannot achieve security by sacrificing human rights. To try and do so would hand the terrorists a victory beyond

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their dreams.

–Kofi Annan

Fight-back

As mentioned before, the first concerns regarding the 1267 sanctions came after the listing of three Swedish Somali-born individuals allegedly involved in terrorist financing. The massive attention devoted to this case in Swedish national media gave rise to the feeling that injustice had been done. This concrete experience in late 2001 put a spotlight on the generally problematic UN sanctions policy (Cramer, 2003: 98) and led to the introduction of guidelines for the conduct of the Committee's work. They were a step in the right direction, suggesting states should include narrative descriptions for their proposed additions to the list, while the de-listing procedure allowed for the petitioning state to work bilaterally with the designating state before a decision was taken by the Committee by consensus (1267 Committee, 2002: para.7).

Yet, the guidelines left much to be desired and this proved to be only the beginning of the challenges. One of the first instances of criticism at the UN level concerned effectiveness – the Secretary-General's High-level Panel on Threats, Challenges and Change report (2004: para.153) stated that “sanctions against Al-Qaida and the Taliban suffer from lagging support and implementation by Member States and affect only a small subset of known Al-Qaida operatives”. Much more serious was Kofi Annan's call on the Security Council (2006: para.5) to establish “fair and clear procedures” for the 1267 sanctions regime. In the same year, in his annual report to the General Assembly, the Special Rapporteur stressed the need for procedural guarantees, describing the then system as a result of “political decisions taken by states' political representatives within political bodies based on confidential evidence” which he found unacceptable (Scheinin, 2006: para.39). The 1267 Monitoring Team reported also in that year that in the last 6 months there had been numerous proposals from states on procedures and at least 3 major academic studies with respect to fairness (Monitoring Team, 2006: para.2). Indeed, the UN Office of Legal Affairs commissioned a study into targeted sanctions which proved the – untenable under human rights law – denial of legal remedies (Fassbender, 2006), the prestigious Watson Institute published a white paper which proposed several recommendations to be urgently implemented to address the various shortcomings in the procedures of the Committee (Watson report, 2006), while the Council of Europe commissioned a report on the sanctions' compliance with the European Convention on Human Rights which found the blacklisting measures to be contrary to the general human rights provisions as embodied in ECHR (Cameron, 2006).

In addition to this mounting criticism, there had also been a growing number of domestic and regional court challenges – faced with a lack of judicial remedies at the UN level, those affected had resorted to attacking domestic regulations implementing the sanctions (Tzanakopoulos, 2010: 250). Based on Monitoring Team's bi-annual reports to the Security Council it can be said that around 40 challenges have been pursued in courts worldwide^[1]. Initially many of them have been unsuccessful because courts showed nominal respect for the Security Council's special position and refused to review its decision, even indirectly (Watson report update, 2009: 18), and even if they offered substantive criticism anyway. This is shown by the *Nada* case where the Swiss Supreme Court acknowledged the procedures were deficient, yet argued this could only be alleviated at the UN level (*Nada*, 2007: para.8(3)). With time, however, courts have become more bold, with the highest court of the European Union annulling EU regulations implementing the sanctions with reference to two cases after it had found that various due process rights were “patently not respected” (*Kadi*, 2008: para.334).

Although the number of cases is relatively small, their symbolic significance should not be underestimated – their resonance in public opinion can undermine the reputation of the Security Council and lead to campaigns of solidarity with those listed, as was the case with Mr Abdelrazik in Canada. People donated money to him while trade unions announced they would be hiring him, in breach of the ‘material support’ provisions of the 1267 resolution (ECCHR report, 2010: 68-69). In addition, the cases put numerous states in a difficult position of being forced to choose between their obligations to implement binding SCRs and contravening the rulings of their courts. Many of them have raised concerns; some 50 states have complained about the lack of transparency and due process in the present system (Monitoring Team, 2005: para. 37), a coalition of like-minded states lobbied unsuccessfully for an

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independent judicial review system (Willis, 2010: 9), and some smaller states like Lichtenstein complained that it had been extremely difficult to “even to get a conversation started on the issue among more heavyweight players, such as the Permanent Five” (Hovell, 2009).

All this has led to a significant loss of legitimacy for the sanctioning regime, the Security Council, and counter-terrorism efforts in general. As already suggested, that constitutes an important problem because a system of sanctions is wholly dependent on state implementation and any loophole drastically diminishes its effectiveness. Yet, in order to assess the relevance of this criticism, a case study might help depict the situation of a listed individual.

Case Study – The History of Mr. Kadi

The story of Yassin Abdullah Kadi, a Saudi Arabian national, can without doubt be described as a “legal odyssey” (van Ginkel, 2011). He was first placed on a US blacklist as a ‘specially designated global terrorist’ and in October 2001 was designated by the 1267 Committee as associated with Osama bin Laden with the reference number QI.Q.22.01. His name was added to the EU list on the same day with an EC Regulation implementing the UN decision. His assets were frozen, and a travel ban applied. He applied to the European Court of First Instance arguing the EC regulation should be annulled because it breached his fundamental rights to be heard, the respect for property, and effective judicial review. In 2005 the CFI rejected that, arguing European institutions acted “under circumscribed powers” and had no autonomous discretion (*Kadi*, 2005: para.265); although it did find jurisdiction to indirectly check the lawfulness of SCRs in relation to *jus cogens* norms. Kadi did not give up, and appealed together with AlBarakaat, to the European Court of Justice. The ECJ Advocate General’s opinion suggested the regulations should indeed be annulled because they contradicted the EU’s principle of respect for fundamental rights. The ECJ followed, determining that the rights of defence, in particular, to be heard, and to effective judicial review were “patently not respected” (*Kadi*, 2008: para.334). The European Commission communicated the narrative summaries of reasons to Mr. Kadi and AlBarakaat and found it sufficient to ensure the protection of fundamental rights, so their listing was renewed. Kadi had to file a further legal application with the European General Court which found his rights of defence to have been observed “only in the most formal and superficial sense” (*Kadi II*, 2010: para.171), which was clearly deficient to allow him to launch an effective challenge against the allegations. The Court could not have been clearer in pointing out that disclosure of evidence is key (Sullivan interview, 2011). Nonetheless, both the Council and Commission have appealed the judgment and another verdict is being awaited, while Mr. Kadi remains on the UN and European lists. He consistently claims to be innocent with no links to terrorism-financing networks and sees himself as a victim of the never-ending “financial Guantanamo”, even though whenever he had been given the opportunity of a fair hearing, the allegations against him proved to be untrue (Carter-Ruck Solicitors, 2010: 2).

The *Kadi* case is probably the most well-known challenge and the first one to succeed in courts. It is arguably also “the most significant legal development to affect the regime since its inception” (Monitoring Team, 2009: para.19). Yet, it has been chosen here purposefully because it exemplifies the struggles a person has to embark on to be de-listed. Emboldened by the 2008 ECJ judgment, national courts have likewise begun to invalidate domestic implementations (*Abdelrazik*, 2009; *Ahmed & Others*, 2010) and so the judgment’s character as a precedent rather than an incident is already becoming visible, as was anticipated by the Watson report update (2009: 19). Also, according to the ECCHR report (2010: 61), it was the *Kadi* case more than any other that led to the introduction of the Office of the Ombudsperson discussed in the next chapter.

At the same time, it has to be pointed out that both the ECJ and the General Court have criticised the 1267 sanctioning system, but from the perspective of the “splendid isolation” of the European legal order. Indeed, the ECJ seems to have used the moment to send out a strong message about the relationship of European law to international law, i.e. the autonomy of the former (de Burca, 2010). Its consequence has been summarised as “constitutionalism on the inside and fragmentation on the outside” (Ziegler, 2009). Indeed, although undeniably a success, the *Kadi* case has highlighted the problem at the international level rather than solved it because without an independent administrative review mechanism at the UN level, independent judicial review of SCRs can only open a Pandora’s box of fragmentation (Reich, 2008: 516).

Situation at the Time When the Office of the Ombudsperson Was Created

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While criticising the procedures of the 1267 sanctioning regime, it has to be mentioned that the Security Council has not been immune to the criticism, and has engaged in a continuing process of reforms (Prost, 2010b: 2). For example, in a discussion on the rule of law in 2006, all members of the Security Council stressed the importance of “fair and clear procedures” and a readiness to agree to reforms (Security Council, 2006).

Due to space constraints, it is impossible to track in detail all the changes made to the regime and analyse why they were introduced. A list of all the resolutions, and reforms they brought, can be found in Annex 2. Yet, by summer 2009, when the Office of the Ombudsperson was introduced by SCR1904, the procedural changes had addressed concerns about notification and accessibility. The first significant improvement came in 2005, when conditions for the “associated with” standard were clarified. Before that sanctions were a call to impose measures without defining the targets, which was similar to repeated calls of the international community to tackle terrorism. In the absence of a universal definition of the concept, it could give rise to adverse human rights consequences (Scheinin, 2005: para.27). Important steps came also in December 2006, when a Focal Point within the Secretariat for de-listing requests was created and a notification procedure established. Though the Focal Point did not constitute an “effective means of fairness” (Qatar, Security Council 5609th meeting, 2006) because it was but a post box, at least individuals could approach the Committee directly, without the need to ask their countries of citizenship or residence for diplomatic protection. In addition, since 2008, narrative summaries of the reasons for listing were to be created and states were to provide statements of case, identifying their publicly releasable parts. Finally, SCR 1822 asked the Committee to conduct a review of all names on the list.

Despite the improvements, none of the measures addressed the issues of effective remedy or review mechanism. The Sanctions Committee, deciding on initial placement as well as subsequent review and delisting, continued to act as a judge in its own case (De Wett & Nollkaemper, 2003: 3). Thus, sanctioning remained the result of a purely political process, which Judge Zoll in Canada described as a “denial of basic legal remedies” (Abdelrazik, 2009: para.51). He also wrote that “The 1267 Committee regime is a situation for a listed person not unlike that of Joseph K in Kafka’s *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime” (*ibid.*: para.53).

Did the creation of the office of Ombudsperson rectify these deficiencies of the Kafkaesque process? Was it any more meaningful than the previous changes?

CHAPTER 4. OFFICE OF THE OMBUDSPERSON

There is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism, on the contrary – the moral vision of human rights is among our most powerful weapons against it.

-Kofi Annan

It is not enough to make nice speeches on the importance of human rights; we must also have the courage to act in accordance with our lofty words.

-Dick Marty

The Office of the Ombudsperson was created by SCR1904, as a direct response to the challenges of designations in domestic or regional courts and probably to anticipate further challenges (SCR 1904, 2009: preambular para.9). The post was accepted by a Canadian judge, Ms. Kimberly Prost, and immediately hailed by the Security Council as the culmination of all reforms, which “substantially improves the procedures and significantly contributes to strengthening the fairness and effectiveness of the regime” (Mayr-Harting, 2010: para.11).

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Mandate

The Ombudsperson, “an eminent individual of high moral character, impartiality and integrity, with high qualifications and experience” (SCR 1904, 2009: para.20), is to receive requests from individuals who seek to be removed from the Consolidated List. Upon receiving such a request, she begins an information gathering process, asking relevant states, UN bodies and the Monitoring Team to provide additional information. After that a period of engagement with the petitioner takes place, during which the Ombudsperson may ask them any additional questions or try to clarify issues that have arisen. She will also forward all replies to the 1267 Committee and coordinate regarding any further enquiries. The result of this process is a Comprehensive Report drafted by the Ombudsperson in which she summarises the activities undertaken and information obtained. The report is then presented to the Committee, which shall decide whether to approve the delisting request through normal decision-making procedures (i.e. by consensus).

During her first press conference, Kimberly Prost said she accepted the job because she believed it is a serious commitment on the part of the Security Council taken in good faith (Prost, 2010a), but she honestly admitted “there has not been any shift in the decision making power through the creation of the office – the power rests solely with the Security Council and its Committee” (Prost, 2011b: 3). She also assured that she will be as aggressive as possible – “quite frankly, I am not known for keeping my opinions to myself” (Prost, 2010b: 8).

Creation of the Office has no doubt increased accessibility. An independent website has immediately been created and a contact email address provided where people can write in any language and even without legal help (Prost, 2011a). So far, fourteen cases have been accepted by Ms. Prost and two de-listings occurred (Ombudsperson website), although it must be recognised that the effectiveness of the procedures should not be assessed by the number of de-listings (Prost interview, 2011c).

But is the Office able to satisfy due process requirements?

A Proper Shake or Just a Stir?

Without hesitation it must be admitted that the creation of the Office is an improvement which shows the willingness of the Security Council to make piecemeal adjustments (Cortright & deWet, 2010: 13). The Ombudsperson is also the “first and only independent body” that the Security Council has given its consent to review the substance of its decisions in the 1267 Committee (Willis, 2010: 70). But it must equally strongly be said that it is but tinkering, and that it does not meet the core problems of the whole regime. Amir Attaran, a Canadian law professor strongly critical of the system, is right when he believes the creation of the office testifies to the Council’s strategy of merely saving face through diplomatic means (O’Neill, 2010) because, as the Chairman of the 1267 Committee admitted himself in 2009, ultimately “it remains a political decision based on a political process” (cited in: *ibid.*).

Indeed, the function of Ms. Prost is one of a watchdog, albeit without the ability to ensure that her observations are taken seriously. She may be aggressive and bold in discussion, exerting considerable political pressure on the Committee members, as suggested by the Monitoring Team (Monitoring Team, 2011: para.33), but without decision-making powers the Ombudsperson cannot be regarded as satisfying the provisions of ICCPR art.14 or ECHR art.6. To highlight again, due process depends on the independence of a decision-maker, accessibility and power to grant an effective remedy. Appointed by the Secretary General and directly accessible, the Ombudsperson may satisfy the first two criteria, but without the mandate to make explicit recommendations, let alone take binding decisions, to call this procedure a remedy is a huge exaggeration, even if the Ombudsperson herself sees it as providing those listed with “some kind of objective review” (Prost interview, 2011c). Within the analysed regime, a decision could be named an effective remedy if it could lift the measures imposed basing on facts and the law, and would be free from political influences and restrictions (Willis, 2010: 71-2). Yet, the Sanctions Committee continues to be the only body with the power to provide an effective remedy, and it remains a political organ that lacks clear legal criteria which, when satisfied, would guarantee de-listing. Thus, the 1267 regime still fails to provide due process standards and the interview with Kimberly Prost seems to confirm that opinion (Prost interview, 2011c).

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That this is the case was confirmed in two judgments rendered by European courts in 2010. In the mentioned *Kadi* case, the General Court argued the Security Council has still not deemed it appropriate to establish an independent and impartial body, because creation of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of the 1267 Committee's decisions (*Kadi II*, 2010: para.128). In a similar vein, the UK Supreme Court concluded that although this improvement is to be welcomed, "the fact remains that there (...) still is not any effective judicial remedy" provided (*Ahmed and others*, 2010: para.78). These verdicts must have been a blow in the face of the Security Council which hoped with this adjustment to have silenced the criticism of courts worldwide (van Ginkel, 2011).

Also the last report of Martin Scheinin, the Special Rapporteur, concluded that the Ombudsperson, with the current mandate, cannot be regarded as a tribunal within the meaning of art.14 ICCPR and so the Security Council is acting *ultra vires*, having taken on "a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of fair trial" (Scheinin, 2010: para.57). His recommendations have been dismissed, with the Security Council permanent members arguing that the ongoing threat of terrorism was serious enough to warrant the current approach, while Russia suggested he himself has exceeded his mandate by considering the lawfulness of Security Council actions (International Service for Human Rights, 2010). This shows the unwillingness of the Council to engage in meaningful discussion or to introduce real change, proving its determination to stick with fig-leaf solutions. The report is, nevertheless, of crucial significance because it frames the discussion about the sanctions not only as a struggle for legitimacy, but "within the context of unlawfulness" – targeted sanctions are found to be in breach of human rights standards as well as *ultra vires* the UN Charter itself (Sullivan interview, 2011).

Obviously, there remains a chance for development and improvement of the mandate of the Ombudsperson. In its April 2011 report, the Monitoring Team suggested it is too early to assess the real impact that the Ombudsperson will have on the regime and the perceptions of its fairness. It also admitted there is room to develop the process, but it would require acceptance from courts and states that an equivalent level of review can be obtained "within a system unique to the Security Council" (Monitoring Team, 2011: para.36). This can be read as a between-the-lines acknowledgement that human rights deficiencies continue to trouble the regime, but it is also a clear call for deference of regional and national courts. It probably is a reasonable move by the Council because with the judicial discontent, the failure to address the due process concerns has created a real "security crisis" (Genser & Barth, 2010: 7). Yet, looking at the reforms to-date, which have failed to grapple with the core problems of the regime, hopes for future reforms should probably be cooled.

A small positive step, which extended and strengthened the mandate of the Ombudsperson, was resolution 1989 (2011). By removing the consensus requirement for delisting decisions, it allows the Ombudsperson to de facto exercise delisting powers by default. Yet, the delisting request can be referred to "full" Security Council, where normal decision-making rules apply, so after all the resolution does not remedy the human rights-related shortcomings expressed above (Scheinin, 2011). In addition, SCR1989 provides that only individuals and entities linked to AlQaeda shall remain on the list, now named the "AlQaeda Sanctions List", while a separate committee and list for those associated with the Taliban will be created. The Ombudsperson will have no role in this new Taliban regime, which is a clearly retrogressive step from the point of view of human rights protections (*ibid.*).

Why are Proper Due-process Guarantees Unattainable?

Looking at the 1267 regime in its entirety and all the changes introduced, it can be noticed that most of the reforms were "mere procedural tinkering" (ECCHR report, 2010: 112) rather than substantive improvements from the perspective of human rights. A question can be asked why that is the case. A definite answer is obviously impossible to be found and the Ombudsperson refused to comment on that matter (Prost interview, 2011c). Yet, Gavin Sullivan has no doubt that, just like other counter-terrorist measures (e.g. detention), sanctions have been put in place because they fit the pre-emptive logic of risk management and allow for extra-legal intervention on the basis of pieces of intelligence information which would not stand up in court (Sullivan interview, 2011). It is important to make it clear that their conflict with fundamental rights was the *raison d'être* of the whole system, not an unfortunate by-effect (Sullivan, 2010). This is confirmed by the words of former US Treasury Secretary Paul O'Neill, who admitted:

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"[We] moved ... on setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court ... because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider"

(cited in Suskind, 2004: 192).

This was done at the international level and under the auspices of the Security Council in order to escape national standards of human rights protections and review (Feinäugle, 2008). Having the Council take decisions about individual listings under Ch. VII was a useful way for individual states to make their executive decisions unconstrained by domestic judicial control and supervision. Illustrative of that is the case of Mr Mohammed al-Ghabra (G in *Ahmed and others*, 2010), who was informed by the UK Treasury that his funds were to be frozen pursuant to his inclusion on the 1267 list which the authorities were bound to implement. He was not told that it was the UK itself which had proposed his inclusion on the UN list in the first place (Guild, 2010: 7). Thus, rather than freezing his assets under national law which would have been subject to domestic judicial review, the government decided to do the same indirectly, via the 1267 Sanctions Committee.

Why is it Important?

Are such methods justifiable, even in the so-called 'war on terror'? The answer is definitely negative because the procedures undermine the credibility of the sanctioning regime as well as international fight against terrorism and, as pointed out in the *Assessing Damage, Urging Action* report, are "unworthy of international institutions like the UN or EU" (Eminent Jurists Panel, 2009: 117).

As any other sanctioning regime, the 1267 one is uniquely vulnerable to non-compliance of member states because any "hole in the sanctions net" (Hovell, 2009) provides a location from which assets can be recaptured and operations planned – any state that is not fully cooperating in the regime becomes potentially a safe haven. It is thus important that individual member states of the UN perceive the system as transparent, effective and legitimate. However, if substantial procedures are not introduced and court challenges like *Kadi* continue, more countries may go along the route of Switzerland, which in March 2010 introduced political reforms changing the way sanctions are implemented and allowing authorities to opt-out of international sanctions in certain cases (Vemeulen, 2010).

If more states follow, the Security Council's ability to take action against this particular threat to international peace and security might be severely compromised.

Yet even worse than the loss of the effectiveness of sanctions, might be the loss of legitimacy of the "war on terrorism". This battle of ideas (Wilkinson, 2006) or "clash about civilization" (Blair, 2006) is very hard to succeed in, but it is nearly impossible to win if the Western world is seen to violate its own proclaimed norms of protection of universal and inalienable human rights and the rule of law. Indeed, in the alleged 'clash of civilization' it is all the more important to adhere to the basic values we profess, especially when the smart sanctions can particularly target people from immigrant communities within Western countries (Cameron, 2006: 9). This is all the more crucial, given the fact that there is no need to sacrifice civil liberties at the altar of security. The threat posed by terrorism needs to be fully acknowledged and taken seriously, but the Security Council can act swiftly without violating human rights (Miller, 2003: 46) and an independent review mechanism would not hamper its legitimacy or effectiveness. Not only can it do so, it also has a responsibility to do it.

CONCLUSION

This essay has sought to evaluate the procedural changes in the 1267 sanctioning regime, particularly the creation of the Office of the Ombudsperson, in light of the right to due process. The system of smart sanctions against AlQaeda, the Taliban and their associates, introduced in 1999, became a crucial part of the international struggle to counter terrorism after 9/11. Although objectively the events of September 11th were not transformative for world politics, even if hugely shocking, it has to be understood that from the American perspective they were disastrous, showing

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the US to be intensely vulnerable “just at the time when the prevailing security paradigm was that it was entering a phase of truly global power with no rivals in sight” (Rogers, 2004: 168). Needless to say, the reaction of the American-led international community was unhesitating and marked a move away from human rights.

After putting the sanctions in the wider context of the “existential threat” posed by terrorism and efforts to counter it, Chapter 1 analysed the original shape of the 1267 regime and its human rights implications. Next, the authority of the Security Council under Chapter VII was looked into and it was concluded that, despite being given broad power, it is bound by certain rules and limits, one of them being the basic guarantees of due process. Chapter 3 focused on the challenges to the sanctioning regime which begun for good after the UN Secretary’s General call for “fair and clear procedures” to be introduced. The case of Mr. Kadi was presented in order to help illustrate the “legal odyssey” of those who found their listing unjust and wanted it annulled and, thus, it shows the practical workings of the regime. Chapter 4 analysed and critically assessed the mandate of the Ombudsperson, hailed as the most significant improvement of the regime.

Although it does bring positive changes, it is by far not satisfactory, but a fig-leaf proposed by the Security Council to prolong the life of the sanctioning regime in the light of mounting criticism and calls for abolition. The critique remains sound because even with the Ombudsperson in place there is no judicial review or effective remedy available to those put on the list. Blacklisting is still a “striking illustration of how human rights principles have been ignored in the fight against terrorism” (Hammarberg, 2008). This has had a disastrous effect on the legitimacy of the sanctions themselves and the war on terror in general.

Because of that, a critical moment to press for meaningful reform beyond mere appearance of improvements has arrived, if the Security Council finds the sanctions truly effective in limiting the financial resources and capabilities of AlQaeda. Whether this is indeed the case is hard to determine, because the Sanctioning Committee itself has stated there are “difficulties in quantifying the effect” (ECCHR report, 2010: 107), while the Monitoring Team acknowledged the sanctions had achieved less than was hoped and overall had a “limited impact” (Monitoring Team, 2004: para.30). This is also the standpoint of independent observers, who point out that most of the people on the list have meagre amounts of money and “it is questionable whether they would be even capable of furthering terrorist acts” (Sullivan interview, 2011).

However, should the sanctions be decided to have any benefits in the counter-terrorist attempts, the price for their maintenance must be real change. To recommend a way forward is beyond the scope and word-limit of this thesis, but the personal impression of the author is that abolition of the sanctioning regime, as suggested by Martin Scheinin and others after him, might undermine the legitimacy and transparency of counter-terrorism, especially given the continuing lack of universal definition of the controversial term. If states are left to manage their domestic blacklists without much supervision, the war against terrorism might lose the remnants of universal acceptance it has, becoming but a name for personal struggles of various leaders. Therefore, vesting the Ombudsperson, or another body, with review and decision-making powers is a necessity, even if the experience of the last decade shows it is politically not viable.

All that is left is an expectation that the alleged embedded idea of human rights (Foot, 2007) at domestic, regional and international levels can make the fight-back for fundamental guarantees happen. This is a must because as put by Lord Hoffman in the British *A and Others* case, “Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.... The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from ... [sanctions] such as these. That is the true measure of what terrorism may achieve” (*A and Others*, 2005: para. 96-97).

APPENDIX 1. TERMINOLOGY

A) Sanctions

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Called a liberal alternative to war (Pape, 1997), sanctions are a foreign policy instrument used to influence the leaders of a nation to conform to some desired behaviour by targeting the whole (Fausey, 1994, p.197). Imposed by the UN for the first time against South Rhodesia in 1965, their use has been much broader in the 1990s. However, their effectiveness has been increasingly questioned (Pape, 1997; Pape 1998; Elliott, 1998; Cortright & Lopez, 2002), their humanitarian impacts on civilians – downright criticised. Compared to “medieval military siege” (Köchler, 1994), they have been discredited especially in the context of Iraq, with the Security Council itself admitting: “we are in a danger of losing the argument (...) about who is responsible for this situation (...) – president Hussein or the UN” (Willis, 2010: 8), while a UNICEF study determined 500,000 children died in Iraq in 1991-1998 “in excess” (Save the Children report, 2002: 30).

B) Smart Sanctions

Calls for smart sanctions were born as a response to the devastating humanitarian effects of comprehensive sanctions in the 1990s. By directly targeting political leaders or those responsible, they do not, in theory, affect the innocent civilian population. Because of that, their development has been compared to the emergence of vertical international criminal law which is also based on the notion of individual, as opposed to collective, responsibility (van Herik, 2007). Consequently some scholars have argued they represent a move to pierce the veil of statehood (Reich, 2008: 506). Introduced for the first time against UNITA in Angola in 1993 and 1997, they have become the preferred UN sanctions instrument, with 11 regimes being currently in force. To develop standards for the new targeted sanctions regimes, three related processes have been initiated (Interlaken, 1998; Bonn-Berlin, 1999-2000; Stockholm 2002-3), though the analysed 1267 regime is not a product of them (Magnusson, 2008: 7).

C) 1267 Committee

Committee established in October 1999 pursuant to SCR 1267, for the purpose of overseeing implementation of sanctions imposed on the Taliban-controlled Afghanistan for its support of Osama bin Laden. With time, its mandate changed as new resolutions were passed, with the measures and the list of targeted groups broadened (SCR 1333, 2000) and territorial links to Afghanistan no longer required (SCR 1390, 2002) for names to be added to the so-called Consolidated List. For a long time, the measures – asset freezing, travel ban and arms embargo – were to apply to AlQaeda, the Taliban as well as individuals and entities associated with them, but with resolutions 1988 and 1989 (2011) the Security Council decided to split the Consolidated List in two. Consequently, the 1267 Committee now deals only with members and “associates” of AlQaeda whose names figure on the new AlQaeda Sanctions List. In addition a country-specific regime for Afghanistan has been created. As of 29th July 2011, the new AlQaeda list included names of 250 individuals and 91 entities (1267 Committee website). The Committee resembles a supranational administrative agency (Reich, 2008: 510) overlooking the imposition of sanctions which – according to the Security Council – are intended to be political and preventive rather than punitive. Consequently, their imposition is not a legal determination but rather a “political finding of association” (Watson report update, 2009: 7).

APPENDIX 2. RELEVANT SECURITY COUNCIL RESOLUTIONS AND CHANGES TO THE REGIME INTRODUCED BY THEM

SCR YEAR

CHANGES

1267 1999 Establishment of the Committee; financial sanctions on the Taliban. 1333 2000 12 months arms embargo on Afghanistan under the Taliban; financial sanctions expanded to cover Osama bin Laden. 1390 2002 Sanctions no longer territorially limited to Afghanistan, but are to target the Taliban, Al Qaeda, bin Laden and people associated with them wherever located; introduction of the travel ban and creation of the Consolidated List. 1526 2004 Establishment of the Monitoring Team. 1617 2005 Criteria for “associated with” established; encouragement to provide first statements of case. 1730 2006 Creation of Focal Point within the UN Secretariat. 1735 2006

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Establishment of a notification process for the states whose nationals have been listed with a 2 weeks' time limit. 1822 2008 Order to conduct a comprehensive review of all names by June 2010, to create narrative summaries of reasons for listing and for states to identify publicly releasable statements of case. 1904 2009 Creation of the Office of Ombudsperson and provision of a new standard form for submission of names; narrative summaries for reasons of listing are to be available online and all statements of case are to be publicly releasable unless the proposing state prohibits; notification process shortened to 3 days. 1988 2011 Creation of a separate sanctioning regime and a list for the Taliban in Afghanistan; use of the Focal Point anew. 1989 2011 Change of the name of the 1267 Consolidated List to "AlQaeda Sanctions List"; it is to include entries associated with AlQaeda only; removal of the consensus requirement for de-listing decisions.

Table 1. Changes introduced to the 1267 sanctioning regime pursuant to subsequent Security Council resolutions.

APPENDIX 3. TEXT OF THE EMAIL "INTERVIEW" WITH KIMBERLY PROST, UN OMBUDSPERSON

So far 2 people have been delisted thanks to the procedure you operate. Would you say the process of applying for de-listing via your office is effective?

Kimberly Prost: *I don't believe that the effectiveness of the Office should be assessed by the number of de-listings, rather by the overall fairness of the process. To date I am satisfied that the process in the first few cases which have reached a conclusion accorded the key elements of fairness – knowing the case against you, having an opportunity to respond to that case and be heard by the decision maker and having some kind of objective review – in this case with respect to the information underlying the listing.*

At the moment, do you feel the system should somehow be improved in terms of its human rights-compliance, or is it fully in agreement with the various human rights treaties?

K.P.: *As Ombudsperson, I consider it inappropriate for me to engage in the broader debate on the sufficiency of the process. I focus on the powers that I have and how they are working in practice.*

Does it ensure due process rights, as codified in UDHR, ICCPR, ECHR? How could you try and convince European Court of Justice or the UK Supreme Court which have argued the Ombudsperson is inadequate to render effective due process?

K.P.: *Same as above.*

Before taking up the post of the Ombudsperson, and even before the resolution 1904, did you feel – personally – that the sanctioning regime was lacking due process safeguards and, thus, losing its legitimacy?

K.P.: *I would refer you on this to the comments I have made in the selected presentations which are my Website.*

What is your experience of cooperation with states? In your January 2011 report to the Security Council, you wrote it was good. Is this still the case, or have you come across some instances of non-cooperation? What about classified material – do you feel your final reports could benefit much if you had access to all the materials in states' possession? Do you feel intelligence material could significantly change your analysis and conclusions as to delisting someone?

K.P.: *Cooperation from States continues to be very good. Confidential information remains a challenge in the long term, but so far has not proven to be an insurmountable obstacle in case practice. More detailed comments are in my most recent Security Council report.*

From your experience to date as the Ombudsperson, do you believe your reports on a delisting request are seriously

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taken into account by the 1267 Committee? Do you find it a serious disadvantage that your recommendations are not binding?

K.P.: *I am entirely satisfied my reports are being taken very seriously and are given careful consideration and analysis by the Committee members.*

On your website you have written that the sanctions are not intended to punish for criminal conduct because their aim, two-fold, is different. Yet, don't you think that, however they are characterised, their result is very much similar to criminal charge, especially that the sanctions are, possibly, indefinite? Ian Cameron has characterised the sanctions as *alternatives to criminal investigations* – what do you think about such an approach?

K.P.: *As Ombudsperson, my view on this matter is as expressed on the website.*

Could you please comment on the recent Security Council Resolutions 1988 & 1989 – why were they passed? Have the Taliban who are on the list thus been refused the opportunity to approach the Ombudsperson? Is this a retreat in terms of protection of fundamental rights of the listed individuals?

K.P.: *In my capacity as Ombudsperson, I do not participate in the discussion or decision making as to the resolutions. I can inform the process through my reports on activities and implementation but the policy and decision making power rests with states. I restrict my comments to issues related to the Ombudsperson process.*

In your opinion, why does the Security Council not want to agree on an independent review body with binding decisions and access to all statements of case and other relevant material?

K.P.: *Same as above.*

Do you think this could ever happen in the future, for example if the judicial challenges in various national or regional courts continue?

K.P.: *This is a matter on which I would not speculate.*

APPENDIX 4. TEXT OF THE EMAIL “INTERVIEW” WITH GAVIN SULLIVAN, CO-AUTHOR OF THE ECCHR REPORT ON BLACKLISTING

In the 2010 ECCHR report, you suggest that the abolition of the blacklisting regime would be a *bold, proactive measure necessary to begin the process of addressing the core problems*. However, can you imagine any reform that would allow the regime to be maintained at the UN level, or is its abolition absolutely the only solution? If sanctioning regime at the UN level is abolished, what with independent regional/ national lists – should the whole idea be abolished?

Gavin Sullivan: *In the Blacklisted report that I wrote with Ben Hayes we argued that the UN Resolutions 1267 and 1373 which set up the targeted sanctions regimes, ought to be abolished. In coming to that conclusion, we assessed three core problems of the list: first, the systemic violation of fair trial rights; second, the issue of disclosure (to both listed individuals and the courts) of the reasons, information and 'evidence' underpinning the listing decisions; and third, the overtly broad scope of the measures and the lack of a clear definition of 'terrorism' at an international level. We then examined how (or if) different types of reforms would effectively deal with these core problems – including the introduction of judicial review mechanisms at the UN level, broadening the scope for national constitutional systems to implement and review the UN listing decisions (following the example set by states such as Switzerland), and abolishing the scheme. In our view, a view supported by the UN Special Rapporteur for countering terrorism, abolition is actually the most viable way of dealing with these problems.*

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We need to remember that the UN listing system is an extraordinarily powerful mechanism. It effectively enables the intelligence agencies of the Security Council member states (who work closely with and in the sanctions committee) to use classified material to deliver punitive, administrative sanctions against individuals thought to be "associated with" terrorism, without any capacity for those individuals to mount an effective challenge. The fact that such a system bypasses core fundamental rights is not an accident – it is rather an intended design feature of a system that operates according to a pre-emptive logic of risk management, rather than evidence, proof or respect for fundamental rights. It is also a system that cannot actually be lawful unless the powers of the committee (and the intelligence agencies they work with) are radically changed. The EU courts could not have been clearer in the most recent Kadi decision. Disclosure is key. Listed individuals must be able to undertake a full substantive review of the material underlying the listing. Anything less than that is unlawful. And yet look at the most recent reforms and you will see very little movement on this critical issue. The sanctions committee have been afforded extraordinary powers through the UN sanctions regime that they will be very reluctant to give up.

If the regime were to be abolished, do you think the fight against terrorism could be seriously weakened? Putting aside the serious human rights concerns, was the sanctioning regime effective in stopping the process of financing terrorism?

G.S.: *As your question suggests, the issue as to whether the abolition of the targeted sanctions regimes would undermine the fight against terrorism begets a further question: are the listing regimes actually effective in meeting their ostensible aim of promoting international peace and security through the blocking of terrorist financing? According to most observers other than the sanctions committee themselves, the answer is clearly 'no'. Many, if not most, of those on the 1267 list have meagre amounts of funds and it is certainly questionable whether those funds would be even capable of furthering terrorist acts. If a de minimus rule was to be introduced (which I think would certainly be a useful reform) then there might at least be some basis for the courts to somewhat objectively assess the contribution that listed individuals are actually capable of making to terrorist activities, and thus undertake a proportionality assessment of the sanctions. But no such reforms have been proposed to date.*

In his recent press statement (29 June 2011), Martin Scheinin acknowledges that the sanctions regime does not remedy the human rights shortcomings expressed earlier, yet he gives conditions under which the assessment might change. Do you believe this is a good route, to constantly try and press for more meaningful reforms in the hope that one day they may be introduced, or is it more appropriate to keep calling firmly for abolition?

G.S.: *Pushing for meaningful reform of the UN system is very important. The point we made in the report was that the reforms proposed to date have entirely failed to grapple with the core problems of the listing regimes – including, most significantly, the issue of access to classified information and the right to an effective remedy. If reforms proposed actually dealt with these core deficiencies, then we would no doubt support them as meaningful. This is also, as I understand it, the position of Martin Scheinin in his assessment of the reforms announced in June.*

I think there needs to be a wider range of opinions on how to most effectively deal with the problems of the targeted sanctions regimes (including that the regimes themselves be abolished should they persist in being ultra vires the UN charter). Human rights and social justice advocates need to be careful not to limit ourselves to always advocating for incremental and piecemeal reforms, which is clearly the path that most NGO's and jurists have preferred to take.

I know that in June 2011 the ECCHR has approached the Ombudsperson acting in support of four Italian residents who would like to be de-listed. What were your impressions of contact with the Ombudsperson, if any? Can you tell me something more about this case? If these people are indeed de-listed as a consequence of the work of the Ombudsperson, will this give you any more faith in her mandate?

G.S.: *I am currently representing four Tunisian-Italians who have been on the 1267 blacklist since 2004 for being "associated with" Al-Qaida. In short, all four were arrested, tried by the Italian authorities and ultimately found not guilty of being part of any group associated with terrorism. And yet, they remain on the list for allegedly being*

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members of a group associated with terrorism (in this case, the GSPC and/or GIA). My clients' case, of course, highlights the different standards of proof that may apply in a court (the criminal standard of "beyond reasonable doubt") and the unique standard applied by the sanctions committee (which, according to recent guidance issued by the Ombudsperson is "whether there is sufficient information to provide a reasonable and credible basis for the listing". The courts have found no evidence specifically linking my clients with terrorism. So the sanctions committee presumably must have some evidence or at least "sufficient information" demonstrating that they are so linked. Should this information be intelligence material (as I believe it must be), then I think my clients ought be able to know what this material is and be afforded the opportunity to contest it (and the allegation it supposedly supports). Anything less would constitute a breach of their fundamental rights, at least before the EU courts (who will most likely be the ones to decide this issue should the UN refuse to delist).

Of course, we are willing to try to achieve delisting through the Ombudsperson (whilst at the same time preparing to challenge at the European level). Should our clients end up being delisted there, it will save all parties time and money (my primary concern here, of course, is to represent the interests of my clients who simply want to come off these lists and start rebuilding their lives as soon as possible). Her new powers, however, are not significantly different than before, especially when it comes to the crucial issue of disclosure of classified material. However, despite the bold statements of members of the Sanctions Committee I do think that they would like to avoid further judicial embarrassment through adverse ECJ decisions on these issues. Such cases ultimately serve to undermine the UN's legitimacy to act in this field – which is something I believe that they crave. My point is that whether my clients come off the list or not through the UN delisting process may have little to do with the powers (or lack thereof) of the Ombudsperson, but through factors that are somewhat arbitrary and contingent upon wishes of the Member States constituting the sanctions committee.

Do you think the Ombudsperson was able to do any good job at all, or was her mandate too weak to achieve anything meaningful? How would you assess the fact that to date 2 individuals have been delisted thanks to that procedure?

G.S.: *I think the Ombudsperson is doing a good job within the strict confines and limits of her powers. The movement towards recognising the current circumstances of listed individuals (rather than simply the circumstances that led to the listing), for example, is gesture towards incorporating some type of proportionality assessment into the delisting procedure – which may prove useful for many of those remaining on the list. However, overall and where it counts, we need to remember that her powers remain extremely weak and the sanctions committee is still the secret and unaccountable body taking all the material decisions pertaining to listed individuals.*

In the current sanctioning regime system as it stands, would you say it is better to have an Ombudsperson, even if the mandate of Ms Prost is weak, or does it only provide a false comfort and is a betrayal of our ideals in the fight for proper human rights protection? (i.e., from the perspective of human rights advocates, is it better to engage in this regime or should we reject co-operating in it at all, because any such action legitimates the whole system?).

G.S.: *The battle for legitimacy that is currently taking place – principally between the sanctions committee and the EU courts – is critical to the survival of the UN sanctions system and, even further, to the authority of the Security Council itself.*

The Committee certainly can claim that they have the power to force states to introduce their listing decisions (Article 103 of the UN Charter is particularly helpful to them here), but so long as the EU and UK courts persist in declaring the listing decisions unlawful and undermining their authority by reviewing their decisions in this way then they have a real legitimacy problem on their hands.

The Ombudsperson is critically important to the UN targeted sanctions regime simply in that it aims to provide the regime with the legitimacy that it sorely lacks.

Initially the situation of blacklisted individuals was rightly called Kafkaesque. With all the changes introduced do you

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think this is still the most adequate description, comparison?

G.S.: *Do listed individuals have any more real access to the information (usually classified) underpinning the listing decisions now than they did when the scheme first developed in 1999? I don't think so. So, as much as the UN Sanctions Committee may want to wish it away, the Kafkaesque description is likely to stay, and aptly so. How can one challenge the allegation against them if they don't know what it is? Unfortunately, the problem essentially remains the same as before.*

In your opinion, why does the Security Council not want to agree on an independent review body, with the power to give binding decisions and access to all relevant material? Is there any particular country that opposes it, or is it due to general state reluctance? If judicial challenges to the sanctioning regime continue, do you think this could ever happen – the Security Council would establish an independent tribunal?

G.S.: *First, I don't think the Security Council actually think that the need for such a mechanism is so acute yet. Their preference is for piecemeal procedural reforms, which they hope, will satisfy the regional and national courts for the time being. I believe that the legitimacy crisis is likely to actually deepen rather than improve, so they may be forced to reconsider this approach eventually.*

However, secondly, I imagine that such a scheme would be vigorously opposed by the security and intelligence agencies that the sanctions committee works with. It's true that even getting these agencies and bodies (from Russia, China, the US and the UK) to share information amongst each other, let alone disclose it to individuals whose lives their decisions are directly affecting, seems unlikely at present. Beyond that, however, I don't think that they would want to depart from an administrative system based on the non-disclosure of classified material.

In your article for the Guardian, published on the day that the ECCHR report came out, 10 Dec 2010, you wrote that the incompatibility of the blacklisting with fundamental rights *is not so much an unfortunate consequence of blacklisting but rather its raison d'être*. Could you please elaborate on that? Do you mean it was introduced as an alternative to criminal prosecutions, or rather that it was introduced at the UN level to avoid judicial scrutiny, which would have been the case with national lists? If that was its *raison d'être*, as you wrote, why were any changes to the procedures introduced? Or would you call them but fig-leaves, not providing any meaningful improvement?

G.S.: *Let's recall for a moment how the former US Treasury Secretary Paul O'Neill described the impetus for the rapid development of blacklisting and asset-freezing:*

"[We] moved ... on setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court ... because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider. Yet 'freeze' is something of a misnomer – funds of Communist Cuba have been frozen in various US banks for forty years."^[2]

Much of the critical literature on the issue presents the ways that targeted sanctions violate fundamental rights as almost an accident or an unfortunate by-product. My point is simply that we need to remember that the violation of the rights of defence (by, for example, failing to allow listed individuals an opportunity to effectively contest the allegations against them) is a core design feature of the system. Targeted sanctions regimes have been prioritised, promoted and developed precisely because they enable pre-emptive, extra-legal security intervention by states on the basis of evidence that is not designed to hold up in court.

As I've said above, the procedural reforms have introduced some changes that could prove helpful to listed individuals trying to get off the list. But on the core issues – effective remedy, rights of defence, disclosure – it's clear that there has been very little movement. The procedural reforms seek to provide legitimacy not legality. When the problems are situated in this context, it's clear that taking these issues and questions of legality or human rights seriously would function to actually undermine the perceived value of the sanctions regime itself.

Martin Scheinin stated in his 2010 report that whatever justification the Security Council may have had in September

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2001 for the adoption of SCR 1373, its continued application years later cannot be seen as a proper response to the threat of terrorism, given the fact it is a de facto legislative measure imposed on the basis of hypothetical future acts falling under the controversial and internationally undefined notion of terrorism. Is he thus insinuating that international terrorism is not the greatest security threat in today's world, as we are often told by politicians and the media? Would you agree? Could it be that terrorism has been socially constructed, exaggerated, as an existential threat, just as transnational organised crime or war on drugs in the 1990s were?

G.S.: *I think the argument that Martin Scheinen was making in his report was that when acting under Chapter VII of the UN Charter (as with the introduction of Resolution 1373), the Security Council are only empowered to make preliminary determinations "deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security". We know, however, that Resolution 1373 is far from meeting this requirement. It obliges states to criminalise terrorism', for example, without providing any clear definition of what terrorism is, thus effectively outsourcing the problem to nation states to resolve according to their own interests. The precautionary measures of the listing regimes resemble permanent, sanctions after they have been applied for years without possibility of effective challenge. And so I think Scheinen is right to point out that whilst the 'specific and concrete' test may have arguably been met in the immediate aftermath of the 9/11 attacks in 2001 when Resolution 1373 was introduced, it is not met now.*

This is crucially significant because it means that the targeted sanctions regimes set up by the UN through Resolutions 1267 and 1373 are not only being found to be unlawful in regional and national jurisdictions such as the EU and UN courts, but they are also ultra vires the UN charter. I think it is important to challenge the legality of the sanctions from both ends – both the top (UN) and the bottom (national courts) – and to frame the struggle for legitimacy that is currently taking place within this context of unlawfulness.

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[1] I have tried to contact the Monitoring Team by email to enquire about the official number of court cases to date, but unfortunately did not receive any reply.

[2] Cited in Suskind, R. (2004) *The Price of Loyalty*. New York: Simon & Schuster (at p.192)

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