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The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts?

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Abstract

This article examines the UN Security Council's 1267 counterterrorism sanctions regime. Initially adopted in 1999, this sanctions regime targets individuals and entities suspected of associating with Al Qaeda and/or the Taliban and it requires UN Member States to freeze their assets and implement travel bans. Central to the operation of the sanctions regime is a "Consolidated List," which is maintained by the so-called 1267 Committee, a sub-committee of the Security Council. This Committee possesses discretionary powers to list and de-list targeted individuals and entities that have been criticized as incompatible with internationally recognized due process guarantees. Reviewing recent developments, including a landmark decision by the European Court of Justice, the article addresses the need for additional safeguards and discusses reform options available to the Security Council. It examines the most recent reform efforts introduced by Security Council resolution 1904 (2009) and argues that a comprehensive review and reform of the 1267 sanctions is crucial if the regime is to provide an "essential tool" in the UN counterterrorism efforts.

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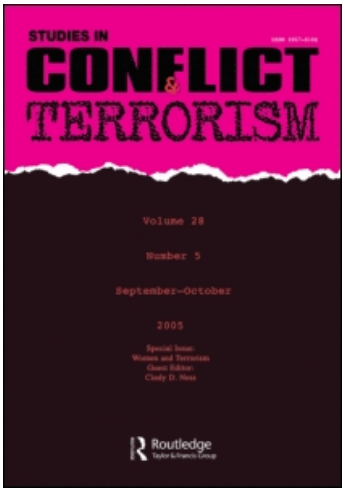

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The Security Council's Al Qaeda and Taliban Sanctions Regime: "Essential Tool" or Increasing Liability for the UN's Counterterrorism Efforts?

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This article examines the UN Security Council's 1267 counterterrorism sanctions regime. Initially adopted in 1999, this sanctions regime targets individuals and entities suspected of associating with Al Qaeda and/or the Taliban and it requires UN Member States to freeze their assets and implement travel bans. Central to the operation of the sanctions regime is a "Consolidated List," which is maintained by the so-called 1267 Committee, a sub-committee of the Security Council. This Committee possesses discretionary powers to list and de-list targeted individuals and entities that have been criticized as incompatible with internationally recognized due process guarantees. Reviewing recent developments, including a landmark decision by the European Court of Justice, the article addresses the need for additional safeguards and discusses reform options available to the Security Council. It examines the most recent reform efforts introduced by Security Council resolution 1904 (2009) and argues that a comprehensive review and reform of the 1267 sanctions is crucial if the regime is to provide an "essential tool" in the UN counterterrorism efforts.

October 2009 marked the tenth anniversary of the establishment of the UN Security Council's Al Qaeda and Taliban sanctions regime. In 1999, the Council, acting under Chapter VII of the UN Charter, adopted resolution 1267, which required all States to freeze the assets of, prevent the entry into or transit through their territories by, and prevent the direct or indirect supply, sale, and transfer of arms and military equipment to any individual or entity associated with Al Qaeda, Osama bin Laden, and/or the Taliban as designated by the 1267 Committee, a sub-committee of the Security Council.[1] Ten years later, the 1267 sanctions regime remains a cornerstone of the UN's counterterrorism efforts. This was recognized by the Council, most recently, in resolution 1904 of 17 December 2009. Emphasizing that sanctions were "an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security," the Council stressed the need for "robust implementation" of the 1267 regime as a "significant tool in combating terrorist activity."[2]

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Nevertheless, the 1267 sanctions regime and its mechanism for the listing and de-listing of individuals and entities known or believed to be associating with Al Qaeda and/or the Taliban have not been without controversy. As Richard Barrett, the coordinator of the 1267 Committee's Al-Qaida and Taliban Monitoring Team, has put it, the controversies mainly stem from the fact that the sanctions regime, although preventive by design, is punitive by impact.[3] Indeed, measures such as the freezing of assets of targeted individuals constitute serious criminal sanctions that traditionally warrant proper safeguards. The 1267 listing and de-listing procedure, however, does not provide for any judicial or quasi-judicial protection for listed individuals or entities. As a consequence, the sanctions regime continues to be criticized for its lack of respect for internationally recognized standards of due process including the right to a fair hearing, the right to judicial review, and the right to an effective remedy.[4]

While the recent criticisms of the 1267 sanctions regime have focused on the listing mechanism's lack of fair and clear procedures, the debate on the regime's shortcomings has implications beyond the workings of the Security Council's Al-Qaida and Taliban Committee. In essence, the discourse showcases a range of fundamental questions concerning the Council's role in strengthening a rules-based international system and maintaining international peace and security under the rule of law. These questions include, but are not limited to, questions about the legal context within which the Council operates and the extent to which the Council itself must adhere to the rule of law and international human rights law.[5] As such the controversies surrounding the 1267 regime also need to be seen against the backdrop of the debate about tools and mechanisms that could be used by the Council to address threats to international peace and security in the future, and, more broadly, as part of the discourse on the reform of the UN Charter itself.[6]

This article, however, will confine itself to an examination of the 1267 sanctions regime. It will first introduce briefly the regime's controversial listing and de-listing procedure. It will then examine the September 2008 decision by the European Court of Justice (ECJ) in the case of *Kadi and Al Barakaat* in which the Court reviewed the implementation of the 1267 counterterrorism sanctions regime within the European Union.[7] This decision is remarkable in that it is the first time that a court has (indirectly) found that Security Council resolutions on counterterrorism violate fundamental rights. To this date, no other international or regional court has held that sanctions imposed by the Security Council in the context of fighting terrorism infringe on human rights. The ECJ decision also demonstrated the need to revise the existing listing and de-listing procedure with a view to ensuring due process guarantees. This article will subsequently discuss options available to the Security Council as far as forms and modalities of an effective review mechanism are concerned. It will also review the most recent changes to the 1267 sanctions regime introduced by Security Council resolution 1904 (2009). The article concludes that the recent reform efforts address due process shortcomings to some extent. However, it argues that a comprehensive review and reform of the 1267 sanctions is needed if the regime is to provide an "essential tool" in international counterterrorism efforts.

The Security Council's 1267 Sanctions Regime, Its Consolidated List, and Due Process

The UN Security Council's 1267 sanctions regime was established in October 1999 and remains a key component of the UN's counterterrorism framework. While its initial geographic target focused on entities and individuals operating within the territory of Afghanistan, it was subsequently expanded to incorporate individuals wherever they were,

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without the necessity of any geographical nexus to Afghanistan. In its current form of operation, the regime effectively amounts to a system of executive proscription of individuals suspected of associating with Al Qaeda and/or the Taliban. As such, the 1267 sanctions regime goes beyond the scope of other Security Council counterterrorism resolutions like resolution 1373 (2001), which require Member States to legislate but leave the details of implementation to each individual State.[8]

Central to the operation of the 1267 sanctions regime is a sub-committee of the Security Council, the so-called 1267 Committee, which oversees the implementation of resolution 1267 and subsequent resolutions. The 1267 Committee is one of three counterterrorism bodies set up by the Security Council, which are made up of all Council members. Following the 9/11 attacks, the Council, in resolution 1373 (2001), established the Counter-Terrorism Committee. By the same resolution the Security Council required States to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions.[9] In 2004, the Security Council, through resolution 1540, established the 1540 Committee with the task to monitor Member States' compliance under the resolution, which aims to prevent the proliferation of weapons of mass destruction to non-state actors, including terrorist groups.[10]

A key feature of the UN Security Council's 1267 counterterrorism sanctions regime is a "Consolidated List" maintained by the 1267 Committee. As of 25 January 2010, 501 individuals or entities were included in the list, which consists of the following four sections:[11]

a) individuals associated with the Taliban (137 individuals)
b) entities and other groups and undertakings associated with the Taliban (none)
c) individuals associated with Al Qaeda (256 individuals)
d) entities and other groups and undertakings associated with Al Qaeda (108 entities).

States may request the 1267 Committee to add names to this list and the Committee also considers submissions by States to delete names from it. The listing and de-listing procedure, however, has been problematic from the beginning, in particular with regard to a lack of due process guarantees. Concerns arose particularly from the fact that individuals and entities were initially not allowed to petition the Committee for de-listing, nor were they granted a hearing. Petitions for de-listing could only be submitted to governments, which in turn could bring the issue to the attention of the Committee. However, any decision concerning de-listing was still being left to the discretion of the committee or the Security Council.

In November 2002, the 1267 Committee then adopted guidelines for inclusion in, and removal from, the list. These guidelines provided, *inter alia*, that submission of names should, to the extent possible, include a statement of the basis for the designation, generally focusing on the connection between the individual and Al Qaeda, the Taliban, or Osama bin Laden, together with identifying information for use by the national authorities implementing the sanctions. The guidelines were subsequently updated in April 2003, December 2005, November 2006, and February 2007 and now also provide for a review mechanism for names that have been on the list for at least four years without update. Accordingly, the UN Secretariat circulated to the Committee in March 2007 a list of 115 names that had not been updated in four or more years. However, very few were selected for review and the review ended without any changes to the List.[12]

Targeted individuals or entities are not informed prior to their being listed and thus do not have any opportunity to prevent the listing by demonstrating that their inclusion in the list is unjustified. Even *after* an individual or entity is listed, Member States do not

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have an obligation to provide detailed information to the person or entity concerned about reasons for their inclusion. States are merely encouraged "to inform, to *the extent possible*, and *in writing where possible*, individuals and entities included on the Consolidated List of the measures imposed on them, the Committee's Guidelines, and, in particular, the listing and de-listing procedures contained herein and the provisions of resolution 1452 (2002)."[13] On 30 June 2008, the Security Council, in resolution 1822 (2008), introduced several improvements in this regard directing the Committee, *inter alia*, to make accessible on its website a narrative summary of reasons for listing for the corresponding entry or entries on the Consolidated List. Nonetheless, targeted individuals and entities remain unable to access detailed information regarding their listing.

Further concerns stemmed from the fact that targeted individuals and entities were not granted any hearing and could not have the listing decision reviewed by an independent body or organ. Initially they were not even allowed to petition the Committee for de-listing. Such petitions could only be submitted to governments, which in turn could bring the issue to the attention of the Committee. However, following on from proposals made by France and the United States (and other countries) and by the Analytical Support and Sanctions Monitoring Team, Security Council resolution 1730 (2006) created a "focal point" within the UN Secretariat responsible for processing submissions by listed persons requesting the lifting of sanctions. Although this enabled affected persons to submit petitions directly and independently of diplomatic protection through their governments, it did not give them the right to participate or to be heard in the review process, nor did it constitute an independent review mechanism. No legal or quasi-legal rules exist that would oblige the Committee to grant a request if specific conditions are met. On the contrary, removal from the list is still left to the discretion of the Committee and possible only with the consent of all of its members. The impact of the establishment of the focal point has thus been relatively limited both as far as due process guarantees and actual number of petitions are concerned.

Security Council resolution 1822 (2008) contained some changes in relation to the review of listings of individuals and entities. It required the 1267 Committee to conduct a review of all names on the Consolidated List by 30 June 2010 in which the relevant names are circulated to the designating States and States of residence and/or citizenship, where known, pursuant to the procedures set forth in the Committee guidelines, in order to ensure the Consolidated List is as updated and accurate as possible.[14] However, despite these notable improvements, the procedure did not amount to a genuine and effective mechanism of judicial control by an independent tribunal as required by internationally recognized standards of due process. Equally concerning, listed individuals and entities have very limited possibilities to challenge a listing before national courts and tribunals. This is mainly due to the obligations of UN Member States as stipulated by Articles 25, 103, and 105 of the UN Charter. Article 25 obliges Member States to comply with Chapter VII resolutions by the Security Council (like resolution 1267 and subsequent resolutions).[15] Article 103 clarifies that obligations under the UN Charter—including binding obligations under Article 25—prevail over "any other international agreement" unless obligations contained therein constitute general principles of international law.[16] This also includes national law implementing international obligations under international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) or the European Convention (ECHR). In addition, even in the event that recourse to national courts is available, the UN enjoys absolute immunity from every form of domestic legal proceedings as stipulated by Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations and other agreements.[17]

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In spite of the improvements made to the listing and de-listing mechanism over the years, the procedure has been criticized by human rights groups as well as by leading legal scholars and practitioners.[18] In particular, it has been argued that the procedure raises serious concerns in relation to fundamental human rights including the *right to judicial review*, the *right to procedural fairness*, the *right to a hearing*, and the *right to an effective remedy*.[19] These rights form the very basis of due process of law and are guaranteed, *inter alia*, by the leading international human rights instruments such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights, and the Banjul Charter. A number of studies and reports by eminent international scholars have thus called for clear, fair, and transparent procedures.[20] This includes, in particular, that individuals and/or entities included on the Consolidated List are informed promptly about their inclusion and that they are heard by a relevant decision-making body.

The issue of sanction-related listing and de-listing and due process has also featured prominently in several legal cases, both at the national and international level. Legal challenges have been presented to the national courts of Belgium, Italy, Switzerland, The Netherlands, Pakistan, Turkey, the United Kingdom, Germany, and the United States of America. Several cases have also been brought before the Courts of the European Communities in Luxemburg. In the cases of *Kadi*, *Yusuf and Al Barakaat*, *Ayadi* and *Hassan*, the European Court of First Instance (CFI) upheld the legality of the EU regulations implementing the 1267 counterterrorism sanctions regime and found that it generally lacked the power to judicially review resolutions by the UN Security Council.[21] However, these findings were rejected in an opinion issued in January 2008 by one of the eight Advocates General assisting the Court.[22] Similarly, the European Court of Justice (ECJ), in the appeal cases of *Kadi* and *Al Barakaat*, found that the Courts of the European Communities have jurisdiction to review the implementation of UN Security resolutions, and further, that the contested EC regulation violated fundamental rights as recognized by Community law.[23] As the ECJ decision has major implications for several pending CFI cases as well as the whole 1267 counterterrorism sanctions regime as implemented within the EU, the judgment will be briefly discussed in the following section.

The Implications of the European Court of Justice Decision in *Kadi* and *Al Barakaat*

The European Court of Justice handed down its joined decision in *Kadi and Al Barakaat* on 3 September 2008 and confirmed that the Council of the EU was competent to adopt the regulation on the basis of the articles of the EC Treaty that it chose. Even if the CFI made certain errors in its reasoning, its final conclusion that the Council was competent to adopt that regulation was not incorrect.[24] However, the ECJ found that the CFI erred in law in ruling that the Community courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation.[25] It held that the review by the Court of the validity of any Community measure in the light of fundamental rights needed to be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system that may not be prejudiced by an international agreement.[26] The ECJ clarified that the review of lawfulness ensured by the Community courts applied to the Community act intended to give effect to the international agreement at issue, and not to the international agreement itself. A judgment given by the Community courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the

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Community legal order would not entail any challenge to the primacy of that resolution in international law.[27] On the contrary, it found that the Community courts needed to ensure the review of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law. This included review of Community measures that, like the contested regulation, were designed to give effect to resolutions adopted by the Security Council.[28]

The ECJ then undertook this analysis and examined whether the regulation(s) of the Council of the EU implementing the UN Security Council's 1267 sanctions regime violated Mr. Kadi's and Al Barakaat's fundamental rights as protected by Community law. It found that the rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, were "patently not respected."[29] The Court pointed out that the effectiveness of judicial review meant that the Community authority in question was required to communicate to the person or entity concerned the grounds on which the measure at issue was based, so far as possible, either when that measure was decided on or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the periods prescribed, their right to bring an action. However, the regulation at issue provided no procedure for communicating the evidence justifying the inclusion of the names of the persons concerned in the list, either at the same time as, or after, that inclusion. At no time did the Council of the EU inform Mr. Kadi and Al Barakaat of the evidence adduced against them in order to justify the initial inclusion of their names in the list.[30]

In this context, the ECJ also took into account the improvements made to the listing and de-listing procedure at the UN level. It acknowledged that any person or entity may now approach the Sanctions Committee directly through the "focal point." However, the Court found that the procedure before that 1267 Committee continues to be essentially diplomatic and intergovernmental with the persons or entities concerned having no real opportunity of asserting their rights. According to the Court, the "Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request."[31] Also, the Court pointed out that these Guidelines do not require the 1267 Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information.[32]

In addition, the ECJ held that the infringement of Mr. Kadi and Al Barakaat's rights of defense also gave rise to a breach of the right to a legal remedy, inasmuch as the appellants were also unable to defend their rights in satisfactory conditions before the Community courts.[33] Furthermore, the Court found that the freezing of funds constituted an unjustified restriction of Mr. Kadi's right to property.[34] According to the Court, the restrictive measures imposed by the regulation(s) of the Council of the EU amounted to restrictions of that right that could, in principle, be justified.[35] However, the regulation in question was adopted without furnishing any guarantee enabling Mr. Kadi to put his case to the competent authorities.[36] Such a guarantee would have been necessary in order to ensure respect for his right to property, having regard to the general application and continuation of the freezing measures affecting him.

The ECJ's decisions in *Kadi* and *Al Barakaat* were confirmed by the Court in the *Hassan* and *Ayadi* decisions of 3 December 2009.[37] Both cases are highly significant and have major implications on both legal and political levels. The cases mark the first time that the ECJ confirmed its jurisdiction to review the lawfulness of measures giving

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effect to the UN Security Council resolutions. Furthermore, the cases constitute the first time the ECJ annulled an EC measure giving effect to a UN Security Council resolution for violating fundamental principles of Community law. As such the judgments have implications for various cases concerning asset freezing currently stayed before the Court of First Instance.[38] More generally, the decision is remarkable in that it is the first time that a court has (indirectly) found that UN Security Council resolutions on counterterrorism violate fundamental rights.

Furthermore, the ECJ judgments have already influenced legal challenges to the 1267 sanctions regime at a national level, both within and outside the EU. In the United Kingdom, for instance, courts have recently annulled or quashed measures implementing the 1267 sanctions regime in the municipal legal order.[39] These developments add to the existing difficulties of the 1267 regime, which has regularly encountered implementation problems ranging from scepticism about the efficacy of the sanctioning measures to doubts about their relevance to the threat, and concerns as to their fairness and transparency. For the latter reason, one of the chambers of the Swiss Parliament, for example, has taken the unusual step of unanimously adopting a motion in September 2009 requiring the Swiss Government to cease implementing Security Council sanctions against individuals included in the 1267 sanctions list where the individuals had been listed for more than three years without being been brought before a court.

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The Need for New or Additional Procedures and Safeguards

The recent ECJ decisions and other developments have demonstrated that the current mechanism is subject to serious shortcomings, in particular in relation to guarantees of due process. Among the due process rights, it is specifically the right to a hearing and the right to judicial review (including the right to an effective remedy) that are engaged by the listing and de-listing procedure. As a result, several recent studies have focused on developing proposal on how to strengthen fair and clear procedures. Reports by institutions like the Watson Institute for International Studies, the Fourth Freedom Forum and Kroc Institute for International Peace Studies, the International Commission of Jurists, and others have pointed out that there are several options available to the Security Council as far as forms and modalities of an effective review mechanism are concerned.[40] The policy proposals include the establishment of an independent international arbitral panel, court, or tribunal; an ombudsman office, an inspection panel following the model of the World Bank Inspection Panel; a commission of inquiry; or a committee of experts serving in their personal capacity (as it exists, for instance, in accordance with Article 28 of the International Covenant on Civil and Political Rights). In general, the proposals can be classified into two categories: The first category includes those mechanisms that would operate in full independence of the Security Council; the second category includes review mechanisms that would be set up under the auspices of the Security Council.

The Need for an Independent Arbitral Panel, Court, or Tribunal

As noted in the Watson Institute report, the right to an effective remedy traditionally entails three elements:

1. an independent and impartial authority;
2. which has the power to grant appropriate relief; and
3. procedural guarantees such as accessibility for individuals or entities affected.

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A body or mechanism that fulfills these criteria would need to be empowered to make final and binding decisions on whether the inclusion of an individual or entity in the Consolidated List was justified. In cases where the inclusion is found to be unjustified, the body or mechanism would need to be able to order that the name of the person or entity is immediately removed from the list, with the consequence that Member States must lift the restrictions imposed on the person or entity.[41] Alternatively, as Fassbender has pointed out, it can be provided that this decision is to be made by 1267 Committee itself, on a binding recommendation made by the review body or mechanism.[42]

The advantages of an independent arbitral panel, court, or tribunal are obvious. It would fulfill the requirements of effective judicial review as required by international human rights law and by general principles of due process. However, given the political and practical sensitivities involved, in practice the establishment of an independent arbitral panel, court, or tribunal appears almost impossible to achieve. As the 1267 Committee's Analytical Support and Sanctions Monitoring Team pointed out:

> [i]t is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter. This argues against any panel having more than an advisory role, and against publication of its opinions, to avoid undercutting Council decisions. It would argue too for the Council retaining authority to select or approve the membership of a review body.[43]

Another obstacle for the establishment of an independent arbitral panel, court, or tribunal stems from the evidentiary problems associated with a review panel. As the 1267 Committee's Monitoring Team stressed;

> . . . Although the panel might be allowed access to the confidential statements of case presented to justify listings, Committee members also draw on intelligence and law-enforcement information available to them nationally or through other sources, including information obtained through bilateral exchanges, which could not easily be made available to reviewers.[44]

This problem is part of a classical challenge faced in the context of judicial review and counterterrorism, that is, whether and to what extent classified intelligence information can be used and/or disclosed in court. It is beyond question that the protection of sensitive sources and of important intelligence information is a legitimate State interest. However, there are mechanisms available to address this issue in a way that also maximizes concern for fair trial rights and due process guarantees. These include in particular closed court proceedings and vetted or security-cleared counsel. The latter option was also emphasized by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism in his 2006 report to the UN General Assembly in which he recommended that "consideration should be given to means through which a listed entity can still challenge the evidence against it."[45] As far as an independent arbitral panel, court, or tribunal to review 1267 listings is concerned, closed court proceedings appear to be a particularly viable option. Such proceedings would protect intelligence and law-enforcement information as well as guarantee fundamental aspects of the right to a hearing (which includes the right to be informed) and of the right to judicial review.

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Review Mechanisms under the Authority of the Security Council

In light of the above-discussed political obstacles for the establishment of an independent arbitral panel, court, or tribunal, it is not surprising that recent proposals have centered on review mechanisms under the authority of the Security Council. These proposals include the creation of a review panel under the authority of the Security Council and the establishment of an ombudsperson office.

In May 2008, a group of like-minded States—Denmark, Germany, Liechtenstein, The Netherlands, Sweden, and Switzerland—put forward a proposal inspired by the example of the World Bank inspection panels to establish a review panel of three to five independent, impartial, and judicially qualified persons to review listing decisions.[46] The panel would have been governed by "general principles of international law concern fair procedure" and composed of persons with experience in handling confidential information.[47] The proposal stipulated that the review panel members were to be appointed by the Security Council upon proposal by the Secretary-General.[48] The panel would have reviewed de-listing requests and taken a decision within a certain timeframe (i.e., three months).[49] Petitioners would have been able to request a de-listing decision through the focal point. The proposal also stipulated that the Committee, all Member States, and all relevant international organizations cooperate with the panel "to the fullest extent possible, in particular by providing any relevant information or evidence."[50] The review panel would have reported its findings and would have recommended to the 1267 Committee either de-listing or the rejection of the petition. The recommendations of the panel would have been published as soon as they were submitted to the Committee.[51] The final decision, however, would have rested with the Committee.[52] In addition, the proposal stipulated that the Committee "shall *ex officio* keep the listing decisions under constant review, re-evaluating them on a regular basis, the intervals to be decided by the Committee, in particular in the light of new information submitted by Member States."[53] Despite its modest and practical approach, the proposal failed to attract sufficient support to be considered by the Security Council in its review meeting in June 2008.

Another proposal—the establishment of an ombudsperson office—was initially made by Denmark in 2006. It stipulated that the Security Council establish an independent review mechanism, in the form of an ombudsperson, which could accept petitions directly from listed parties who claim they were unjustly included on the Consolidated List and unable to get de-listed. The ombudsperson would have the authority to consider those petitions, as well as other cases raised on his or her own initiative, and make a recommendation for action to the Committee which would endorse or disregard the recommendation.[54] Thus, the ombudsperson's decision would not be binding on the 1267 Committee. Procedurally, he or she would be accessible by listed individuals, but there would not be a formal hearing, nor would the ombudsperson have access to non-redacted statements of case.

While the Danish ombudsperson proposal did not receive much attention when first put forward in 2006, the Security Council considered the establishment of such a mechanism in detail in its review meeting on 17 December 2009—much to the surprise of most commentators. Adopting resolution 1904 (2009), the Council drew on the 2006 proposal and decided that, when considering de-listing requests, the 1267 Committee:

> shall be assisted by an Office of the Ombudsperson, to be established for an initial period of 18 months from the date of adoption of this resolution, and requests the Secretary-General, in close consultation with the Committee, to appoint an eminent individual of high moral character, impartiality

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> and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson, with the mandate outlined in Annex II of this resolution, and further decides that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.[55]

In particular, resolution 1904 (2009) abolished the 1267 regime's "focal point" procedure (adopted in 2006) and introduced a three-step mechanism to deal with de-listing requests from targeted entities and individuals. In a first step—the so-called information gathering period (two months)—the Ombudsperson is mandated to acknowledge the receipt of the de-listing request; inform the petitioner of the general procedure for processing de-listing requests; answer specific questions from the petitioner about 1267 Committee procedures; and forward the de-listing request to the 1267 Monitoring Team for additional information.[56] At the end of this two-month period of information gathering, the Ombudsperson is required to present a written update to the 1267 Committee on progress to date, including details regarding which States have supplied information. The Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for information gathering, giving due consideration to requests by UN Member States for additional time to provide information.[57]

Upon completion of the information gathering period, the new arrangements require the Ombudsperson to facilitate a two-month period of engagement, which may include dialogue with the petitioner, the 1267 Committee and UN Member States (the so-called dialogue period). At the end of this period, the Ombudsperson, with the help of the 1267 Monitoring Team, drafts and circulates to the 1267 Committee a comprehensive report that summarizes, and specifies the sources of, all information available to the Ombudsperson that is relevant to the de-listing request. Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations, this report then lays out for the Committee the principal arguments concerning the de-listing request. However, it must respect confidential elements of UN Member States's communications with the Ombudsperson. In the third and final step—the Committee discussion and decision (two months) period—the 1267 Committee has thirty days to review the Ombudsperson's comprehensive report. It is then the responsibility of the chair of the Committee to place the de-listing request on the Committee's agenda for consideration.[58]

The establishment of the Ombudsperson office constitutes a significant improvement to the existing listing and de-listing procedure. Nevertheless, it is unlikely that this mechanism fulfills international legal requirements of effective due process. In particular, the Ombudsperson does not have the power to grant appropriate relief as the final decision on whether to de-list or not would rest with the 1267 Committee. This stands in contrast to the requirements as set out in the 2008 *Kadi and Al Barakaat* decision of the European Court of Justice. It is also unclear to what extent the Ombudsperson has access to all relevant information. The current arrangements do not compel UN Member States to submit evidence in support of listing decisions. It is difficult to see how the Ombudsperson may submit a listing decision or de-listing request to thorough scrutiny when he or she is dependant on States providing access to information in a quasi-voluntary manner. This, in turn, has serious implications for the guarantees of the right to a hearing and the right to effective judicial review. Finally, the new arrangements are silent on the question of effective remedies. Those individuals and entities who have been wrongly placed on the Consolidated List, either because the intelligence on which the placement was based was

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incorrect or because the name on the list is an acronym or wrongly spelt, do not have access to any compensation or restitution as stipulated by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[59] This Declaration provides that States should provide redress for victims of crimes and abuse of power.

Conclusion

The Security Council considers Al Qaeda and the Taliban to be serious threats to international peace and security and continues to regard the 1267 as a key tool to counter those threats. As the Belgian Chair of the 1267 Committee, Jan Grauls, remarked at the Security Council meeting on 15 December 2008:

> I do not think there is any doubt in anyone's mind that terrorism remains one of the most serious threats to international peace and security. The sanctions regime against Al-Qaida, the Taliban and their associates is still one of the most important tools of the international community in the fight against terrorism. In that light, it is important that Member States use this tool to the fullest extent possible by proposing the names of key actors for listing and complying fully with the sanctions measures.[60]

Nevertheless, the fallibility of the 1267 sanctions regime and its Consolidated List, including technical issues like the misspellings of names, and, most importantly, the problematic procedure of listing and de-listing targeted entities and individuals, has undermined support. In spite of several improvements—the notification of sanctioned individuals and entities, the posting of narrative summaries of reasons for listing on the Committee's website and the review of all names on the Consolidated List by 30 June 2010—the listing and de-listing mechanism continues to raise serious concerns in relation to internationally recognized requirements of due process. These concerns specifically stem from the insufficient protection of the *right to a fair hearing*, the *right to judicial review* and the *right to an effective remedy* as contained in the constitutions of many UN Member States as well as in leading international human rights instruments.

The Security Council has so far failed to subject the 1267 sanctions regime to comprehensive review or reform. In particular, the Council has been slow in strengthening fair and clear procedures for listed entities and individuals. This has partly to do with the fact that most Council members have been hesitant to accept any procedure or outside independent review mechanism that would, as they see it, erode the authority of the 1267 Committee. The discourse on appropriate review mechanisms of the 1267 listing and de-listing procedure thus appears to be somewhat trapped in the quandary. Proposals that would fulfill the due process requirements of international human rights law are politically infeasible, whereas measures that gain support from the Security Council contain shortcomings as far as internationally guaranteed due process rights are concerned. The most recent amendments adopted as part of resolution 1904 (2009) contain important improvements to the existing listing and de-listing procedure. The establishment of an Office of the Ombudsperson in particular promises to strengthen the de-listing procedures for targeted entities and individuals.

It is reasonable to assert that the recent improvements were at least partly made possible by the Obama administration's readiness to re-engage with the UN. In addition, legal challenges to the implementation of the 1267 sanctions regime in the EU appears to have made the European members of the Security Council more receptive to strengthening

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the existing de-listing procedures for targeted entities and individuals. Domestic court cases in United Kingdom in particular seem to have prompted the British government to pursue reform of the 1267 sanctions regime at the Council with greater intensity. Moreover, it seems that a series of expert reports including those issued by the Watson Institute, the Kroc Institute, and other institutions as well as advocacy efforts by civil society groups have contributed to highlighting the shortcomings of the 1267 listing and de-listing procedures. These reports provided a range of detailed recommendations on how to strengthen the listing and de-listing mechanisms that have fed into the recent reform efforts.

The experience of the Security Council's recent 1904 amendments thus suggests that the option of pursuing incremental change offers the greatest possibility for achieving concrete improvements in listing and de-listing procedures.[61] This scenario recognizes that the Security Council's 1267 listing and de-listing mechanism is on an evolutionary path toward modestly improved due process procedures. As George Lopez, David Cortright, Alistair Millar, and Linda Gerber-Stellingwerf have observed, the incremental approach acknowledges that the Council has entered a period of system response and adjustment.[62] After an initial period in the immediate aftermath of 9/11 in which listing decisions were made hastily and with little regard for the rule of law and human rights, the Security Council appears to have adopted an approach of greater responsibility and sensitivity to due process rights. The short-term focus of incremental reform efforts should thus focus on working with Security Council members to develop a new resolution that builds on the changes established in resolution 1904 (2009).

Nonetheless, rather than limiting the discourse on the legal and technical challenges of the listing and de-listing mechanism *per se*, it is essential to address the value, effectiveness, and sustainability of the 1267 sanctions regime more broadly. The international community as a whole, and the permanent members of the Security Council in particular, need to consider what they are prepared to give up to maintain the 1267 sanctions regime as an effective UN sanctions regime, or whether they are prepared to give up the 1267 regime in order to maintain the authority that they interpret to have from the UN Charter. Tough questions need to be asked in this context, questions that have implications beyond the operation of the 1267 sanctions regime. These include an assessment of whether the 1267 sanctions regime is in fact an "essential tool" in the international fight against terrorism, and further, whether this tool is actually effective. How has the 1267 sanctions regime changed to keep pace with the evolving threat from Al Qaeda and the Taliban? Are additional tools necessary to combat terrorism more effectively in the framework of the UN?

A thorough review of the 1267 sanctions regime must further include an analysis of its strategic impact. What is the role of the 1267 sanctions regime within the broader framework of international counterterrorism co-operation? Should its mandate be enhanced or refocused? What is the optimal relationship of the 1267 Committee with the other UN counterterrorism committees (the 1373 and 1540 Committees)? Also, does the 1267 sanctions regime impede the ability of the Security Council, and more broadly of the United Nations, to play a role in identifying national human rights shortcomings in counterterrorism law and policy of Member States? The Security Council will need to address these questions as a matter of urgency. Otherwise the 1267 sanctions regime will be at risk of becoming a liability rather than remaining "essential tool" for the UN's counterterrorism efforts. The next opportunity for the Council to adopt reform measures emerges when the mandate for the 1267 Monitoring Team comes up for renewal in June 2011. This leaves ample time for comprehensive review.

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Notes

1. The sanctions regime has since been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), and 1904 (2009) so that the sanctions now cover individuals and entities associated with Al Qaeda, Osama bin Laden, and/or the Taliban wherever located.

2. SC Res. 1822, 30 June 2008.

3. Press Conference on Security Council Al-Qaida and Taliban Sanctions Committee, New York, 12 February 2009. Available at http://www.un.org/News/briefings/docs//2009/090212_Barrett.doc.htm

4. Ian Johnstone, "The UN Security Council, Counter-Terorism and Human Rights," in Andrea Bianchi and Alexis Keller, eds., *Counterterrorism: Democracy's Challenge* (Oxford: Hart, 2008), pp. 335–353.

5. On this topic see, for example, Simon Chesterman, "The UN Security Council and the Rule of Law," New York University School of Law, Public Law Research Paper No. 08–57 (2008). Available at SSRN, http://ssrn.com/abstract=1279849

6. On sanctions and the rule of law, see, *inter alia*, Jeremy M. Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007); David Cortright and George Lopez (eds.), *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder: Lynne Rienner, 2000). On Security Council reform, see, *inter alia*, Nico Schrijver, "Reforming the UN Security Council in Pursuance of Collective Security," *Journal of Conflict & Security Law* 12 (2007), pp. 127–138; Thomas G. Weiss, "The Illusion of UN Security Council Reform," *Washington Quarterly* 26 (2003), pp. 147–161; Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Kluwer, 1998).

7. *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities* (C-402/05 P) and (C-415/05 P) [2008]. Available at http://curia.europa.eu/en/ [hereinafter *Kadi and Al Barakaat*].

8. Andrea Bianchi, "Security Council's Anti-Terror Resolutions and their Implementation by Member States," *Journal of International Criminal Justice* 4 (2006), pp. 1044–1073.

9. The Counter-Terrorism Committee facilitates the provision of assistance to States to build capacity to counter terrorism on a national, regional, and global level. Its work is assisted by a Counter-Terrorism Committee Executive Directorate (CTED) established by the Security Council in 2004. More information about this Committee is available at http://www.un.org/sc/ctc/; see also Eric Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism," *American Journal of International Law* 97(2) (2003), pp. 333–341.

10. More information about this Committee is available at http://www.un.org/sc/1540/. The distinct but complementary roles of the three Committees are described in a comparative table issued jointly and posted on their respective websites.

11. Figures taken from the official website of the 1267 Committee, available at http://www.un.org/sc/committees/1267/consolist.shtml.

12. Seventh Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Security Council, S/2007/677, 29 November 2007, para. 40.

13. Guidelines of the Committee for the Conduct of its Work, No. 6 (h), Available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf (emphasis added).

14. Security Council Res. 1822 (2008) further directs the 1267 Committee, upon completion of the general review, to conduct an annual review of all names on the Consolidated List that have not been reviewed in three or more years.

15. Article 25 of the UN Charter reads: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

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16. Article 103 of the UN reads: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

17. See Bardo Fassbender, "Targeted Sanctions and Due Process," Humboldt-Universität zu Berlin, 2006, Study commissioned by the United Nations, Office of Legal Affairs, Office of the Legal Counsel. Available at http://www.un.org/law/counsel/Fassbender_study.pdf, p. 5. This point has also been made by Dick Marty of the Parliamentary Assembly of the Council of Europe who cited a Swiss case in which an individual was acquitted of terrorism-related charges in a domestic criminal proceeding and the Swiss State ordered to pay compensation. Nonetheless, the person in question still remained on the 1267 list with his assets frozen; Dick Marty (Rapporteur), "UN Security Council Black Lists—Introductory Memorandum," Committee on Legal Affairs and Human Rights, CoE, PACE, AS/Jur (2007) 14 (19 March 2007), p. 1.

18. See, for example, Jessica Almqvist, "A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions," *International and Comparative Law Quarterly* 57 (2008), pp. 303–332; Iain Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, (2006). Available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf; Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN General Assembly, A/61/267, 16 August 2006.

19. For an in-depth legal analysis of these rights as they are engaged by the 1267 Listing and De-Listing Procedure see Larissa van den Herik and Nico Schrijver, "Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law," in *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, Watson Institute for International Studies at Brown University (March 2006), pp. 9–23. Available at http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.

20. See, for example, Iain Cameron and Kenneth Nordback, "EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale," *European Business Law Review* 14 (2003), pp. 111–142; Iain Cameron, "European Union Anti-Terrorist Blacklisting," *Human Rights Law Review* 3 (2003), pp. 225–246; Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN General Assembly, A/61/267, 16 August 2006; Final Report of the Expert Workshop on Human Rights and International Cooperation in Counter-Terrorism organized by the OSCE-ODIHR and the OHCHR in Triesenberg, Liechtenstein, 15–17 November 2006, ODIHR.GAL/14/07, 21 February 2007. Available at http://www.osce.org/documents/odihr/2007/02/23424_en.pdf; Report of the UN Secretary-General, UN Security Council S/PV.5474, 22 June 2006.

21. *Yusuf and Al Barakaat v. Council of the EU* (T-306/01) [2005] ECR II-3533; *Kadi v Council of the EU* (T-315/01) [2005] ECR II-3649; *Ayadi v Council of the EU* (T-253/02) [2006] ECR II-2139; *Hassan v. Council* of the EU (T-49/04) [2006] ECR II-52. For an in-depth analysis of the CFI decisions, see, for example, Gabriele Porretto, "The European Union, Counter-Terrorism Sanctions against Individuals and Human Rights Protection," in Miriam Gani and Penelope Mathew, eds., *Fresh Perspectives on the "War on Terror"* (Canberra: ANU ePress, 2008), pp. 235–258.

22. Opinion of Advocate General Poiares Maduro of 16 January 2008, *Kadi v. Council and Commission* (C-402/05 P) and Opinion of 23 January 2008, *Al Barakaat International Foundation v. Council and Commission* (C-415/05 P) (hereinafter *Al Barakaat*), available at http://eur-lex.europa.eu. The ECJ is assisted by eight Advocates General who are responsible for presenting a legal opinion on the cases assigned to them. They can question the parties involved and then give their opinion on a legal solution to the case before the judges deliberate and deliver their judgement. The intention behind having Advocates General attached is to provide independent and impartial opinions concerning the Court's cases. The opinions of Advocates General are advisory only and do not bind the Court, but they are nonetheless very influential and are followed in the majority of cases.

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23. *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities* (C-402/05 P) and (C-415/05 P) [2008]. Available at http://curia.europa.eu/en/ [hereinafter *Kadi and Al Barakaat*].

24. *Kadi and Al Barakaat*, paras. 234–236.

25. Ibid., paras. 327–328.

26. Ibid., para. 316.

27. Ibid., para. 327.

28. Ibid., para. 326.

29. Ibid., para. 334.

30. Ibid., paras. 345–348.

31. Ibid., para. 324.

32. Ibid., para. 325.

33. Ibid., paras. 349–352.

34. Ibid., paras. 354–371.

35. Ibid., paras. 354, 366.

36. Ibid., para. 369.

37. *Hassan v. Council of the European Union and Commission of the European Communities* (CFI T-49/04); *Ayadi v. Council of the European Union and Commission of the European Communities* (T-253/02).

38. Indeed, referring to the ECJ's Kadi and Al Barakaat decision, the CFI, on 11 June 2009, annulled the implementing measures with respect to Omar Mohammed Othman in the case of *Othman v Council of the European Union and Commission of the European Communities* (T-318/01).

39. See, for example, Hay v HM Treasury, [2009] EWHC 1167 (Admin); A, K, M, Q & G v HM Treasury ([2008] EWHC 869 (Admin).

40. International Commission of Jurists, "Assessing Damage, Urging Action—Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights" (February 2009), p. 121. Available at http://ejp.icj.org/hearing2.php3?id_article=167&lang=en; Report of the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, entitled "Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists" (April 2009). Available at http://www.fourthfreedom.org/pdf/Overdue_process.pdf; see also Fassbender, pp. 30–31 and Iain Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights," *Nordic Journal of International Law* 72 (2003), pp. 159, 208–211.

41. See Fassbender, "Targeted Sanctions and Due Process," p. 31.

42. Ibid.

43. Eighth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Security Council, S/2008/324, 14 May 2008, para. 41.

44. Ibid.

45. Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN General Assembly, A/61/267, 16 August 2006, para 39.

46. Discussion Paper (May 2008), "Improving the Implementation of Sanctions Regimes through Ensuring 'Fair and Clear Procedures'" (on file with author). See also Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees' Listing Decisions, 8 November 2007. Available at http://www.liechtenstein.li/en/pdf-fl-aussenstelle-newyork-discussionpaper-de-listing-workshop-2007-11-8.pdf

47. Discussion Paper, "Improving the Implementation of Sanctions Regimes," p. 2.

48. Ibid.

49. Ibid, p. 3.

50. Ibid.

51. Ibid.

52. See also Michael Bothe, *Explanatory Memorandum to the Discussion Paper on Supplementary Guidelines for the Review of Sanctions Committees' Listing Decisions*, 8 November 2007.

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Available at http://www.liechtenstein.li/en/pdf-fl-aussenstelle-newyork-explanatory-memorandum-prof-bothe-de-listing-workshop-2007-11-8.pdf

53. Discussion Paper, "Improving the Implementation of Sanctions Regimes," p. 1.

54. Fifth Report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Security Council, S/2006/750, 20 September 2006, para. 49.

55. UN Security Council Resolution 1904 (2009), para. 20.

56. Ibid., Annex II, paras. 1–4.

57. Ibid., paras. 5–7.

58. Ibid., paras. 8–14.

59. General Assembly resolution 40/34 of 29 November 1985, annex. See also the report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Martin Scheinin, UN General Assembly, A/61/267, 16 August 2006, para. 40.

60. Briefing by H.E. Mr. Jan Grauls, Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities, to the Security Council on 15 December 2008, UN Security Council, 6043rd meeting, Doc S/PV.6043, p. 9.

61. Report of the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, p. 9.

62. Ibid.

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