

# Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee

*Machiko Kanetake\**

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## I. Introduction

The upsurge in the invocation of Chapter VII in the post Cold War era, accompanied by the diversification of the notion of “threat to the peace”, has both quantitatively and qualitatively increased instances wherein the UN Security Council’s (SC) activities permeate the domestic sphere and brought about greater involvement at the individual level.<sup>1</sup> While the proposition that the SC’s discretion must not bypass the rule of law has gained advocacy, worthy of more attention is the fact that the delimitation of power must be ensured, not merely relative to Member States but also *vis-à-vis* non-state actors. In other words, accountability to wider constituencies in international society – what this article terms as *community accountability* – must be enhanced.

This article proposes that a normative case for such community accountability is emerging, and that the enhancement of such accountability is possible even without recourse to institutionalized settings such as the case of judicial review of SC resolutions. To provide an example of this, this article examines the accountability mechanism of the decision-making undertaken by the *Al Qaeda and Taliban Sanctions Committee* (the 1267 Committee or the Committee) of the SC established pursuant to S/RES/1267 (1999) on 15 October 1999.

The following issues will be addressed:

1. Which constituencies of the international community should and could hold the Committee and the SC to account (see below under Chapter II.);<sup>2</sup>

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<sup>1</sup> The period after the 1990s witnessed the increase and diversification of instances in which the SC’s exertion of authority directly impinged upon individuals, as illustrated by (i) economic sanctions targeting specific individuals (to be discussed in this article), (ii) peacekeeping operations that increased in number and assumed a wider range of mandates, and (iii) transitional administrations in war-torn territories.

<sup>2</sup> This article assumes that the accountability of the Committee is effectively a matter of the SC. The Committee’s mandate is set out by the SC and subject to revision by the latter at all times. In addition, under certain circumstances decisions of the Committee can be submitted to the SC, see *Al-Qaida and Taliban Sanctions Committee, Guidelines of the Committee for the Conduct of its Work*, last amended on 12 February 2007 (hereinafter

2. How have various constituencies in the international community challenged the perceived accountability deficit of the Committee's decision-making and how have the Committee and the SC responded to such challenges (see below under Chapter III.), and finally;
3. It will be focused on the accountability towards targeted individuals and entities; what the accountability mechanism should and could be in the foreseeable future, and, in particular, what problems would be associated with the introduction of a centralized review process (see below under Chapter IV.).

Born out of the lessons learned from comprehensive sanctions, sanctions targeting specific individuals and entities have been one of the SC's key strategies in responding to any "threat to the peace". One such application has been the establishment of the sanctions regime under Chapter VII against the Taliban, triggered by the bombings of the US embassies in Kenya and Tanzania.<sup>3</sup>

The individual targets are designated by the Committee made up of all 15 members of the SC. The Committee's work has been supported by the Monitoring Group (2001-2003) and the Analytical Support and Sanctions Monitoring Team (2004-), composed of independent experts appointed by the Secretary-General (SG).

The sanctions regime has been modified and strengthened ever since by subsequent resolutions, including S/RES/1333 (2000) of 19 December 2000, by extending the reach of the assets freeze to members of Al Qaeda<sup>4</sup> and S/RES/1390 (2002) of 28 January 2002 further expanded the targets of the assets freeze deciding: "... that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000)", imposing

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Committee Guidelines 2007), para. 4(a), available at: <[http://www.un.org/sc/committees/1267/pdf/1267\\_guidelines.pdf](http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf)>.

<sup>3</sup> Before the passing of S/RES/1267, lists of individuals and entities were drawn under S/RES/917 (1994) of 6 May 1994 for Haiti; S/RES/1127 (1997) of 28 August 1997 for Angola and S/RES/1171 (1998) of 5 June 1998 for Sierra Leone, by the respective sanctions committees.

<sup>4</sup> S/RES/1333 (2000) of 19 December 2000, para. 8(c).

a travel ban and arms embargo.<sup>5</sup> Between these two extensions, the September 11 terrorist attack occurred.

Few would doubt the potential advantage of the Al Qaeda/Taliban sanctions regime at the UN in obliging all states, not merely like-minded states, to block the financing of particular terrorists. The uniformity of targets is what the sanctions regime aims at. Compared to its confidence in the sanctions regime in the earlier reports,<sup>6</sup> however, the Monitoring Team acknowledges in its 2007 report that states are losing confidence in the sanctions regime.<sup>7</sup> This might be true for various non-state constituencies as well: not limited to the targeted individuals and entities alleging their non-involvement and their immediate local communities, but also financial institutions devoting their resources to tracing and blocking the designated assets.

The accountability issue, represented, *inter alia*, by questions in connection with decisional transparency in listing/delisting and human rights concerns, is the primary, if not the sole, source of dissatisfaction.<sup>8</sup>

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<sup>5</sup> S/RES/1390 (2002) of 28 January 2002, para. 2.

<sup>6</sup> See *2nd Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2005/83 of 15 February 2005 (hereinafter 2nd Report of the Monitoring Team), para. 16; *3rd Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2005/572 of 9 September 2005 (hereinafter 3rd Report of the Monitoring Team), para. 2.

<sup>7</sup> *6th Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2007/132 of 8 March 2007 (hereinafter 6th Report of the Monitoring Team), paras 2-3.

<sup>8</sup> 6th Report of the Monitoring Team, see note 7, para. 15-16. There are at least two other major causes for the lack of confidence, the detailed account of which is beyond the scope of this article. (i) One impediment concerns the resources and technical capacity of many Member States to implement the decisions. See, e.g., C.A. Ward, "The Counter-Terrorism Committee: Its Relevance for Implementing Targeted Sanctions", in: P. Wallensteen/ C. Staibano (eds), *International Sanctions: Between Words and Wars in the Global System*, 2005, 167 et seq. (ii) Another concern which may be shared by some states is that countering terrorism by way of targeted sanctions itself may be counterproductive; the potential of collective security rather lies in addressing the roots of terrorism. See, e.g., N. Krisch, "The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the

However, the significant aspects of the Al Qaeda/Taliban sanctions regime are that the level of accountability discharged by the Committee has been challenged by Member States and various non-state actors, and that the SC and the Committee have made efforts to respond to them from the sanctions' early stages. This process provides an invaluable insight into global governance, particularly into the role of decentralized standard-setting processes in enhancing the accountability of global administrative bodies.

## II. Community Accountability of the Security Council

### 1. Candidates of Accountability Holders

The decision-making of the Al Qaeda/Taliban sanctions regime impinges upon the lives and activities of many. Should "impact" be the most simplified fount to call for accountability, the regime experiences no shortage of candidates of accountability holders. These candidates are Member States (more precisely relevant state authorities),<sup>9</sup> the targeted individuals/entities, their immediate local communities and financial institutions in the web of implementation. On the other hand, the SC's accountability is traditionally directed towards the General Assembly (GA) and Member States.<sup>10</sup> A concern can thus be raised since insufficient regard has been paid to the possibility that the SC is in part "accountable to the wrong constituencies".<sup>11</sup> The UN's transformation

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Security Council", in: C. Walter et al. (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, 2004, 879 et seq. (901-906).

<sup>9</sup> Here a "Member State" refers to the aggregate of various state authorities relevant to the implementation of the sanctions. It follows that even the permanent members of the SC (and thereby also of the Committee) would not automatically be excluded as accountability holders, given that sending a delegation to the Committee does not automatically mean that its decision-making is shared by the relevant authorities of the permanent members.

<sup>10</sup> See under II. 3., of this article.

<sup>11</sup> N. Krisch, "The Pluralism of Global Administrative Law", *EJIL* 17 (2006), 247 et seq. (250). This question has also been raised in international relations. See R.O. Keohane, "Global Governance and Democratic Accountability", in: D. Held/ M. Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance*, 2003, 130 et seq.

necessitates the consideration of what one calls *community accountability* to the wider membership of the international community. Such community accountability would be, in Keohane's work, a concept embracing both "internal accountability" and "external accountability".<sup>12</sup> At the same time, the invocation of "community" is also a project to re-think whether, and how, the common framework to call the SC to account could develop beyond the dichotomy of the internal and the external.

A family of Member States assumes no uniformity in terms of the degree of impact. For instance, the Committee's decision-making carries greater relevance for those states in which the listed individuals and entities (or their assets) are believed to be located, as well as to those states which submit the names of the individuals/entities to the Consolidated List. At the same time, these states are not in accord on the claims they have against the Committee. The former may be concerned about the sharing of as much information as possible with the Committee, while a matter of priority for the latter may well be assurance that the information they have provided is kept confidential.

An assets freeze certainly has a significant impact on the listed individuals and entities, including that upon their human rights, namely, the right to property (article 17, Universal Declaration of Human Rights), and possibly a person's right not to be subjected to arbitrary or unlawful interferences with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation (article 17, International Covenant on Civil and Political Rights (ICCPR)).<sup>13</sup> It is a disturbing fact that the Committee's listing and delisting process disregards further the right to a fair hearing (article 14 ICCPR) and the right to an effective remedy (article 2 (3) ICCPR) of those individuals and entities on the List. They are entitled to a fair hearing only if the assets freeze, the deprivation of property, amounts to a "criminal charge"<sup>14</sup> or

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<sup>12</sup> Keohane, see note 11, 141.

<sup>13</sup> Strengthening Targeted Sanctions through Fair and Clear Procedures: White Paper prepared by the Watson Institute Targeted Sanctions Project (Brown University), 30 March 2006, Doc. A/60/887-S/2006/331 of 14 June 2006 (hereinafter Paper by the Watson Institute), 13.

<sup>14</sup> International Covenant on Civil and Political Rights, *ILM* 6 (1967), 368 et seq. (hereinafter ICCPR), article 14 (1). Compare, e.g., E. De Wet, "The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View", in: E. De Wet/ A. Nollkaemper (eds), *Review of the Security Council by Member States*, 2003, 7 et seq. (15-16); with the Paper of the Watson Institute, see note 13, 14-18.

if it involves the determination of a person's "rights and obligations in a suit at law".<sup>15</sup> The longer a suspected individual remains on the List, the more likely it is that the effect of sanctions will resemble a criminal charge.<sup>16</sup> Further, the listing has been used in criminal cases to establish, or at least to help in establishing, individuals' involvement in terrorism.<sup>17</sup>

The listing of individuals and entities can also bring severe consequences on their immediate local communities.<sup>18</sup> One such widely reported instance is the financial calamity in Somalia brought about by the closure of the Al Barakaat offices<sup>19</sup> shortly after the September 11 attacks.<sup>20</sup> Prior to the ban, the Al Barakaat network was the largest employer in Somalia, whereas many others depended on the remittance

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<sup>15</sup> Article 14 (1) ICCPR. Compare, e.g., I. Cameron, "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", *Nord. J. Int'l L.* 72 (2003), 159 et seq. (192, fn. 91); with the Paper of the Watson Institute, see note 13, 14-15.

<sup>16</sup> See J.E. Alvarez, "The Security Council's War on Terrorism: Problems and Policy Options", in: De Wet/ Nollkaemper, see note 14, 119 et seq. (132, 134-135); P. Guthrie, "Security Council Sanctions and the Protection of Individual Rights", *New York University Annual Survey of American Law* 60 (2004), 491 et seq. (503-506).

<sup>17</sup> 6th Report of the Monitoring Team, see note 7, para. 36, Box 1.

<sup>18</sup> *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Doc. A/HRC/4/88 of 9 March 2007 (hereinafter Report of the UNHCHR), para. 23.

<sup>19</sup> The Al Barakaat network, a money-remittance system headquartered in the United Arab Emirates, developed to address the need of Somali immigrants to transfer money to their relatives in Somalia where no banking system had operated: see J. Roth et al., "National Commission on Terrorist Attacks Upon the United States: Monograph on Terrorist Financing, Staff Report to the Commission", 21 August 2004, 67-69, available at: <<http://www.9-11commission.gov/>>. Compare in this respect also E.A. Thompson, "Misplaced Blame: Islam, Terrorism and the Origins of *Hawala*", *Max Planck UNYB* 11 (2006), 279 et seq.

<sup>20</sup> In November 2001, the US blocked the assets of the Al Barakaat network. A few days later, many Al Barakaat entities appeared on the UN List. See Roth et al., see note 19, 79; White House, Terrorist Financial Network Fact Sheet: Shutting Down the Terrorist Financial Network, 7 November 2001, at: <<http://www.whitehouse.gov/news/releases/2001/11/print/20011107-6.html>>; Press Release AFG/163-SC/7206 of 9 November 2001.

from relatives abroad through Al Barakaat.<sup>21</sup> US officials anticipated that alternative remittance companies would quickly fill the vacuum, but in any event it would take some time for the alternatives to materialize.<sup>22</sup> Still a year later, November 2002, the Somali transitional government and the rebels issued a joint call for the reopening of the Al Barakaat banks, raising the concern that the “thousands employed by the bank had to stop work, while those that received money from relatives and friends abroad can no longer survive”.<sup>23</sup>

Owing to the proliferation of both nationality and location of targets, the asset freeze under the 1267 Committee has had a more far-reaching impact on the financial community in terms of the time and resources they spend on compliance, compared to the case of the earlier asset freeze measures under the Haiti and Angola sanctions regime.<sup>24</sup> One of the prominent aspects of the Al Qaeda/Taliban sanctions seems to be the greater mobilization of private sectors, particularly financial institutions, into the web of SC sanctions regimes.<sup>25</sup> Further, the financial institutions face potential civil liability against their clients if they freeze assets on an a large basis, while at the same time encountering possible penalty by national authorities for failing to implement the assets freeze.<sup>26</sup>

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<sup>21</sup> BBC News, Somali Company “Not Terrorist”, 8 November 2001, available at: <<http://news.bbc.co.uk/2/hi/africa/1645073.stm>>; New York Times, A Nation Challenged, A Midwestern Community: Somalis in Minneapolis Worry About Effect of Money-Transfer Raids, 9 November 2001; Washington Post, Somalis Said to Feel Impact of U.S. Freeze of al-Barakaat, 30 November 2001.

<sup>22</sup> Washington Post, see note 21.

<sup>23</sup> BBC News, Somali Factions Want Bank Assets Freed, 11 November 2002, available at: <<http://news.bbc.co.uk/2/hi/africa/2442685.stm>>.

<sup>24</sup> S/RES/917 (1994) of 6 May 1994, para. 4 (Haiti); S/RES/1173 (1998) of 12 June 1998, para. 11 (Angola).

<sup>25</sup> In its 5th report in 2006, the Monitoring Team incorporated a section on “the role of the private sector”, stressing the need for a greater contribution from banks to the UN’s efforts to cut terrorist financing: *5th Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2006/750 of 20 September 2006 (hereinafter 5th Report of the Monitoring Team), paras 83-85.

<sup>26</sup> See European Banking Industry Committee, Re: European Banking Industry Committee’s Recommendations for Improvements to UN Resolutions



Among these candidates of accountability holders, the impact upon Member States and the targeted individuals/entities is by far greater than on the others, inasmuch as these constituencies are directly addressed by the relevant SC resolutions and the Committee's decisions. Therefore, this article is focused on accountability to them. It is worth noting that the quest for the accountability of the SC does not automatically suggest the pursuit of democracy at the SC. Although no fixed definitions can be provided by either concept, accountability generally operates in broader forms and on broader levels than does democracy, as understood by domestic standards in general, at least in the sense that the former necessitates neither a *demos vis-à-vis* decision-makers nor elections.<sup>27</sup> Despite the fact that one cannot realistically claim that the SC should ensure democracy with elections and equitable representation,<sup>28</sup> the SC can be held accountable. At the same time, the modes of accountability for the SC, without presupposing a *demos*, suggest flexibility as well as uncertainty as to *who*, if not a *demos*, holds the body to account.

## 2. Holding the Security Council and the Committee to Account under Global Administrative Law

Calling a public body to account is a mechanism to control its power.<sup>29</sup> It refers to a *process of interaction* in which accountability holders, who are external and entitled to call the body to account, demand explana-

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in the Field of Financial Sanctions, 11 April 2007, 2, available at: <[http://www.esbg.eu/uploadedFiles/Position\\_papers/Banking%20Industry%20recommendations%20for%20improvements%20to%20UN%20Resolutions%20in%20the%20field%20of%20financial%20sanctions.pdf](http://www.esbg.eu/uploadedFiles/Position_papers/Banking%20Industry%20recommendations%20for%20improvements%20to%20UN%20Resolutions%20in%20the%20field%20of%20financial%20sanctions.pdf)>.

<sup>27</sup> See R.O. Keohane, "The Concept of Accountability in World Politics and the Use of Force", *Mich. J. Int'l L.* 24 (2003), 1121 et seq. (1122); R.O. Keohane/ J.S. Nye, Jr., "Redefining Accountability for Global Governance", in: M. Kahler/ D.A. Lake (eds), *Governance in a Global Economy: Political Authority in Transition*, 2003, 386 et seq. (386-389).

<sup>28</sup> See Keohane, see note 27, 1136.

<sup>29</sup> Accountability-based control largely refers to *ex post* oversight, C. Scott, "Accountability in the Regulatory State", *Journal of Law and Society* 27 (2000), 38 et seq. (39). However, it is noted that participation before making decisions is also one realization of accountability. Further, to call public administrations to account may, at the same time, facilitate the reconstruction of accountability standards for future conducts, in which sense, the ef-

tions and impose consequences for failing to act according to a set of standards while the body responds to such a call.<sup>30</sup> The following four questions are attached to this process: (i) Who is accountable? (ii) To whom? (iii) On the basis of what standards? (iv) How would such consequences be imposed? In domestic contexts, administrative law based on a constitution generally governs these questions. A straightforward example is judicial review, founded upon constitutional values (such as the rule of law, popular sovereignty and the protection of fundamental human rights), relevant pieces of legislation and case-law. A judicial review defines a public body to be accountable, confers *locus standi* upon accountability holders, lays out the grounds of review and finally offers remedies as a result of the review.

On the other hand, global administrative law is yet to be developed such that it systematically responds to these questions in relation to the SC and the Committee. In fact, the ever-increasing appearance of “the rule of law”, “democracy” and “human rights” at the UN and other international forums is striking, and the World Summit Outcome document in September 2005 declared that “they belong to the universal and

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fect of accountability-based control is also prospective: D. Curtin/ A. Nollkaemper, “Conceptualizing Accountability in International and European Law”, *NYIL* 36 (2005), 3 et seq. (8).

<sup>30</sup> Authors phrase the process of interaction in slightly different ways: see R. Mulgan, “‘Accountability’: An Ever-Expanding Concept?”, *Public Administration* 78 (2000), 555 et seq. (555) (“accountability ... involves *social interaction and exchange*, in that one side, that calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions” (emphasis original)); A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract*, 2001, 81 (“setting standards against which to judge the account; obtaining the account; judging the account; and deciding what consequences, if any, should follow from it”); R.W. Grant/ R.O. Keohane, “Accountability and Abuses of Power in World Politics”, *Am. Polit. Sci. Rev.* 99 (2005), 29 et seq. (29) (“some actors ... judge whether [other actors] have fulfilled their responsibilities in light of [a set of] standards, and to impose sanctions if they determine that these responsibilities have not been met”); Curtin/ Nollkaemper, see note 29, 8 (“an actor explains conduct and gives information to others, in which a judgment or assessment of that conduct is rendered on the basis of prior established rules or principles and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor”). This study avoids the use of “sanctions” and replaced it with “consequences”, since the latter better captures the inclusion of non-institutionalized forms of “sanctions” such as reputation.

indivisible core values and principles of the United Nations ... ”.<sup>31</sup> Nevertheless, in relation to the first question of *who is accountable*, it is traditionally against national governments to generate and apply a set of these values; hence, cautious steps must be taken when translating them for the global sphere against global administrative bodies.<sup>32</sup>

With reference to the rule of law, “the need for universal adherence to and implementation of the rule of law at both the national and *international levels*” was confirmed by the aforesaid World Summit Outcome document and subsequent GA resolutions.<sup>33</sup> While “the rule of law at ... international levels” is multi-faceted, several states perceived it as embracing an aspect of subjecting the UN and more broadly international organizations, to some form of the rule of law constraints.<sup>34</sup> This may support the advocates of the proposition that the maxim of the rule of law and one of its tenets, namely, “[p]ower entails accountability”,<sup>35</sup> is emerging as a normative underpinning of global administrative law whereby the SC and the Committee are accountable insofar as they exert power. At present, further consensus building inside and outside the

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<sup>31</sup> 2005 World Summit Outcome, A/RES/60/1 (2005) of 24 October 2005, para. 119.

<sup>32</sup> See C. Harlow, “Global Administrative Law: The Quest for Principles and Values”, *EJIL* 17 (2006), 187 et seq.; B. Kingsbury et al., “The Emergence of Global Administrative Law”, *Law & Contemp. Probs* 68 (2005), 15 et seq. (42-51). Harlow also points out the danger of unifying the principles, Harlow, *ibid.*, 211-214.

<sup>33</sup> 2005 World Summit Outcome, see note 31, para. 134 (emphasis added). See also The Rule of Law at the National and International Levels, A/RES/61/39 (2006) of 18 December 2006; The Rule of Law at the National and International Levels, A/RES/62/70 (2008) of 8 January 2008.

<sup>34</sup> See, e.g., *Report of the Secretary-General, The Rule of Law at the National and International Levels: Comments and Information Received from Governments*, Doc. A/62/121 of 11 July 2007, 6-8 (Austria), 14 (Finland); *Summary Record of the 14th Mtg of the Sixth Committee, the Rule of Law at the National and International Levels*, Doc. A/C.6/62/SR.14, 15 November 2007, para. 19 (Mr. Beras Hernández of the Dominican Republic). See also Doc. S/PV. 5474 of 22 June 2006 (the SC meeting entitled “Rule of Law and Maintenance of International Peace and Security”).

<sup>35</sup> International Law Association, *Accountability of International Organisations: Final Report*, 2004, 5, available at: <[http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm)>.

GA remains to be seen in terms of how the maxim materializes in the light of global administrative bodies.<sup>36</sup>

Contested likewise is the invocation of human rights, notably the right to a fair hearing embodied in major human rights instruments,<sup>37</sup> as a normative foundation of global administrative law. An argument has been put forward to the effect that the observance of customary human rights norms attaches *a priori* to the legal personality of international organizations, inclusive the UN, enjoyed under international law.<sup>38</sup> Criticism can be leveled against this approach, in that it appears difficult to conform to the *Reparation for Injuries* case of 1949. Here the ICJ observed that it was “capable of possessing international rights and duties”,<sup>39</sup> which is not the same as suggesting that international organizations are bound by customary rights and duties, including those *essen-*

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<sup>36</sup> See Harlow, see note 32, 195-198, 207-211.

<sup>37</sup> Universal Declaration of Human Rights, A/RES/217A (III) (1948) of 10 December 1948, article 10; ICCPR, see note 14, article 14. See also 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5 (Protocol 11, ETS No. 155), article 6; 1969 American Convention on Human Rights, ILM 9 (1969), 99 et seq., article 8; 1981 African (Banjul) Charter on Human and Peoples’ Rights, ILM 21 (1982), 58 et seq., article 7.

<sup>38</sup> A. Reinisch, “Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions”, *AJIL* 95 (2001), 851 et seq. (858-859); P. Sands/ P. Klein, *Bowett’s Law of International Institutions*, 5th edition, 2001, 458-460; N.D. White, *The Law of International Organisations*, 2nd edition, 2005, 217. A passage in the ICJ’s Advisory Opinion in 1980 may be one authority to support the stance that international organizations are subject to customary law: see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports 1980, 73 et seq. (89-90) (“International organizations are subject of international law, and as such, are bound by any obligations incumbent upon them under general rules of international law”). Similarly, H.G. Schermers/ N.M. Blokker, *International Institutional Law: Unity Within Diversity*, 4th edition, 2003, 1002; F. Morgenstern, *Legal Problems of International Organizations*, 1986, 32. It is noted that the view that international organizations are subject to general international law does not appear to agree with the remark by the same authors that the legal personality of international organizations has, in principle, no predetermined content in international law: see below note 41.

<sup>39</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174 et seq. (hereinafter *Reparation for Injuries*) (179).

*tially governing state activities* such as human rights norms.<sup>40</sup> In principle, the legal personality of international organizations has no predetermined content in international law.<sup>41</sup> This presumption is, of course, increasingly subject to qualification by the development of *jus cogens* as well as common rules on international organizations.<sup>42</sup> Nevertheless, it seems that the observance of customary human rights norms is yet to join these categories, and it is still premature to conclude that such rights can be invoked against international organizations in general.<sup>43</sup>

The second question of accountability *to whom* is fundamental to the abovementioned process of interaction; the demands that the actors in question submit to the public body are not always uniform, which may dictate the relevance or substance of accountability standards that the public body is required to discharge and the manner in which it is subjected to consequences. A question is then posed as to how such accountability holders are to be determined. Two separate questions arise with regard to this issue: who *ought to be* a holder, and who actually has the *power* to become one. Such power generally derives from an actor's *potential ability to impose consequences* for the perceived failure of administrative bodies to be accountable towards them.<sup>44</sup> These *normative* and *pragmatic* bases seem to be present in the law and politics of accountability.<sup>45</sup>

Normatively, three sets of justifications are commonly acknowledged in the domestic democratic order: authorization, political or financial support and impact.<sup>46</sup> On the other hand, the global administrative law is yet to become disciplined enough to portray common normative bases with which to determine who ought to be an accountability holder. Arguably, the disparity between those who have a normative

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<sup>40</sup> The ICJ observed in *Reparation for Injuries* that “rights and duties [of the UN] are [not] the same as those of a State”, see note 39.

<sup>41</sup> Sands/ Klein, see note 38, 473; Schermers/ Blokker, see note 38, 990, 992-993; White, see note 38, 40-41.

<sup>42</sup> See below note 47. Also see below notes 101-102 and corresponding paragraph.

<sup>43</sup> See Kingsbury et al., see note 32, 46-47; Harlow, see note 32, 204-207; B. Fassbender, “Targeted Sanctions and Due Process”, *Study Commissioned by the UN Office of Legal Affairs*, 20 March 2006, 20, paras 5.3-5.5, available at: <[http://www.un.org/law/counsel/Fassbender\\_study.pdf](http://www.un.org/law/counsel/Fassbender_study.pdf)>.

<sup>44</sup> See Keohane, see note 27, 1125.

<sup>45</sup> See Keohane, see note 11, 142, 149; Keohane, see note 27, 1125.

<sup>46</sup> Keohane, see note 11, 140.

basis to become accountability holders and those who have the power to hold a public body to account is largest when the accountability mechanism is less institutionalized. For instance, the conferral of *locus standi* for judicial review by courts in many Western countries is an authoritative determination of the status of accountability holders, albeit perhaps in the narrowest sense. Such holders can use judicial review in order to impose consequences on relevant decision-makers.

On the other hand, global administrative law is characterized by the absence of an equivalent constitutional authority to verify the status of accountability holders and direct public bodies to discharge accountability. In the absence of such a highly institutionalized mechanism, small states or non-state constituencies may not be able to hold the SC to account, even if the normative basis for becoming accountability holders is strong. The accountability calls from such constituencies would perhaps not reach the SC, unless the calls are accompanied by other accountability holders and relevant UN bodies, particularly those actors with a stronger power to undermine the operational effectiveness of the particular SC-led activities.

With regard to the third question pertaining to the bases on which administrative bodies are called to account, undeniably, a series of common rules governing internal matters or external relationships of international organizations have gradually evolved,<sup>47</sup> although adjudi-

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<sup>47</sup> Some examples include an *ultra vires* doctrine, the legal personality of international organizations, an implied power doctrine, interpretation of constituent instruments, and a series of rules on immunities and privileges: see D. Akande, "International Organizations", in: M.D. Evans (ed.), *International Law*, 2nd edition, 2006, 277 et seq. (280-298); E. Lauterpacht, "The Development of the Law of International Organization by the Decisions of International Tribunals", *RdC* 152 (1976-IV), 381 et seq. One may add the development concerning the rules on delegation of powers, and the rules of responsibility owed by international organizations. For delegation, compare, D. Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs", *BYIL* 67 (1996), 413 et seq.; D. Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, 1999; N. Blokker, "Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'", *EJIL* 11 (2000), 541 et seq.; with S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, 2001, 163-218. For the rules of responsibility, see the work of the International Law Commission on *Responsibility of International Organizations*, available at: <<http://www.un.org/law/ilc/>>.

cative organs are often circumspect about ascertaining such rules independently from constituent instruments.<sup>48</sup> Such rules, either categorized as part of traditional sources of custom and general principles of law, or seen as a unique body of law (termed as international institutional law or global administrative law), are applicable to the UN and thus the SC insofar as they are not inconsistent with the Charter.<sup>49</sup> However, these common rules on international organizations are of limited maturity in controlling their exertion of authority. Owing to the absence of ultimate legislative and judicial authorities, the growth of administrative bodies<sup>50</sup> has, so far, produced no uniform formula of administrative law to fetter the discretion of public bodies. It is still noteworthy that the fragmented practices or issue-dependent principles that collectively form global administrative law have been identified through the activities of international administrative bodies and certain adjudicative organs established within them. Kingsbury, Krisch and Stewart, in their project on global administrative law, ascertain several “candidates” for the principles of administrative law concerning procedural grounds, namely, participation, transparency, reasoned decisions and review procedures.<sup>51</sup> The enhancement of transparency and participation is exemplified by the Basel Committee on Banking Supervision, which, having emerged as a closed club model, started to invite comments from industry, academia, the government etc., and makes these comments publicly accessible.<sup>52</sup> The establishment of the World Bank Inspection Panel is a prominent example of review mechanisms.<sup>53</sup> On

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<sup>48</sup> International adjudicative organs tend to ascribe their reasoning to an interpretation of constituent instruments, and avoid expressly accepting the existence of common rules applicable to international organizations. See comments by Akande on *Reparation for Injuries*, Akande, see note 47, 282. See also an instructive analysis of the decision by the International Labour Organization Administrative Tribunal in *In re Bustani*, J. Klabbers, “The Bustani Case Before the ILOAT: Constitutionalism in Disguise?”, *ICLQ* 53 (2004), 455 et seq.

<sup>49</sup> See Akande, see note 47, 280.

<sup>50</sup> For the various types of global administration, see Kingsbury et al., see note 32, 20-23.

<sup>51</sup> Kingsbury et al., see note 32, 37-40.

<sup>52</sup> See M.S. Barr/ G.P. Miller, “Global Administrative Law: The View from Basel”, *EJIL* 17 (2006), 15 et seq. (24-27, 45).

<sup>53</sup> See Kingsbury et al., see note 32, 39; R.B. Stewart, “U.S. Administrative Law: A Model for Global Administrative Law”, IILJ Working Paper

the other hand, substantive grounds of accountability, such as proportionality and legitimate expectations, seem underdeveloped.<sup>54</sup>

Finally, the question is posed as to how consequences would be imposed. At the international level, no general procedure exists for the judicial review of the decision-making of global administrative bodies. Although the majority of the ICJ in the *Lockerbie* case (1992 and 1998) seems to have endorsed the Court's competence to review SC resolutions,<sup>55</sup> the use of the ICJ as a mechanism to hold the SC to account is significantly limited for three reasons. Firstly, in order for the GA to request an Advisory Opinion, non-objection from a majority of UN Member States must be secured, and in a contentious case, there must be an unavoidable link between the legality of an SC resolution and the subject matter of the dispute before the ICJ, as in the rare instance of *Lockerbie*. Secondly, the principal accountability questions such as transparency and participation do not always fit with the traditional sources of law provided in Article 38 (1) of the ICJ Statute.<sup>56</sup> Thirdly, more fundamentally, only states and UN organs/specialized agencies are entitled to refer legal disputes and questions to the ICJ.<sup>57</sup> As a matter of procedure, other non-state actors do not have access to the ICJ to request a review of the SC's actions,<sup>58</sup> which necessarily restricts the promise that the ICJ holds in enhancing accountability to them.

Without institutional channels, the primary means to respond to a perceived failure of the SC to discharge certain standards of behavior will be public reputation.<sup>59</sup> Even in domestic administrative law, it

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2005/7 (Global Administrative Law Series), 35, available at: <<http://www.iilj.org>>.

<sup>54</sup> Kingsbury et al, see note 32, 40-41.

<sup>55</sup> See T.M. Franck, *Fairness in International Law and Institutions*, 1995, 242-244; C. Gray, "Case and Comment: The Lockerbie Case Continues", *CLJ* 57 (1998), 433 et seq.

<sup>56</sup> See Kingsbury et al., see note 32, 29-30.

<sup>57</sup> 1945 Statute of the International Court of Justice, *AJIL* 39 (1945), Suppl., 215 et seq., Arts 34 (1), 65 (1); 1945 Charter of the United Nations, Article 96.

<sup>58</sup> See F.O. Vicuña, "Individuals and Non-State Entities Before International Courts and Tribunals", *Max Planck UNYB* 5 (2001), 53 et seq. (56-58).

<sup>59</sup> See Grant/ Keohane, see note 30, 37; Keohane, see note 27, 1133-1134, 1138. Accountability in its core sense that Mulgan defines seems to encompass reputational accountability through private sectors such as the media: see Mulgan, see note 30, 565. At the same time, it is suggested that the inclusion of reputational detriment will risk blurring the demarcation line be-



would be a mistake to conceptualize a tool to compel accountability as synonymous with judicial review.<sup>60</sup> Both states and non-state constituencies can take part in raising criticism against particular actions of the SC.<sup>61</sup> However, public reputation as a tool to hold the SC to account is susceptible to dilution, as the SC is in varying degrees constantly subjected to negative criticism or positive praise from the public, just as in the case of other domestic and global administrative bodies. Therefore, whether or not such a non-institutionalized reputational accountability tool is effective varies according to circumstances. Although public reputation generally matters for international organizations,<sup>62</sup> it would certainly become a more powerful tool if the various constituencies and the wider UN membership act in the same direction, either in consort or in parallel; and to undermine such reputation entails negative operational consequences to the activities of the SC, such as non-cooperation by local communities within the context of UN territorial administrations, which undermine the operational effectiveness of SC activities and make them appear more costly in discharging mandates.<sup>63</sup>

Overall, the accountability mechanism relative to the SC and the Committee must be, in large part, illuminated through the analysis of specific normative frameworks, practices and discourse relating to them instead of resorting to the deductive reasoning from common principles of global administrative law.

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tween accountability-based control and other modes of control, see *ibid.*, 565-566.

<sup>60</sup> See E. Fisher, "The European Union in the Age of Accountability", *Oxford Journal of Legal Studies* 24 (2004), 495 et seq. (497-498).

<sup>61</sup> Keohane, see note 27, 1138.

<sup>62</sup> One of the sources of authority for international organizations is what Barnett and Finnemore call "moral authority", meaning that they represent "the community's interests or the defender of the values of the international community": M. Barnett/ M. Finnemore, *Rules for the World: International Organizations in Global Politics*, 2004, 23.

<sup>63</sup> See for the context of peacekeeping, F. Hoffmann/ F. Mégret, "Fostering Human Rights Accountability: An Ombudsperson for the United Nations?", *Global Governance* 11 (2005), 43 et seq. (49).

### 3. Member State Authorities

#### a. Normative Framework

That the UN Charter, a constituent instrument upon which the SC exercises its authority, subsists as constraints of its discretion was affirmed by the ICJ at the outset of the UN when it enunciated that the “political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations of its powers” (*Admission to the UN* case).<sup>64</sup> The same was confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* case in 1995.<sup>65</sup>

The UN Charter institutionalized the minimum level of accountability to all Member States as a form of accountability to the GA. This includes the SC’s reporting duties pursuant to Arts 24 (3) and 15 (1) under the Charter; while consideration of annual reports by the GA has been a mere formality for a long time,<sup>66</sup> some changes have been introduced since the early 1990s to enhance the reports’ format and adoption procedure.<sup>67</sup> Further, Article 17 serves as the SC’s fiscal accountability to the GA, since it can downsize the budget for a particular SC operation or even refuse to approve it. The 1267 Committee is under such budgetary scrutiny, inasmuch as its funding comes from the regular UN budget.<sup>68</sup>

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<sup>64</sup> *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, ICJ Reports 1948, 57 et seq. (64).

<sup>65</sup> *Prosecutor v Dusko Tadic* (Case IT-94-1-AR72), Appeals Chamber, Decision of 2 October 1995, para. 28 (“The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be”).

<sup>66</sup> F.A. Vallat, “The General Assembly and the Security Council of the United Nations”, *BYIL* 29 (1952), 63 et seq. (84); J. Delbrück, “Article 24”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 442 et seq. (452).

<sup>67</sup> See Descriptive Index to Notes and Statements by the President of the Security Council relating to Documentation and Procedure (June 1993 to December 2005), Doc. S/2006/78 of 7 February 2006, 2.

<sup>68</sup> The funding for the SC’s counter-terrorism programs comes from the regular UN budget: A. Millar/ E. Rosand, *Allied Against Terrorism: What’s Needed to Strengthen Worldwide Commitment*, 2006, 29-30.

In other contexts not encompassed by these provisions, “delegation” of powers to the SC through the UN Charter may serve as a normative underpinning for the GA to call the organ to account.<sup>69</sup> According to Sarooshi, the *delegatus non potest delegare* maxim, known as the non-delegation doctrine, is applicable to the UN and thus the SC as a general principle of law,<sup>70</sup> and the accountability of the SC to the collective of Member States with regard to the way in which the delegated power is being exercised is implicit in the doctrine.<sup>71</sup>

With reference to individual Member States, Arts 31 and 32 of the Charter provide for the participation of “specially affected” states or those states party to a dispute, the former being incorporated in Rule 37 of the SC’s Rules of Procedure.<sup>72</sup> In response to requests by Member States to participate, the SC usually extends invitations under Rule 37 without discussion, and the requests have rarely been rejected or not acted upon.<sup>73</sup> However, participation under Rule 37 entails certain limitations in theory and practice. Firstly, in contrast to Article 32, Article 31 stipulates that a Member State of the UN “*may participate ... whenever [the SC] considers that the interests of that Member are specially affected*”,<sup>74</sup> which gives rise to a controversy as to whether the members are vested with the right to participation or even the right to be

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<sup>69</sup> It is noted that although UN Member States delegate powers to the SC, the relationship between Member States and the SC is not characterized by a principal-agency relationship *strictu sensu*; like most international organizations, the SC exercises powers under the UN Charter *on its own behalf*, and not strictly on behalf of all Member States: see D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, 2005, 29, 43.

<sup>70</sup> Sarooshi, *The Delegation*, see note 47, 22.

<sup>71</sup> Sarooshi, *The Delegation*, see note 47, 22, 25-32.

<sup>72</sup> The explicit reference to Article 32 of the Charter has been rare in the practice of the SC. It is the usual practice of the SC to simply refer to Rule 37 when invitations are extended to Member States. See, e.g., *Repertoire of the Practice of the Security Council, Supplement 2000-2003 (Advance Version)*, Chapter 3, 6; R. Dolzer, “Article 32”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 580 et seq. (580-582).

<sup>73</sup> For example, between 2000 and 2003, in only one instance the request was denied: see *Repertoire of the Practice of the Security Council*, see note 72, 14-16.

<sup>74</sup> Emphasis added.

heard by the SC.<sup>75</sup> While the future development regarding the interpretation of the article merits close attention, it is the present understanding of the SC that Member States do not have such a right.<sup>76</sup> It is left to the SC to decide whether the interests of Member States are “specially affected”, and the organ owes, strictly speaking, no obligation to extend an invitation even after the decision. Secondly, participation under Rule 37 has been understood as involving formal and private meetings. Whether or not Member States are permitted to participate in “informal consultations of the whole” has been a matter decided upon by the SC without reference to Rule 37.<sup>77</sup> Thirdly, in relation to participation in the 1267 Committee’s discussion, its Guidelines incorporate a provision according to which specially affected Member States may be invited to the Committee’s discussions.<sup>78</sup> However, it must be borne in mind that the Committee usually meets in closed sessions;<sup>79</sup> without advance notice of meetings and their agendas, Member States would be, in practice, prevented from submitting their requests for participation.<sup>80</sup>

The UN Charter provides yet another accountability mechanism under Article 50, which is of particular relevance to economic sanctions. While consultation with countries that sustained a loss by participating in sanctions had been propounded under the League of Nations when it

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<sup>75</sup> See, e.g., R. Dolzer, “Article 31”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 573 et seq. (577-578); S. Talmon, “The Security Council as World Legislature”, *AJIL* 99 (2005), 175 et seq. (187, fn. 112).

<sup>76</sup> It is an understanding of the SC that it owes no obligations to extend invitations in cases of Article 31: see, *Repertoire of the Practice of the Security Council*, see note 72, 3 (“Only in [the instance of Article 32] does the Security Council have an obligation to extend an invitation”).

<sup>77</sup> See *Repertoire of the Practice of the Security Council*, see note 72, 9-10.

<sup>78</sup> Committee Guidelines 2007, see note 2, para. 3(b) (“The Committee may invite any Member of the United Nations to participate in the discussion of any question brought before the Committee in which interests of that Member are specifically affected”).

<sup>79</sup> Committee Guidelines 2007, see note 2, para. 3(b) (“The Committee will meet in closed sessions, unless it decides otherwise”).

<sup>80</sup> In this respect, it is worth noting that in 2006, the SC “encourage[s] Chairs of the subsidiary bodies of the Council to make the schedule of meetings of subsidiary bodies available to the public”, Note by the President of the Security Council, Doc. S/2006/507 of 19 July 2006, para. 47.

instigated sanctions against Italy,<sup>81</sup> the Charter institutionalized it as the “right to consult the Security Council” exercisable by those states (members and non-members) which are confronted with “special economic problems”. The SC, under Article 50, received a number of requests in relation to economic sanctions undertaken against South Rhodesia, Iraq and the former Yugoslavia.<sup>82</sup> Despite the entitlement vested in states, however, the presence of Article 50 has been somewhat diminished by the transition to targeted sanctions as in the case of the Al Qaeda/Taliban regime.<sup>83</sup> In fact, according to the report of the SG in 2007, no appeal under Article 50 has been submitted since 2003.<sup>84</sup>

Overall, with regard to the collectivity of Member States, the normative bases to call the SC to account are strong and in part institutionalized through the Charter. On the other hand, Arts 31 and 50 of the Charter and established practice relating to them may not serve, for instance, in the case of those states which wish to approach the Committee for information in order to identify a targeted individual or verify the accusation against him/her.

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<sup>81</sup> See *League of Nations Official Journal, Special Supplement*, No. 150, 1936, 11 (Proposal No. 5, Organisation of Mutual Support, Adopted by the Co-ordination Committee on 19 October 1935).

<sup>82</sup> See V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, 1990, 633-639; J. Carver/ J. Hulsmann, “The Role of Article 50 of the UN Charter in the Search for International Peace and Security”, *ICLQ* 49 (2000), 528 et seq.; B.O. Bryde/ A. Reinisch, “Article 50”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 784 et seq.; B.H. Al-Khasawneh, “Consultation under Article 50 of the United Nations Charter: The Experience of the Middle East”, in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 325 et seq.; W. Czapliński, “The Position of States Specially Affected by Sanctions in the Meaning of Article 50 of the United Nations Charter: The Experience of Central and Eastern Europe”, in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 335 et seq.

<sup>83</sup> The SG observed in 2006 that “all of the Council’s existing sanctions regimes are now targeted in nature and the unintended consequences for civilian populations and third States are thereby minimized”, *Report of the Secretary-General, Implementation of the Provisions of the Charter of the United Nations related to Assistance to Third States Affected by the Application of Sanctions*, Doc. A/61/304 of 31 August 2006, para. 7.

<sup>84</sup> *Report of the Secretary-General, Implementation of the Provisions of the Charter of the United Nations related to Assistance to Third States Affected by the Application of Sanctions*, Doc. A/62/206 of 3 August 2007, para. 14.

## b. Pragmatic Basis

Measured by the potential ability to impose consequences, power disparities are arguably evident between those states with the capacity to submit names to the Consolidated List on the one hand (“providers”), and those states which are largely the recipients of the target names. Of course, states’ power is constructed by many other factors outside the sanctions regime and the analysis cannot be so self-contained whether or not providers or recipients. The power disparity is therefore one illustration generated from factors unique to the Al Qaeda/Taliban sanctions regime.

Being accountable to those states that hold the reliable intelligence with regard to the Al Qaeda members and their associates is a practical necessity if the Al Qaeda/Taliban sanctions are to have a bearing on global counter-terrorism efforts. Since the UN does not have a general capacity to collect (as opposed to receive) international intelligence relating to them, national intelligence is the primary source.<sup>85</sup> The crux is that the submission of names relies on states’ willingness as opposed to obligations, and so provider states could undermine the operational significance of the list without violating any obligations.<sup>86</sup> A well known contributor is the United States, but other countries including Saudi Arabia, Italy, Algeria, France, Spain, Belgium, Germany, the United Kingdom, China and Russia have reportedly submitted names to the Committee.<sup>87</sup> The submission of *Jemaah Islamiya* (supported by 50 Member States) was led by the United States and Australia.<sup>88</sup> In addi-

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<sup>85</sup> See S. Chesterman, *Shared Secrets: Intelligence and Collective Security*, 2006, 70-71, available at: <<http://www.lowyinstitute.com/Publication.asp?pid=60>>.

<sup>86</sup> See S/RES/1735 (2006) of 22 December 2006, para. 12 (“Encourages States to submit ... names”).

<sup>87</sup> E.A. Wayne, “Internationalizing the Fight”, *eJournal USA: Economic Perspectives* 9 (3) (2004), 6 et seq. (6-7), available at: <<http://usinfo.state.gov/journals/ites/0904/ijee/ijee0904.htm>>; US Department of State, Money Laundering and Terrorist Financing in the Middle East and South Asia, Testimony by E.A. Wayne, Assistant Secretary for Economic and Business Affairs, before the Senate Committee on Banking, Housing, and Urban Affairs, 13 July 2005, available at: <<http://www.state.gov/e/eeb/rls/rm/2005/49564.htm>>.

<sup>88</sup> Minister for Foreign Affairs (Australia) Media Release (FA158), *Jemaah Islamiyah Listing*, 26 October 2002, available at: <[http://www.foreignminister.gov.au/releases/2002/fa158\\_02.html](http://www.foreignminister.gov.au/releases/2002/fa158_02.html)>; US Department of State, Press

tion, there must be many other potential providers who have the capacity to submit names but still hold back from doing so.

Power disparities can also be seen within these provider states. As said, the vast majority of the names on the list have been submitted by the United States, either alone or in conjunction with other UN members,<sup>89</sup> and it has been a principal advisor of the Committee.<sup>90</sup> Being accountable to the relevant US authorities is an operational imperative for the functioning of the Committee, and no doubt it has been highly accountable to them. The Monitoring Group and the Team made a number of visits to US government departments,<sup>91</sup> presumably to exchange information and seek assistance in conducting implementation assessments.

By contrast, those states which largely remain *recipients* of the list may have less potential to impose negative consequences on the operation of the 1267 Committee. Nevertheless, there still remain some possibilities. The characteristics of the Al Qaeda/Taliban sanctions regime provide states, including the recipient states, the potential to exercise a certain degree of power to hold the SC to account as far as they have the capacity to implement the sanctions. Unlike other sanctions regimes primarily targeted at governmental officials or rebels within a restricted geographical area, Al Qaeda “has autonomous underground cells in some 100 countries” with “no single headquarters”.<sup>92</sup> The increasing proliferation of their activities<sup>93</sup> makes it important for the SC and the Committee to absorb requests from a wider range of states and enhance accountability towards them. Truly, as the Monitoring Team admits,

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Statement by R. Boucher, Designation of Two Terrorists, January 24, 2003, available at: <<http://www.state.gov/r/pa/prs/ps/2003/16843.htm>>.

<sup>89</sup> E. Rosand, “The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions”, *AJIL* 98 (2004), 745 et seq. (746).

<sup>90</sup> Richard Barrett, the Coordinator of the Monitoring Team since 2004, states: “The United States, of course, is intensely engaged through this whole process [of the fight against terrorism]. We find great support from them in our work on the committee ...”: CNN, Diplomatic License: Current Events at the United Nations, 3 September 2004, available at: <[http://transcripts.cnn.com/TRANSCRIPTS/0409/03/i\\_dl.00.html](http://transcripts.cnn.com/TRANSCRIPTS/0409/03/i_dl.00.html)>.

<sup>91</sup> Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002), Doc. S/2002/1050 of 20 September 2002, para. 10.

<sup>92</sup> Council of Foreign Relations, Backgrounder: Al-Qaeda, 7 July 2005, available at: <<http://www.cfr.org/publication/9126/>>.

<sup>93</sup> See B.O. Riedel, “Al Qaeda Strikes Back”, *Foreign Aff.* 86 (2007), 24 et seq.

however, well designed a sanctions regime is, its impact inevitably depends on effective implementation by Member States.<sup>94</sup> Further, the effective functioning of the 1267 sanctions regime requires not only mere compliance through the adoption of appropriate domestic legislation<sup>95</sup> but also states' enhanced willingness to cooperate. In particular, it relies on their readiness to ensure that financial institutions within their jurisdictions are screening accounts and transactions in an effective and timely manner.<sup>96</sup>

#### 4. Targeted Individuals/Entities

##### a. Normative Framework

While the Charter provides non-state constituencies with no clauses equivalent to Article 31,<sup>97</sup> Rule 39 of the SC's Rules of Procedure still paves the way for "members of the Secretariat or other persons" to participate in its discussion for the purposes to "supply it with information or ... to give other assistance".<sup>98</sup> An increasing number of invitations have been extended to wider UN membership, other international organizations and individuals.<sup>99</sup> Likewise, the 1267 Committee's Guide-

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<sup>94</sup> 2nd Report of the Monitoring Team, see note 6, para. 42.

<sup>95</sup> For the types of domestic legislation, see 3rd Report of the Monitoring Team, see note 6, paras 44-49, Annex I.

<sup>96</sup> *4th Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2006/154 of 10 March 2006 (hereinafter 4th Report of the Monitoring Team), para. 68.

<sup>97</sup> Compare, Article 71 of the Charter (providing for "arrangements for consultation with non-governmental organizations" in relation to ECOSOC).

<sup>98</sup> Rule 39 of the Provisional Rules of Procedure Doc. S/96/Rev. 7 provides the following: "The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence". A guideline has also been formulated with respect to participation of members of the Secretariat in informal consultations, see note by the President of the Security Council, Doc. S/2007/749 of 19 December 2007.

<sup>99</sup> In 2003, the invitations issued under Rule 39 rose to 159, about 15 times more than in 1990, Repertoire of the Practice of the Security Council, see note 72, 6.



lines prescribe their participation.<sup>100</sup> However, Rule 39 does not entitle any non-state actors, much less targeted individuals, to participate in the discussion of the SC and the Committee; moreover, the criteria with which to invite them are yet to be formulated.

Instead, much of the discussion has been devoted to the invocation of human rights, particularly the right to a fair hearing (article 14, ICCPR) and the right to an effective remedy (article 2 (3), ICCPR). Should the SC be obliged to comply with these human rights standards, the targeted individuals and entities would be, at least in theory, entitled to invoke their rights *vis-à-vis* the SC. In other words, this entitlement provides them with a cogent normative basis in their claiming the status of accountability holders against the SC and the Committee.

Among different levels of human rights norms, least controversial is the observance of human rights established as *jus cogens*, which cannot be overridden by the effect of Article 103 of the Charter.<sup>101</sup> Two lines of reasoning uphold this proposition. Firstly, it can be inferred from the constituent instrument that a treaty-based institution, including the UN, cannot be endowed with powers to act in contravention to *jus cogens*, inasmuch as states cannot derogate from it.<sup>102</sup> A more society-oriented explanation is that peremptory norms are fundamentally im-

<sup>100</sup> Committee Guidelines 2007, see note 2, para. 3(b).

<sup>101</sup> See e.g., D. Akande, "The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?", *ICLQ* 46 (1997), 309 et seq. (322); Reinisch, see note 38, 859; J.A. Frowein/ N. Krisch, "Introduction to Chapter VII", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 701 et seq. (711); Alvarez, see note 16, 133. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1993, 325 et seq. (440, para. 100) (Separate Opinion of Judge Lauterpacht); Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005 (CFI) (hereinafter *Kadi*), para. 226; Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment of 21 September 2005 (CFI) (hereinafter *Yusuf*), para. 277; *R (Hilal Abdul-Razzaq Ali Al-Jedda) v Secretary of State for Defence*, [2006] EWCA Civ 327, Judgment of 29 March 2006 (CA), para. 71; *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, Judgment of 12 December 2007 (HL), para. 35 (Lord Bingham).

<sup>102</sup> A. Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", *EJIL* 16 (2005), 59 et seq. (60, 68).

portant for the international community, and therefore, the UN, having a legal personality in the international arena and being a participant therein, must be subject to them.

However, the extent to which human rights qualify as *jus cogens* remains controversial. The list of non-derogable human rights under article 4 (2) of the ICCPR is partly a recognition of the peremptory nature of those norms.<sup>103</sup> Neither article 14 nor article 2 (3) are mentioned. While the Human Rights Committee holds the view that the category of peremptory norms extends beyond the list of non-derogable provisions provided in article 4 (2),<sup>104</sup> the growing consensus that the core elements of the right to a fair hearing are non-derogable and *jus cogens* may still remain restricted to the context of criminal proceedings.<sup>105</sup>

Further contested is the observance of human rights under customary law and treaties by the SC acting under Chapter VII. Different interpretations have been advanced to account for the relevant articles of the UN Charter, particularly Article 1 (1) and (3) through Article 24 (2). One side observes that the Charter obliges the SC to comply with human rights established under customary law<sup>106</sup> and those under major human rights treaties,<sup>107</sup> leading to the conclusion that any restrictions upon human rights would have to be justified in accordance with the established criteria such as the requirement of proportionality. The other side submits that the compliance *strictu sensu* with human rights obligations, both under treaties and customary law, is not assumed by the Charter. All the Charter is required to do is to give consideration to them, and how the balance can be best struck between respect for human rights and the maintenance of peace and security is up to the SC.<sup>108</sup> This leads one to conclude that only the SC's complete disregard would

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<sup>103</sup> Human Rights Committee, General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, Doc. CCPR/C/21/Rev.1/Add.6 of 4 November 1994, para. 10; Human Rights Committee, General Comment No. 29: State of Emergency (Article 4), Doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001, para. 11.

<sup>104</sup> Human Rights Committee, General Comment 29, see note 103.

<sup>105</sup> De Wet, see note 14, 17, 22-23; E. De Wet/ A. Nollkaemper, "Review of Security Council Decisions by National Courts", *GYIL* 45 (2002), 166 et seq. (183).

<sup>106</sup> For instance, Alvarez, see note 16, 125-126.

<sup>107</sup> See, e.g., Akande, see note 101, 323-324; and De Wet, see note 14, 8-14.

<sup>108</sup> Frowein/ Krisch, see note 101, 711.

constitute a contravention of the Charter.<sup>109</sup> Under the second reading, the normative tie between the individuals and the SC would be remote and more difficult to construct.

Arts 31 and 32 of the Vienna Convention on the Law of Treaties<sup>110</sup> feature a set of different interpretive methods – the textual, systematic, teleological, and historical (or intentions) approaches – as well as consider subsequent practice and relevant rules of international law.<sup>111</sup> The problem of how much relative weight should be attached to these factors is left unanswered by the general rules on interpretation.<sup>112</sup> Among these components, the textual and historical readings seem in favor of the latter proposition. This is not surprising, inasmuch as the development of human rights norms, much less the anticipated impact that the UN itself impinges upon the rights of individuals, was significantly limited when the Charter was drafted. From the textual reading, the UN Charter strives for the promotion of human rights, but does not strictly bind itself or the SC by extrinsic human rights norms.<sup>113</sup> Under Article 1 (3), “[t]o achieve international co-operation ... in promoting and encouraging respect for human rights” is one of the overall aims to be

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<sup>109</sup> Frowein/ Krisch, see note 101, 711.

<sup>110</sup> A constituent instrument of international organizations triggers arts 31 to 33 of the Vienna Convention on the Law of Treaties with regard to the way it is to be constructed, see 1969 Vienna Convention on the Law of Treaties, *ILM* 8 (1969), 679 et seq., article 5 (“The present Convention applies to any treaty which is the constituent instrument of an international organization”). Arts 31 and 32 of the Convention reflect customary international law, see *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, para. 160, available at: <<http://www.icj-cij.org>>; and other cases referred to in the paragraph.

<sup>111</sup> Article 31 of the Vienna Convention requires consideration of the terms’ textual meaning (textual approach), their “context” (systematic approach), and the treaty’s “object and purpose” (teleological approach), as well as “subsequent practice”, and “any relevant rules of international law”, and article 32 licenses to refer to preparatory works (historical or intentions approach).

<sup>112</sup> It is true that the principle of effectiveness is extant as a general rule to be applied when more than one reading is possible, *ILCYB*, 1966, Vol. 2, 219, para. 6. However, which construction “enable[s] the treaty to have appropriate effects” (ibid.) may likewise be open to more than one interpretation: see generally, Lauterpacht, see note 47, 420-465.

<sup>113</sup> See the preamble (“to reaffirm faith in fundamental human rights”), Arts 1 (3), 55 (c) of the UN Charter.

pursued by the SC through Article 24 (2); however, no reference is made to the organ's compliance with human rights. Furthermore, the textual and systematic reading of Article 1 (1) suggests that the SC is not expected to observe international law when acting under Chapter VII in the same manner as it does under Chapter VI, inasmuch as the phrase of "the principles of justice and international law" does not appear in the first part of the article.<sup>114</sup> The drafting history of Article 1 (1) reveals that the phrase was inserted to make clear that the SC had no power to impose the terms of settlement of international disputes or situations.<sup>115</sup> At the same time, the latter proposition is supported by the fact that the proposal to likewise subject Chapter VII measures to the principles of international law was rejected at the San Francisco Conference,<sup>116</sup> although noteworthy still is that half the delegates seemed supportive of the former proposition.<sup>117</sup>

On the other hand, with reference to subsequent practice, the position appears to be somewhere in between the two propositions. In the context of economic sanctions, clear reference at the UN in support of the first proposition is found in a working paper prepared under the Sub-Commission of the Commission on Human Rights, which submitted that it was implied by Article 1 (1) and (3) of the Charter that, "[s]anctions must be evaluated to ensure that ... they do not in any way violate principles of international law stemming from sources 'outside' the Charter",<sup>118</sup> including the right to life and the rights to security of

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<sup>114</sup> Compare, e.g., Frowein/ Krisch, see note 101, 710-711; with Reinisch, see note 38, 856-857; De Wet, see note 14, 8-9.

<sup>115</sup> See T.D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter", *NYIL* 26 (1995), 33 et seq. (66-67).

<sup>116</sup> L.M. Goodrich/ E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd and revised edition, 1949, 93-94; Gill, see note 115, 67-68. But see Akande, see note 101, 319-320.

<sup>117</sup> The final voting with regard to the amendment resulted in a split amongst the delegates, see Gill, see note 115, 66, fn. 90.

<sup>118</sup> Sub-Commission on the Promotion and Protection of Human Rights, *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper Prepared by Mr. Marc Bossuyt*, Doc. E/CN.4/Sub.2/2000/33 of 21 June 2000, para. 24. See also Committee on Economic, Social and Cultural Rights, General Comment No. 8: *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, Doc. E/C.12/1997/8 of 12 December 1997.

the person, health, education or employment.<sup>119</sup> It added that “the Security Council was responsible for all known consequences of its actions” in relation to these human rights.<sup>120</sup> This working paper did not receive explicit endorsement by the Commission on Human Rights, much less by the GA or the SC. However, it is still noteworthy that a range of measures to ameliorate the humanitarian and human rights related impacts of sanctions have been implemented by the SC,<sup>121</sup> as exemplified by the Oil-for-Food Program for Iraq,<sup>122</sup> the provision of humanitarian exemptions,<sup>123</sup> the monitoring of humanitarian impact,<sup>124</sup> and more broadly, the methodological transition of the SC sanctions from comprehensive ones to more “smart” alternatives. The subsequent development in practice indicates that the SC has increasingly narrowed its discretion in terms of how to take into account the respect for human rights when acting under Chapter VII. In any case, such development still remains within the bounds of the above-mentioned textual and historical readings, in that it does not go so far as to suggest that the SC is formally bound by human rights norm.

#### b. Pragmatic Basis

Although a normative framework according to which individuals claim the status of accountability holders may further develop in the future, individuals and entities may lack the ability to bring about consequences. As noted above, without institutionalized channels, public reputation is a general recourse open to non-state constituencies to respond to the SC’s accountability deficits.<sup>125</sup> In order to render the repu-

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<sup>119</sup> Sub-Commission, see note 118, para. 26.

<sup>120</sup> Sub-Commission, see note 118, para. 72.

<sup>121</sup> See generally, J.A. Frowein/ N. Krisch, “Article 41”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 735 et seq. (745-746).

<sup>122</sup> See generally, *Review and Assessment of the Implementation of the Humanitarian Programme Established Pursuant to Security Council Resolution 986 (1995) (December 1996-November 1998)*, Doc. S/1999/481 of 28 April 1999.

<sup>123</sup> See generally, G.L. Burci, “Interpreting the Humanitarian Exceptions through the Sanctions Committees”, in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 143 et seq.

<sup>124</sup> See generally, E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 226-247.

<sup>125</sup> See under II. 2. of this article.

tational accountability tool effective, their voices need to be accompanied by other accountability holders and various UN bodies acting in concert or in parallel. In order for this to occur, individuals and entities first need to mobilize the media, academic institutions and human rights NGOs that may support them. In addition, as will be discussed below,<sup>126</sup> the involvement of national courts may be a powerful tool in attracting concerted or parallel challenges from Member States and other constituencies.

### III. Enhancing the Community Accountability: Challenges and Responses

#### 1. Setting the Accountability Principles

It is notable that there is a clear sign of the emergence of what appear to be accountability principles concerning the administration of SC sanctions targeting individuals. The GA built up a consensus over such a normative framework, and this development appeared in the World Summit Outcome document in September 2005, in which the GA stated the following:

“108. We call upon the Security Council, with the support of the Secretary-General, to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the application of sanctions in accordance with the Charter.

109. We also call upon the Security Council, with the support of the Secretary-General, to ensure that *fair and clear procedures* exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”<sup>127</sup>

<sup>126</sup> See under III. 3. of this article.

<sup>127</sup> 2005 World Summit Outcome, A/RES/60/1 (2005) of 24 October 2005, paras 108-109 (emphasis added). The Committee noted in December 2005 that “[m]ore than 50 States have mentioned the need for due process and transparency in the Committee’s listing and/or de-listing procedures” (although the details of statements are not fully available), para. 13 Assessment, Doc. S/2005/761 of 6 December 2005 (hereinafter Committee’s Written Assessments 2005), Annex I, para. 37.

The statements encapsulate not merely the need of monitoring and development of sanctions designing but also the call for procedural fairness and clarity in listing and delisting. The SG was aligned with this appeal, stating in his April 2006 report on a counter-terrorism strategy that “[m]ore must be done ... to improve the *accountability and transparency* of sanctions regimes”, with particular reference to the Al Qaeda/Taliban sanctions.<sup>128</sup> These requests are reflected in the “United Nations Global Counter-Terrorism Strategy” adopted by consensus at the GA in September 2006, in which it encouraged the 1267 Committee “to ensure, *as a matter of priority*, that *fair and transparent procedures* exist” for listing, delisting and granting humanitarian exceptions.<sup>129</sup> One of the GA’s special committees, which has been working on the issue of economic sanctions since the early 1990s,<sup>130</sup> embarked on addressing the issue of fairness and clarity in listing and delisting.<sup>131</sup>

Of course, these documents requesting *fairness and transparency* in the Committee’s listing procedures have no binding force in themselves. Aside from the limited arena,<sup>132</sup> the authority of the GA is recommen-

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<sup>128</sup> Report of the Secretary-General, *Uniting against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, Doc. A/60/825 of 27 April 2006, para. 42 (emphasis added). See also *ibid.*, para. 117 (SG asked the Office of Legal Affairs to develop guidelines); Fassbender, see note 43.

<sup>129</sup> The United Nations Global Counter-Terrorism Strategy, A/RES/60/288 (2006) of 20 September 2006, Annex, Plan of Action, para. 15 (emphasis added). See also Report of the Informal Working Group of the Security Council on General Issues of Sanctions, Doc. S/2006/997 of 22 December 2006, para. 3(v).

<sup>130</sup> See the website of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization at: <<http://www.un.org/law/chartercomm/>>.

<sup>131</sup> See the revised working paper submitted by Russia in February 2007, incorporating the provision to “ensure that the selection of such individuals and entities for listing is based on fair and clear procedures”, *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, GAOR 62nd Sess., Suppl. No. 33, Doc. A/62/33 (2007), para. 23. See also the EU Presidency Statement before the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (statement by Mr. Fitschen of Germany on behalf of the European Union), 7 February 2007, available at: <[http://www.europa-eu-un.org/articles/en/article\\_6778\\_en.htm](http://www.europa-eu-un.org/articles/en/article_6778_en.htm)>.

<sup>132</sup> The GA has a certain law-making authority over the UN’s organizational issues through binding “decisions” (Article 18 (2), UN Charter). These de-

datory.<sup>133</sup> However, if normative value should be accorded to them, one possible interpretation may be that these requests form part of a subsequent practice to interpret the Charter.<sup>134</sup> Understandably, such construction may well invite criticism. Firstly, none of the aforesaid documents reasonably indicate that they purport to elaborate on any particular Charter provisions, as evidently contrasted with the 1970 Declaration on Friendly Relations<sup>135</sup> and a few other GA resolutions.<sup>136</sup> Secondly, even granting that they detail particular Charter provisions, subsequent practice may not be a cogent basis of interpretation if it is not supported by one or more additional methods of interpretation.<sup>137</sup>

It would be too early to conclude if, and to what extent, normative value attaches to the aforesaid requests by the GA. Nevertheless, it is

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cisions include suspension of rights and privileges of membership (Article 5), expulsion of Members (Article 6) and budgetary questions (Article 17): *Certain Expenses of the United Nations*, ICJ Reports 1962, 151 et seq. (163).

<sup>133</sup> Arts 10-14 of the UN Charter; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq. (50, para. 105).

<sup>134</sup> Vienna Convention on the Law of Treaties, see note 110, article 31 (3)(b). Although article 31 (3)(b) speaks of “the agreement of the parties”, institutional practice has been invoked to prove such an agreement, see generally, J.E. Alvarez, *International Organizations as Law-Makers*, 2005, 87-89. But see Lauterpacht, see note 47, 458-464.

<sup>135</sup> A/RES/2625 (XXV) (1970) of 24 October 1970.

<sup>136</sup> See, e.g., Definition of Aggression, A/RES/3314 (XXIX) (1974) of 14 December 1974; Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22 (1987) of 18 November 1987.

<sup>137</sup> It remains a point of controversy as to whether subsequent practice could constitute an autonomous element for the purpose of interpreting the Charter. The differences in opinion derive, *inter alia*, from the understanding of the interpretive methods adopted by the ICJ in the *Namibia* case: compare, e.g., Akande, see note 47, 289; with G. Ress, “The Interpretation of the Charter”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition, 2002, 13 et seq. (27-30). In addition, caution has been voiced to the effect that dependence on practice is liable to endorsement of the SC’s institutional actions, led by a few powerful states, as *intra vires*, because the absence of objections by other states may result in such actions qualifying as reflecting the agreement of the parties: see Ress, *ibid.*, 25, 28-29; Alvarez, see note 134, 91-92.



still worth noting that the GA has the potential as well as the limits to act as a standard-setting institution to enhance the community accountability of the SC. The GA has certainly taken one significant step forward in agreeing on the framework to hold the 1267 Committee to account, and the aforementioned call for fairness and transparency must be credited for the universality of the forum. At the same time, the need to compromise at a deliberation forum of all states favors the obscurity of standards that they agree upon, and also leads to the failure to absorb the voices of some Member States. It would be even more complicated for the GA to represent wide-ranging demands from non-state accountability holders.

In view of these limits, the GA documents are equivocal (or inclusive) with regard to *whom*, and *how*, such fairness and transparency should be ensured. In particular, there remains a lack of consensus as to whether, and how, the SC should be accountable to non-state constituencies of the international community whose lives are affected by the Committee's decisions. This led to the absence in the GA documents of clear references to the procedural guarantees of individuals and entities on the List.

The divergence in opinions is evident from the Council meeting in June 2006 entitled "Rule of Law and Maintenance of International Peace and Security".<sup>138</sup> Bearing in mind the World Summit Outcome, most states, including all permanent members, reiterated the need to ensure the fairness and transparency for the 1267 Committee procedures.<sup>139</sup> The SC's Presidential statement reaffirmed its commitment to "ensuring that fair and clear procedures exist".<sup>140</sup> Not surprisingly, however, permanent members, in their statements, avoided references to procedural guarantees to individuals on the list, which contrasts with

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<sup>138</sup> Doc. S/PV. 5474 of 22 June 2006; Doc. S/PV. 5474 (Res. 1) of 22 June 2006.

<sup>139</sup> Doc. S/PV. 5474 of 22 June 2006, 10 (Ms. Pierce of the United Kingdom), 12 (Mr. Burian of Slovakia), 13 (Mr. Kitaoka of Japan), 14 (Mr. Bolton of the United States), 17 (Mr. Shcherbak of Russia), 18 (Mr. De La Sablière of France), 20 (Mr. Mayoral of Argentina), 25 (Nana Effah-Apenteng of Ghana), 27 (Mr. Li Junhua of China), 28 (Mr. Gayama of Congo), 33 (Mr. Pfanzelter of Austria); Doc. S/PV. 5474 (Res. 1) of 22 June 2006, 7 (Mr. Briz Gutiérrez of Guatemala), 18 (Mrs. Juul of Norway); UNSC Presidential Statement, Doc. S/PRST/2006/28 of 22 June 2006.

<sup>140</sup> UNSC Presidential Statement, Doc. S/PRST/2006/28 of 22 June 2006.

some other states which referred to due process,<sup>141</sup> the right to be heard,<sup>142</sup> external review,<sup>143</sup> or effective remedy.<sup>144</sup>

## 2. Fairness and Transparency: Member States

### a. Challenges

For many Member State authorities which have the capacity to implement sanctions, one of the commonly acknowledged immediate concerns was the insufficiency of basic identifiers (i.e., name, date of birth etc.). This problem arises from the fact that the Committee's listing process does not oblige minimum identifiers to be ascertained before the listing. The rationale for not doing so is that the effect of the asset freeze will be as preventive as possible. Following the growth of the names on the List after the September 11 attacks,<sup>145</sup> the identifier concern became a more pressing issue. As the Monitoring Group reported in 2002, a number of government officials encountered problems with the List "at the technical level".<sup>146</sup> Many entries lack basic identifiers, such as date of birth and nationality, "which makes enforcement action virtually impossible" as the Monitoring Team observed in 2004.<sup>147</sup> The Committee reported in its 2005 report that as many as 65 states have said that sanctions cannot be fully implemented without sufficient iden-

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<sup>141</sup> Doc. S/PV. 5474 of 22 June 2006, 3 (Mr. Moeller/ Ms. Løj of Denmark), 12 (Mr. Burian of Slovakia), 15 (Mr. Pereyra Plasencia of Peru), 20 (Mr. Mayoral of Argentina), 21 (Mr. Al-Nasser of Qatar); Doc. S/PV. 5474 (Res. 1) of 22 June 2006, 17 (Mrs. Núñez de Odremán of Venezuela), 19 (Mr. Adekanye of Nigeria).

<sup>142</sup> Doc. S/PV. 5474 (Res. 1) of 22 June 2006, 9 (Mr. Barriga of Liechtenstein).

<sup>143</sup> Doc. S/PV. 5474 of 22 June 2006, 12 (Mr. Burian of Slovakia), 25-26 (Nana Effah-Apenteng of Ghana).

<sup>144</sup> Doc. S/PV. 5474 of 22 June 2006, 24 (Mrs. Telalian of Greece); Doc. S/PV. 5474 (Res. 1) of 22 June 2006, 11 (Mr. Baum of Switzerland).

<sup>145</sup> See Rosand, see note 89, 749.

<sup>146</sup> *Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002)*, Doc. S/2002/541 of 15 May 2002, para. 8.

<sup>147</sup> *1st Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2004/679 of 25 August 2004 (hereinafter 1st Report of the Monitoring Team), para. 37.

tifiers.<sup>148</sup> Such difficulties persist to date; the Monitoring Team pointed out in 2006 that “[m]any Member States continue to complain that some entries on the List are inadequate or inaccurate”,<sup>149</sup> and reiterated in 2007 that “[t]he lack of identifiers on the List is consistently quoted by States ... as the principal reason for a lack of thorough implementation”.<sup>150</sup>

The degree that the Committee members devoted their time for communication with other Member States added a source of frustration. At least 12 states have voiced discontent over a lack of response when they sought additional information.<sup>151</sup> Further, the absence of standards for listing increased the anxiety of several countries that even the already insufficient identifying information may not be trustworthy. Germany stated at the SC meeting in 2003 that “clear criteria should be developed that would specify under which objective conditions a given individual or entity should be added to that list”.<sup>152</sup> The Committee decides on a case-by-case basis as to whether the proposed individuals or entities are “associated with” the Taliban or Al Qaeda. Before the revision of the Guidelines in 2005, such decision had been made by a two working-day non objection procedure;<sup>153</sup> the objection to the proposed listing must have been raised within 48 hours. If not bilaterally notified in advance by a designating state, this procedure may have effectively excluded objections by some Committee members if their capacity or circumstances were such that they could not afford to challenge it.<sup>154</sup>

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<sup>148</sup> Committee’s Written Assessments 2005, see note 127, Annex I, para. 37.

<sup>149</sup> 4th Report of the Monitoring Team, see note 96, para. 29.

<sup>150</sup> *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*, Doc. S/2007/677 of 29 November 2007 (hereinafter 7th Report of the Monitoring Team), para. 29.

<sup>151</sup> Committee’s Written Assessments 2005, see note 127, Annex I, para. 37.

<sup>152</sup> Doc. S/PV. 4798 of 29 July 2003, 14 (statement by Mr. Pleuger of Germany).

<sup>153</sup> *3rd Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002)*, Doc. S/2002/1338 of 17 December 2002, Annex III (*Guidelines of the Security Council Committee Established Pursuant to Resolution 1267 (1999) for the Conduct of its Work*, Adopted on 7 November 2002 (hereinafter Committee Guidelines 2002)), para. 8(b).

<sup>154</sup> See Paper by the Watson Institute, see note 13, 32.

Overall, one of the prime focuses for many states and financial institutions has been the enhancement of the overall quality of identifiers and communication with the Committee, so that the difficulties and costs associated with implementation would be alleviated. Certainly there are many other concerns; albeit not the main focus for many states at least at the initial stage of the sanctions regime, including the clarity of standards for listing represented by the above-quoted remark by Germany in 2003, which overlaps with those of other accountability holders (which will be discussed below).

## b. Responses

The SC and the Committee must be credited for the progress they have made in the overall quality of the List and communication with Member States. (These are chronologically listed in the Appendix as far as it is ascertainable from the SC documents).

Firstly, as for the information updating, the Committee Guidelines revised in 2003 added a section for “updating the existing information”, which provides for target identifiers to be updated at all times by instructing the Committee to consider additional information supplied “expeditiously”.<sup>155</sup> An annual review process was introduced in 2006 for those listings left un-updated for more than four years.<sup>156</sup>

Secondly, progress was made with reference to the list of identifiers and the information to be included in statements of case when submitting new names. Particular reference can be made to the introduction of a standard “cover sheet” for listing proposals in mid-2006.<sup>157</sup> The cover sheet, together with the Guidelines revised in 2006, incorporated a more detailed list of identifiers, and requested Member States to provide in their statements of case as much detail as possible, specific findings and

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<sup>155</sup> *The Al-Qaida and Taliban Sanctions Committee, Guidelines of the Committee for the Conduct of its Work*, as amended on 29 November 2006 (hereinafter Committee Guidelines 2006) (on file with the author), para. 7; identical to Committee Guidelines 2007, see note 2, para. 7.

<sup>156</sup> Committee Guidelines 2006, see note 155, para. 6(i); identical to Committee Guidelines 2007, see note 2, para. 6(i). Following the first review in 2007, which ended without any changes to the List, the Monitoring Team suggested further improvement in the review procedure: see 7th Report of the Monitoring Team, see note 150, paras 40-48.

<sup>157</sup> 5th Report of the Monitoring Team, see note 25, para. 20, Annex II (cover sheet).

supporting evidence.<sup>158</sup> The introduction of the standard cover sheet was, for one thing, to “make it easier for States to prepare requests for listing” as the US delegation described.<sup>159</sup> Yet the cover sheet was also perceived by the EU and Switzerland as a step to enhance transparency.<sup>160</sup> The Swiss delegation describes the cover sheet as “oblig[ing] Member States ... to specify suspected links with Al-Qaida or the Taliban”, with a view to further enhancing the transparency and effectiveness of the listing procedure.<sup>161</sup>

Thirdly, the frequency and quality of communication have been improved, both *vis-à-vis* all Member States and those particularly affected by the decisions. The Committee convened “open briefings”<sup>162</sup> for all interested Member States at least in 2003 and 2006, the latter being attended by 50 representatives, in order to keep them informed of its work.<sup>163</sup> In 2004 the Committee established a list of “contact points”,<sup>164</sup> whereby its decisions to update the list are emailed to over 300 contact

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<sup>158</sup> Committee Guidelines 2006, see note 155, paras 6(e), (d); with a minor modification, Committee Guidelines 2007, see note 2, paras 6(e), (d).

<sup>159</sup> Doc. S/PV. 5538 of 28 September 2006, 14 (statement by Ms. Sanders of the United States).

<sup>160</sup> The EU Presidency Statement, see note 131; Doc. S/PV. 5679 of 22 May 2007, 36 (statement by Mr. Grütter of Switzerland).

<sup>161</sup> Doc. S/PV. 5679 of 22 May 2007, 36 (statement by Mr. Grütter of Switzerland).

<sup>162</sup> The use of “open briefings” is part of the attempt to enhance accountability of the SC since about 1993. For details, see Descriptive Index, see note 67; Note by the President of the Security Council, Doc. S/2006/507 of 19 July 2006; Note by the President of the Security Council, Doc. S/2007/749 of 19 December 2007. See generally, M.C. Wood, “Security Council Working Methods and Procedure: Recent Developments”, *ICLQ* 45 (1996), 150 et seq. (154-161); S.C. Hulton, “Council Working Methods and Procedure”, in: D.M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, 2004, 237 et seq. (245-251); Talmon, see note 75, 188.

<sup>163</sup> *Report of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2007/59 of 7 February 2007 (hereinafter Committee Annual Report 2007), para. 12; *Report of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2004/281 of 8 April 2004, para. 21.

<sup>164</sup> *Report of the Security Council Committee Established Pursuant to Resolution 1267 Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, Doc. S/2004/1039 of 31 December 2004, para. 7.

points, including not merely the states' missions to the UN but the relevant ministries and agencies responsible for implementation.<sup>165</sup> In relation to particular states, it decided in 2005 to use the statement of case submitted by the designating states "in responding to queries from Member States whose nationals, residents or entities have been included" on the List.<sup>166</sup> It is anticipated that the Committee strengthens interaction with these Member States, given that in 2006 the Council encouraged sanctions committees "to seek the views of Member States that are particularly affected by the sanctions" as part of its efforts to enhance the efficiency and transparency.<sup>167</sup>

Yet the enhancement of communication owes much to the work of the Monitoring Group (2001-2003)<sup>168</sup> and the Monitoring Team (2004-).<sup>169</sup> A monitoring mechanism for sanctions is not without precedent,<sup>170</sup> as evidenced by the Inquiry under Resolution 1013 (1995) for Rwanda, the Monitoring Mechanism under Resolution 1295 (2000) for Angola and the Panel of Experts under Resolution 1306 (2000) for Sierra Leone.<sup>171</sup> In particular, the Monitoring Mechanism for Angola undertook a range of tasks including analysis of the targets, investigation of violations of sanctions, visits to some Member States, and the making of recommendations to the Committee.<sup>172</sup>

Built on these experiences, the monitoring mechanism of the 1267 Committee, in charge of far more comprehensive tasks, has created "a tighter administrative network for the enforcement of UN sanctions".<sup>173</sup> The Monitoring Team engages in building up close contact

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<sup>165</sup> Committee Annual Report 2007, see note 163, para. 14.

<sup>166</sup> S/RES/1617 (2005) of 29 July 2005, para. 6.

<sup>167</sup> Note by the President of the Security Council, Doc. S/2006/507 of 19 July 2006, para. 46.

<sup>168</sup> S/RES/1363 (2001) of 30 July 2001, paras 3, 4(a); S/RES/1390 (2002) of 28 January 2002, para. 9; S/RES/1455 (2003) of 17 January 2003, para. 8.

<sup>169</sup> S/RES/1526 (2004) of 30 January 2004, para. 6; S/RES/1617 (2005) of 29 July 2005, para. 19, and Annex I; S/RES/1735 (2006) of 22 December 2006, para. 32, and Annex II.

<sup>170</sup> See V. Gowlland-Debbas, "Sanctions Regimes under Article 41 of the UN Charter", in: V. Gowlland-Debbas (ed.), *National Implementation of United Nations Sanctions: A Comparative Study*, 2004, 3 et seq. (23).

<sup>171</sup> S/RES/1013 (1995) of 7 September 1995; S/RES/1295 (2000) of 18 April 2000, para. 3; S/RES/1306 (2000) of 5 July 2000, para. 19.

<sup>172</sup> See, e.g., Final Report of the Monitoring Mechanism on Angola Sanctions, Doc. S/2000/1225 of 21 December 2000.

<sup>173</sup> Krisch, see note 8, 887.

with state officials, and, where necessary, the Team informally provides advice to countries considering listing or delisting. The Team actively visits Member States and attends regional meetings,<sup>174</sup> and has daily contact with both the Counter-Terrorism Committee under S/RES/1373 (2001) of 28 September 2001 and the so called 1540 Committee imposed under S/RES/1540 (2004) of 28 April 2004, its members as well as its experts.<sup>175</sup> Resolution 1735 also added an explicit reference to the responsibility to “consult with relevant representatives of the private sector, including financial institutions, to learn about the practical implementation of the assets freeze ...”, to the list of the Monitoring Team’s mandates.<sup>176</sup> Such strong interaction with national bureaucracies, international organizations and the private sector produces “a much higher degree of mutual learning” and “a more flexible and informed decision-making than under most previous sanctions regimes”,<sup>177</sup> which in turn increases the above-mentioned bodies’ willingness to cooperate with the Committee.

Probably the sacred area in which no noteworthy changes have been made is the standards of listing and delisting. S/RES/1617 (2005) of 29 July 2005 has given a more elaborated definition of the “associated with” category,<sup>178</sup> but no guidance on evidential standards is provided. The possible explanations are that any standard-setting in this area undermines the flexibility of the listing, or that given the diversity of materials submitted to the Committee, any standards may prove unworkable. Between the demand for transparency and the need to ensure flexibility, listing and delisting remain left to the Committee’s case-by-case decision-making by consensus. It is likely that more challenges will be raised in the future with respect to the standards of listing.

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<sup>174</sup> In 2006, the Monitoring Team visited 25 states, participated in 20 international and regional conferences, and organized four regional meetings. The Committee’s members also visited five states in 2006: see Committee Annual Report 2007, see note 163, paras 21, 24, 27.

<sup>175</sup> 4th Report of the Monitoring Team, see note 96, para. 138.

<sup>176</sup> S/RES/1735 (2006) of 22 December 2006, Annex II, para. (m).

<sup>177</sup> Krisch, see note 8, 887.

<sup>178</sup> S/RES/1617 (2005) of 29 July 2005, paras 2-3; Committee Guidelines 2007, see note 2, para. 6(c).

### 3. Fairness and Transparency: Targeted Individuals/Entities

#### a. Challenges

##### *aa. Challenges by the Listed Individuals and Entities*

Without being notified of any detailed grounds of listing, and in an absence of any specific procedures available to them before the Committee, the targeted individuals and entities alleging their non-involvement must place their immediate reliance upon the diplomatic channels of their respective governments. Yet the governments may be unwilling to represent their claims, or, even if they are willing to do so, the designating government may be unable or reluctant to share intelligence information. While awaiting the outcome of diplomatic negotiations, or having found themselves unlikely to receive governmental support, some individuals whose assets have been frozen have challenged before national courts, on a variety of grounds including infringement of their human rights, relevant domestic legislation to implement SC decisions.

Such court challenges have arisen in many parts of the world. As of February 2005, at least 13 lawsuits were identified by the Monitoring Team.<sup>179</sup> Litigation involving listed individuals and entities continued to grow, and by September 2007, there were at least 26 known legal challenges to the sanctions or the administration of them, nine of which were brought before the European Court of Justice (ECJ) (including those before the Court of First Instance (CFI)) with the 17 others being in Pakistan, Switzerland, Turkey, United Kingdom, United States and the Netherlands.<sup>180</sup> An action has been brought against other sanctions regimes.<sup>181</sup> The impact of the rise of court challenges is not merely one of operational impediments. As the Austrian representative observed on behalf of the EU, “a negative court ruling would not only put the

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<sup>179</sup> 2nd Report of the Monitoring Team, see note 6, para. 50.

<sup>180</sup> 7th Report of the Monitoring Team, see note 150, Annex I; 6th Report of the Monitoring Team, see note 7, para. 35, Annex I; 5th Report of the Monitoring Team, see note 25, Annex III.

<sup>181</sup> Case T-362/04, *Leonid Minin v Commission of the European Communities*, Judgment of 31 January 2007 (CFI), paras 58 et seq. (concerning the Liberia sanctions under Resolution 1521 (2003), and the CFI rejected the claim in the light of its earlier decisions in *Yusuf, Kadi*, and *Ayadi*).



Member States concerned in a difficult position but might also call the whole system of targeted United Nations sanctions into question".<sup>182</sup>

The CFI's decisions in *Kadi* (2005), *Yusuf* (2005), *Ayadi* (2006) and *Hassan* (2006) are some of the outcomes of those challenges. *Kadi* and *Ayadi* appeared on the List in October 2001,<sup>183</sup> and *Yusuf* was designated in November 2001.<sup>184</sup> *Hassan* was listed in November 2003.<sup>185</sup> *Kadi* and *Yusuf* together with two other Swedish citizens (*Aden*, *Abdi Abdulaziz Ali*) and the *Al Barakaat International Foundation* seated in Sweden, soon brought actions before the ECJ in December 2001,<sup>186</sup> followed by *Ayadi* in August 2002 and *Hassan* in February 2004.<sup>187</sup> They sought the annulment of relevant EC regulations,<sup>188</sup> on the ground of, *inter alia*, infringement of the right to a fair hearing, the right of respect for property, and the right to effective judicial review.

The use of national courts to contest the acts of international organizations, directly or as secondary disputes, is by no means new.<sup>189</sup> Nevertheless, the additional difficulty inherent in bringing challenges to the legislation implementing the *Al Qaeda/Taliban* sanctions concerns the fact that national authorities have very little discretion, owing to both the character of the obligation under SC resolutions and the degree of specification. For one thing, by virtue of the effect of Article 103

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<sup>182</sup> Doc. S/PV. 5446 of 30 May 2006, 26 (Mr. Pfanzelter of Austria, speaking on behalf of the EU).

<sup>183</sup> See Press Release SC/7180 of 19 October 2001.

<sup>184</sup> See Press Release AFG/163-SC/7206 of 9 November 2001.

<sup>185</sup> See Press Release SC/7920 of 14 November 2003.

<sup>186</sup> Action Brought on 10 December 2001 by *Abdirisak Aden* and Others against the Council of the European Union and the Commission of the European Communities, Case T-306/01, *OJ* (2002), C 44/27 et seq.; Action brought on 18 December 2001 by *Yassin Abdullah Kadi* against the Council of the European Union and the Commission of the European Communities, Case T-315/01, *OJ* (2002), C 56/16 et seq.

<sup>187</sup> Action brought on 22 August 2002 by *Chafiq Ayadi* against the Council of the European Union and the Commission of the European Communities, Case T-253/02, *OJ* (2002), C 289/25; Action brought on 12 February 2004 by *Faraj Hassan* against the Council of the European Union and the Commission of the European Communities, Case T-49/04, *OJ* (2004), C 94/52.

<sup>188</sup> Council Regulation (EC) 881/2002, *OJ* (2002), L 139/9 et seq. (which repealed Council Regulation (EC) 467/2001, *OJ* (2001), L 67/1 et seq.).

<sup>189</sup> See for the overview of the types of cases involving international organizations, A. Reinisch, *International Organizations Before National Courts*, 2000, 24-31.

of the UN Charter, Member States are not expected to counterbalance the obligations under SC resolutions with other conflicting treaty or customary obligations incurred by them, including general human rights norms. Therefore, the situations are different from those of *Waite and Kennedy* (1999), where the European Court of Human Rights (ECtHR) seems to have analyzed whether the appropriate balance had been struck between Germany's conventional obligation to grant immunity to the European Space Agency and its obligation under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), primarily through the application of the proportionality test under the ECHR, in a situation where the primacy of one obligation over the other is not clear-cut.<sup>190</sup>

Also the Member States retain little discretion because of the way the Al Qaeda/Taliban sanctions were designed; the relevant SC resolutions are not drafted in a manner to allow discretion to be exercised by Member States, at least on the designation of targets and the types of sanctions imposed. The more faithful national authorities are in respect of the implementation of the Al Qaeda/Taliban sanctions, the less discretion they can exercise. Likewise, the more faithful national courts are in respect of the interpretation of obligations under the UN Charter, the less can be done by courts to direct governmental actions. In this respect, the circumstances also differ from those of the CFI's decision in *Organisation des Modjahedines du peuple d'Iran (OMPI)* (2006), which concerned an entity designated under the EC measures implementing SC Resolution 1373 (as opposed to Resolution 1267).<sup>191</sup> Although para. 1(c) of S/RES/1373 (2001) of 28 September 2001 imposes upon Member States Chapter VII obligations to freeze funds of suspected terrorists, it is for the Member States to designate specific individuals and entities suspected of terrorism and determine the procedures for freezing assets.<sup>192</sup> This "discretionary appreciation"<sup>193</sup> of Member States and the European Community made it possible for the CFI to scrutinize the EC legislation giving effect to the SC decision in the light of, "as a mat-

<sup>190</sup> See *Waite and Kennedy v Germany* (Application No. 26083/94), Judgment of 18 February 1999 (ECtHR), paras 59-74.

<sup>191</sup> Council Regulation (EC) 2580/2001, *OJ* (2001), L 344/70 et seq. (which is based on Council Common Position 2001/931/CFSP, *OJ* (2001), L 344/93 et seq.).

<sup>192</sup> Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v Council of the European Union*, Judgment of 12 December 2006 (CFI), paras 99-107.

<sup>193</sup> See note 192, para. 107.

ter of principle, fully applicable<sup>194</sup> human rights, without eroding the supremacy of SC obligations.<sup>195</sup>

Given the little scope of discretion, there was no surprise when the CFI delivered the judgments in September 2005 for *Kadi* and *Yusuf* respectively, and by virtue of Arts 25, 48 and 103 of the UN Charter, as well as the provisions of the EC Treaty, required the Community to give effect to SC resolutions.<sup>196</sup> It stated that the review of the relevant EC legislation implementing the SC resolutions “fall[s], in principle, outside the ambit of the Court’s judicial review”.<sup>197</sup> This point was reiterated by the CFI in *Ayadi* and *Hassan* decided in July 2006.<sup>198</sup>

However, the CFI did not miss the chance to send signals to the SC and the EU Member States that there was some potential for judicial control. In *Kadi* and *Yusuf*, the CFI observed that “the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens* ... from which

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<sup>194</sup> See note 193, para. 108.

<sup>195</sup> See for the summary and comments, A. Johnston, “Thawing Out? The European Courts and the Freezing of Terrorist Assets”, *CLJ* 66 (2007), 273 et seq. (274). See other cases brought against the measures implementing S/RES/1373, including Case T-327/03, *Stichting Al-Aqsa v Council of the European Union*, Judgment of 11 July 2007 (CFI), paras 53 et seq. (The CFI found a breach of duty to state reasons under article 253 EC); Case C-266/05 P, *Jose Maria Sison v Council of the European Union*, Judgment of 1 February 2007 (ECJ), paras 26 et seq. (The ECJ rejected the appellant’s arguments that the Council breached the Community law as well as human rights in refusing to disclose the documents); Case C-355/04 P, *Segi, Aritz Zubimendi Izaga, Aritza Galarraga v Council of the European Union*, Judgment of 27 February 2007 (ECJ), paras 18 et seq. (The ECJ dismissed the appeal as the appellants’ names were included only in the Common Positions which are not generally reviewable by the Court); Case C-229/05, *Osman Ocalan, on behalf of the Kurdistan Workers’ Party (PKK), Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v Council of the European Union*, Judgment of 18 January 2007 (ECJ), paras 24 et seq. (The ECJ remitted the PKK application to the CFT to decide on the merits, while refusing to accept KNK’s standing).

<sup>196</sup> See *Kadi*, see note 101, paras 222-223; *Yusuf*, see note 101, paras 273-274.

<sup>197</sup> *Kadi*, see note 101, para. 225; *Yusuf*, see note 101, para. 276.

<sup>198</sup> Case T-253/02, *Chafiq Ayadi v Council of the European Union and Commission of the European Communities*, Judgment of 12 July 2006 (CFI) (hereinafter *Ayadi*), para. 116; Case T-49/04, *Faraj Hassan v Council of the European Union and Commission of the European Communities*, Judgment of 12 July 2006 (CFI) (hereinafter *Hassan*), para. 92.

no derogation is possible”.<sup>199</sup> Furthermore, in *Ayadi* and *Hassan*, the CFI made a slightly far-fetched attempt to interpret the delisting section of the Committee Guidelines as conferring on interested persons “the right to present a request for review of their case to the government” of residence/citizenship, which is also “guaranteed by the ECHR”.<sup>200</sup> This led the CFI to observe that the Member States must ensure, as far as possible, that targeted persons can present their delisting requests before competent national authorities, and that delisting requests are presented “without delay and fairly and impartially” to the 1267 Committee.<sup>201</sup>

These signals that national courts “could in the future police the limits of international sanctions”<sup>202</sup> may have reminded many international lawyers of the judicial techniques used by the majority of the ICJ in the *Lockerbie* case (1992 and 1998) to preserve its own presence *vis-à-vis* the SC. In both the Order of 1992 and the preliminary judgment in 1998, the majority of ICJ judges did not leave out the possibility of judicial review of SC Resolutions 731 and 748, despite the latter being adopted under Chapter VII.<sup>203</sup>

The CFI in *Kadi* and *Yusuf* understandably concluded that there were no infringements of *jus cogens*. As for the right to be heard, the absence of direct challenge by individuals “is not, however, to be deemed improper in the light of the mandatory prescriptions of the public international order”.<sup>204</sup> As for the right to effective judicial review, the CFI took note of the delisting procedures under the Committee Guidelines, which “constitute another reasonable method of affording adequate protection of the applicants’ fundamental rights as recog-

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<sup>199</sup> *Kadi*, see note 101, para. 226; *Yusuf*, see note 101, para. 277. See for a critical view, M. Bulterman, “Fundamental Rights and the United Nations Financial Sanction Regime: The *Kadi* and *Yusuf* Judgments of the Court of First Instance of the European Communities”, *LJIL* 19 (2006), 753 et seq. (767-770).

<sup>200</sup> *Ayadi*, see note 198, paras 145-146; *Hassan*, see note 198, paras 115-116.

<sup>201</sup> *Ayadi*, see note 198, paras 147-149; *Hassan*, see note 198, paras 117-119.

<sup>202</sup> Krisch, see note 11, 268.

<sup>203</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, ICJ Reports 1992, 3 et seq. (15, para. 40); Franck, see note 55, 242-244; Gray, see note 55, 433 et seq.

<sup>204</sup> *Kadi*, see note 101, para. 268. Similarly, *Yusuf*, see note 101, para. 315.

nized by *jus cogens*".<sup>205</sup> The claims by *Ayadi* of the infringements of various procedural guarantees were equally rejected.<sup>206</sup> Yusuf was removed from the List in August 2006 after almost five years of listing,<sup>207</sup> although the reasons for his removal are not publicly available. On the other hand, as of 7 April 2008, Kadi, Ayadi, Hassan and the Al Barakaat International Foundation remain on the List, awaiting the judgments to be delivered by the ECJ.<sup>208</sup>

*bb. Parallel Challenges by States*

Some of the targeted individuals managed to be delisted from the List owing to diplomatic efforts. In November 2001, having found its nationals on the List (Aden and others referred to above), the Swedish government soon approached the 1267 Committee and the US administration.<sup>209</sup> After the Swedish Security Police concluded in December 2001 that no accusations were confirmed, the Swedish government filed a request with the 1267 Committee for a review of the List in January 2002, and at the same time, entered negotiations with the United States administration.<sup>210</sup> The story of Aden was reported in the media in Sweden and abroad.<sup>211</sup> Although the delisting request was initially rejected

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<sup>205</sup> *Kadi*, see note 101, para. 290; *Yusuf*, see note 101, para. 345.

<sup>206</sup> *Ayadi*, see note 198, paras 115-169; *Hassan*, see note 198, paras 91-129.

<sup>207</sup> Press Release SC/8815 of 24 August 2006.

<sup>208</sup> As for *Kadi* and *AlBarakaat International Foundation*, in his opinion delivered on 16 January 2008 and 23 January 2008, respectively, the Advocate General concluded that the EC courts had the authority to review the contested EC legislation, and that the legislation infringed the appellants' human rights including their right to be heard: see Case C-402/05, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Advocate General's Opinion of 16 January 2008; Case C-415/05 P, *Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Advocate General's Opinion of 23 January 2008.

<sup>209</sup> P. Cramér, "Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council", in: De Wet, see note 14, 85 et seq. (91).

<sup>210</sup> See Cramér, see note 209, 91-94.

<sup>211</sup> See Cramér, see note 209, 92, fn. 41 (Swedish media). See for example, BBC News, Sweden Questions US Terror Charges, 14 February 2002, available at: <<http://news.bbc.co.uk/2/hi/europe/1820020.stm>>; BBC News, Swedish Somalis Fight Terror Links, 20 February 2002, available at: <<http://news.bbc.co.uk/2/hi/africa/1831478.stm>>.

by the 1267 Committee in February 2002 having met objections from the United States, Russia and the United Kingdom,<sup>212</sup> the United States decided to remove Aden and Abdi Abdulaziz Ali in July 2002 after strong pressure from the Swedish government.<sup>213</sup> This was followed by the Committee's adoption of the delisting procedure in August 2002,<sup>214</sup> under which the removal of their names was approved.<sup>215</sup>

In tandem with the diplomacy involved in the delisting of Aden and others, Sweden took one of the first diplomatic initiatives, the so-called "Stockholm Process",<sup>216</sup> to invite governmental and non-governmental attention to the issue of procedural guarantees.<sup>217</sup> Although, due to the politically sensitive nature of the issue,<sup>218</sup> the aspect of legal safeguards for the targeted individuals did not become the main focus of the process. The outcome report presented to the SC in February 2003 touches upon the need to ensure procedural guarantees.<sup>219</sup> The call for proce-

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<sup>212</sup> See Cramér, see note 209, 93-94.

<sup>213</sup> BBC News, Swedish Terror Suspects Cleared, 14 July 2002, available at: <<http://news.bbc.co.uk/2/hi/europe/2128042.stm>>.

<sup>214</sup> Press Release AFG/203-SC/7487 of 16 August 2002. See Committee Guidelines 2002, see note 153.

<sup>215</sup> Press Release SC/7490 of 27 August 2002. Together with Aden and Abdi Abdulaziz Ali, one individual and three entities were removed from the UN List: see *ibid.* They had been listed in the United States due to their involvement in Al Barakaat, but the United States removed their names after the filing of suit against the government: see Roth et al., see note 19, 80-81, 84-86.

<sup>216</sup> The Stockholm Process is one in a series of targeted sanctions reforms, known as the Interlaken Process (1998-2001), the Bonn-Berlin Process (1999-2001), and the Stockholm Process (2001-2002), sponsored by Switzerland, Germany and Sweden, respectively. See for a summary of these sanction reform initiatives, T.J. Biersteker et al., "Consensus from the Bottom Up? Assessing the Influence of the Sanctions Reform Processes", in: P. Wallensteen/ C. Staibano (eds), *International Sanctions: Between Words and Wars in the Global System*, 2005, 15 et seq.

<sup>217</sup> The Stockholm Process was announced in October 2001, initially without any particular reference to the issue of procedural guarantees: see Doc. S/PV. 4394 of 22 October 2001, 5-6 (Mr. Dahlgren of Sweden). After the listing of Swedish citizens, however, the Swedish government tried to bring the question of legal safeguards for individuals into the agendas of the Process.

<sup>218</sup> Cramér, see note 209, 103.

<sup>219</sup> See P. Wallensteen et. al. (eds), *Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options – Results from the*

dural safeguards was then echoed by Germany, which encouraged the SC at the meeting in July 2003 to consider the “possibility that a targeted individual might bring his case to the Committee” in the light of “core elements of due process to be applied by the Security Council, *mutatis mutandis*”.<sup>220</sup> Then Switzerland, Germany and Sweden commissioned the project undertaken by the Watson Institute of Brown University, entitled “Strengthening Targeted Sanctions Through Fair and Clear Procedures” presented to the SC and the GA in June 2006.<sup>221</sup> The Watson Institute report addressed procedural guarantees to a greater extent: it recommended that an administrative focal point be designated within the UN Secretariat to which individuals may submit their delisting requests;<sup>222</sup> and it proposed several options for review mechanisms accessible to individuals.<sup>223</sup>

Until 2004, as far as the official records are concerned, there were only a few references in the GA or SC as to the procedural guarantees of individuals and entities on the List.<sup>224</sup> However, with these governmental attempts in parallel with the individuals’ court challenges, the due process and human rights issue gradually became a more widely shared issue by 2004 at the governmental level.<sup>225</sup> By 2005, the delisting process became “high on the agenda of States and international organizations”, being raised in virtually all the Monitoring Team’s

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*Stockholm Process on the Implementation of Targeted Sanctions*, 2003, paras 37, 282-285, available at: <<http://www.smartsanctions.se/>>. The report was presented to the SC: see Press Release SC/7673 of 25 February 2003; Doc. S/PV. 4713 of 25 February 2003.

<sup>220</sup> Doc. S/PV. 4798 of 29 July 2003, 14 (statement by Mr. Pleuger of Germany). Italy, speaking on behalf of the EU also referred to the need to promote due process in the proceedings of the Committee: see Doc. S/PV. 4798 of 29 July 2003, 21 (statement by Mr. Spatafora of Italy, speaking on behalf of the EU).

<sup>221</sup> Paper by the Watson Institute, see note 13. Earlier in May 2006 these three governments held discussions with the 1267 Committee on the Watson Institute report, see Committee Annual Report 2007, see note 163, para. 10.

<sup>222</sup> Paper by the Watson Institute, see note 13, 43-44.

<sup>223</sup> Paper by the Watson Institute, see note 13, 46-51.

<sup>224</sup> For instance, Doc. S/PV. 4798 of 29 July 2003, 14 (“there could be room for the possibility that a targeted individual might bring his case to the Committee for consideration”, statement by Mr. Pleuger of Germany). See also Doc. S/PV. 4798 of 29 July 2003, 21 (statement by Mr. Spatafora of Italy, speaking on behalf of the EU).

<sup>225</sup> See for example, Doc. S/PV. 4892 of 12 January 2004; 1st Report of the Monitoring Team, see note 147, paras 34, 41.

meetings with Member States.<sup>226</sup> Some states even voiced hesitation to propose new listings “because the system lacked a robust de-listing mechanism”.<sup>227</sup>

*cc. Parallel Challenges by the Wider UN Membership*

The call for legal safeguards for listed individuals and entities also received support from several bodies inside the United Nations. In 2004, the UN High-level Panel made an unequivocal call for a reviewing process in relation to the Al Qaeda/Taliban sanctions regime, noting that “the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.”<sup>228</sup>

In response to the World Summit document, the SG directed the Office of Legal Affairs to develop proposals,<sup>229</sup> which commissioned the study by Fassbender of the Humboldt University (Germany).<sup>230</sup> The SG set out later his views of minimum standards to ensure fairness and transparency in the listing and delisting process. They include the following four basic elements, in short: the right to be informed of the measures, the right to be heard directly by the decision-making body, the right to review by an effective review mechanism, and periodical review by the Council.<sup>231</sup> The need for these procedural safeguards for individuals was endorsed by the Special Rapporteur appointed by the then Commission on Human Rights in his report in August 2006,<sup>232</sup> as well as by the UN High Commissioner for Human Rights in her report presented to the Human Rights Council in March 2007.<sup>233</sup> The High

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<sup>226</sup> 3rd Report of the Monitoring Team, see note 6, para. 52.

<sup>227</sup> 3rd Report of the Monitoring Team, see note 6, para. 54.

<sup>228</sup> *Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, Doc. A/59/565 of 2 December 2004, para. 152.

<sup>229</sup> Report of the Secretary-General, see note 128, para. 117.

<sup>230</sup> Fassbender, see note 43.

<sup>231</sup> See Doc. S/PV. 5474 of 22 June 2006, 5 (statement by Mr. Michel, Legal Council of the UN, presenting the Secretary-General’s view).

<sup>232</sup> *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Doc. A/61/267 of 16 August 2006, paras 38-41.

<sup>233</sup> See Report of the UNHCHR, see note 18, paras 25-27.



Commissioner pointed out that the listing has no end date, which may render the freezing of assets permanent and more punitive.<sup>234</sup>

## b. Responses

The SC's earlier responses to ameliorate the impact on listed individuals were largely devoted to the provision of humanitarian exemptions (see Appendix), as represented by the introduction of enhanced procedures for such exemptions under S/RES/1452 (2002) of 12 December 2002. In mid-2006, in response to criticism from various sectors, the question of how to address the fairness of the sanctions regime finally reached "the top of the 1267 Committee's agenda".<sup>235</sup> The Chairman of the Committee stressed in September 2006 the Committee's awareness of "the numerous calls urging it [to] adopt fair and clear listing and de-listing procedures".<sup>236</sup> In December 2006, based on a French proposal, the SC unanimously adopted S/RES/1730 (2006) of 19 December 2006, requesting the SG to establish a "focal point" to receive delisting requests as a mechanism to be generally applied to SC sanctions involving designated individuals.<sup>237</sup> By November 2007, the focal point has received 17 requests, 16 of which reached the Committee's table; 13 delisting requests were approved, with the other three being decided to remain on the List.<sup>238</sup>

Resolution 1730 is certainly "a real achievement".<sup>239</sup> The new procedures under Resolution 1730 differ from its predecessor in the following aspects: the designated individuals and entities can themselves submit a petition to the focal point; and more significantly, neither their state of residence/citizenship nor the designating government must be persuaded in order for the delisting request to be placed on the Committee's agenda. Previously, individual petitioners faced a first major hurdle in convincing the state of residence/citizenship, which in turn

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<sup>234</sup> See Report of the UNHCHR, see note 18, para. 25.

<sup>235</sup> 5th Report of the Monitoring Team, see note 25, para. 2. See also Doc. S/PV. 5538 of 28 September 2006.

<sup>236</sup> Doc. S/PV. 5538 of 28 September 2006, 4 (Mr. Mayoral of Argentina, Chairman of the 1267 Committee).

<sup>237</sup> See for the summary of initial proposals, 5th Report of the Monitoring Team, see note 25, paras 49-51.

<sup>238</sup> See Doc. S/PV. 5779 of 14 November 2007, 5 (Mr. Verbeke of Belgium, Chairman of the 1267 Committee).

<sup>239</sup> Doc. S/PV. 5679 of 22 May 2007, 13 (Ms. Pierce of the United Kingdom).

would attempt to persuade the designating state and, in the event of an unsuccessful bilateral negotiation, decide whether to submit the delisting request without the designating state's support.<sup>240</sup> Under the new procedure, a recommendation from any of the Committee members ultimately suffices to place the delisting request on the Committee's agenda, in so far as the relevant member is willing to prepare an explanation.<sup>241</sup>

While appreciating the progress made, not all states would share the US' confidence that the focal point "adequately addresses the concern heard from Member States about a perceived lack of fairness in the sanctions process".<sup>242</sup> The crux is that the reform leading to Resolution 1730 pertains to the process according to which *the delisting request is placed upon the Committee's table*, as opposed to the Committee's listing/delisting decision-making itself.

Further challenges, therefore, would likely be raised with regard to the Committee's decisions themselves, particularly relating to a *review mechanism* and the *standards of listing/delisting*. Some non-permanent SC members and some other governments outside the SC have already been calling upon the Committee to launch new negotiations on a review mechanism. In adopting Resolution 1730, Denmark, Greece and Qatar expressed their disappointment and encouraged the SC to continue to work for a review mechanism.<sup>243</sup> Switzerland, speaking also on behalf of Germany and Sweden, reiterated the importance of a review mechanism as "the deficiency that is most often brought up in courts".<sup>244</sup> Switzerland remarked that the focal point "does not change the intergovernmental character of the procedure itself", warning that the current procedure may conflict with human rights, which potentially erodes the legitimacy of the sanctions regimes.<sup>245</sup> These calls for a review procedure were also echoed by Greece, Ghana, Slovakia, Liech-

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<sup>240</sup> See Committee Guidelines 2007, see note 2, para. 8(e) (continuing to provide the previous delisting process).

<sup>241</sup> See Committee Guidelines 2007, see note 2, para. 8(d)(vi)(c).

<sup>242</sup> Doc. S/PV. 5679 of 22 May 2007, 22 (Mr. Khalilzad of the United States).

<sup>243</sup> Doc. S/PV. 5599 of 19 December 2006, 2-3 (Mr. Løj of Denmark), 3 (Ms. Papadopoulou of Greece), 3-4 (Mr. Al-Nasser of Qatar). Similarly, Doc. S/PV. 5779 of 14 November 2007, 22-23 (Mr. Al-Nasser of Qatar).

<sup>244</sup> Doc. S/PV. 5446 of 30 May 2006, 29 (Mr. Maurer of Switzerland, speaking on behalf of Germany, Sweden and Switzerland).

<sup>245</sup> Doc. S/PV. 5679 of 22 May 2007, 36-37 (Mr. Grütter of Switzerland).

tenstein and Argentina.<sup>246</sup> Liechtenstein observed that a “worldwide comprehensive asset freeze and travel ban without any time limits strongly affects the substantive rights of individuals, and must therefore be counterbalanced with appropriate legal protection against error or misuse.”<sup>247</sup>

The aspect of standards of listing was raised, for instance, by South Africa, which pointed upon the need for “a higher evidentiary standard” to prove “a substantive nexus” with Al Qaeda or the Taliban “given the serious consequences of such listing”.<sup>248</sup> Some other states also expressed in general terms the need for further improvements with a view to fair and clear procedures.<sup>249</sup> As encapsulated in the Monitoring Team’s statement in mid-2007, “there is continued concern [among states] that sanctions have a punitive effect ... and that the listing process should therefore incorporate higher standards of fairness”.<sup>250</sup> These further calls receive support from the UN High Commissioner for Human Rights who, while commending Resolution 1730 as a “first step”, nevertheless described it as “far from being a comprehensive solution to the problem” in the light of procedural guarantees to be ensured.<sup>251</sup>

Overall, the 1267 Committee continues to be subjected to scrutiny by various governmental and non-governmental watchdogs, in the light of the accountability principles of fairness and transparency. Following the introduction of Resolution 1730, Germany, speaking on behalf of the EU, remarked that the EU would “observe the implementation of

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<sup>246</sup> Doc. S/PV. 5446 of 30 May 2006, 10 (Mr. Vassilakis of Greece), 17 (Mr. Christian of Ghana); Doc. S/PV. 5474 of 22 June 2006, 12 (Mr. Burian of Slovakia), 25-26 (Nana Effah-Apenteng of Ghana); Doc. S/PV. 5679 of 22 May 2007, 32-33 (Mr. Barriga of Liechtenstein), 35 (Mr. Mayoral of Argentina).

<sup>247</sup> Doc. S/PV. 5679 of 22 May 2007, 33 (Mr. Barriga of Liechtenstein). On 8 November 2007, Denmark, Sweden and Switzerland organized a round table on delisting, inviting governmental and non-governmental representatives, Doc. S/PV. 5779 of 14 November 2007, 28 (Mr. Wenaweser of Liechtenstein, speaking on behalf of Switzerland and Liechtenstein).

<sup>248</sup> Doc. S/PV. 5679 of 22 May 2007, 15 (Mr. Kumalo of South Africa).

<sup>249</sup> Doc. S/PV. 5679 of 22 May 2007, 8 (Mr. Chávez of Peru), 11 (Mr. Kleib of Indonesia), 21-22 (Mr. Al-Nasser of Qatar). Similarly, Doc. S/PV. 5779 of 14 November 2007, 24-25 (Mr. Natalegawa of Indonesia).

<sup>250</sup> 7th Report of the Monitoring Team, see note 150, para. 26.

<sup>251</sup> Report of the UNHCHR, see note 18, para. 28.

the new guidelines and procedures” and added that “[i]n the light of that experience, other challenges might be identified” in the future.<sup>252</sup>

#### IV. The Future of a Review Mechanism for Individuals and Entities

Given that accountability challenges are likely to continue, it would be interesting to explore in more detail what responses should and could be made by the SC and the Committee in the foreseeable future. As discussed above, fairness and transparency may signify different things for the various accountability holders, and it is beyond the scope of this article to give consideration to all the possible responses by the SC. This Chapter focuses on one realization of accountability towards the designated individuals and entities: a mechanism to review the Committee’s listing decisions, which has attracted growing attention as one of the basic elements in ensuring fairness and transparency towards those individuals.<sup>253</sup>

##### 1. Decentralized Review Mechanism

One of the preliminary questions is *who* can review the Committee’s decisions. One dichotomy is whether it can be done by Member States.<sup>254</sup> The idea is to oblige Member States to establish a review process through their national courts, to which the individuals and entities on the UN List may submit a petition. One of the operational advantages is that no significant operational costs would be incurred by the sanctions regime compared to the establishment of a review mechanism at the UN. Yet it is difficult to see how this decentralized review mechanism could co-exist with the centralized listing/delisting decision-making in the Committee. The problems arising appear greater than those arising from a centralized review (some of these problems will be discussed below).

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<sup>252</sup> Doc. S/PV. 5679 of 22 May 2007, 24 (Mr. Matussek of Germany, speaking on behalf of the EU). An identical statement was made in November 2007: see Doc. S/PV. 5779 of 14 November 2007, 33 (Mr. Lobo de Mesquita of Portugal, speaking on behalf of the EU).

<sup>253</sup> See under III. 3. b. of this article.

<sup>254</sup> See, e.g., Cameron, see note 15, 205-208; Guthrie, see note 16, 535-537.

Firstly, such an obligation to conduct a review can only be imposed upon the original designating state for two main reasons. One is the availability of information necessary for such review; if a petition can be submitted outside the original designating state, the state receiving the petition would need to request further information from the original designating state in order to conduct a review on its own. Sharing information relating to the investigation of suspected terrorists between states, if not close allies, may be even more difficult than that with international organizations. Furthermore, such review would be to subject not only the decisions of the Committee, but also indirectly designating states' decisions to blacklist the terrorists, to the courts of third states in receipt of a petition, which would be more problematic than a review at the UN level.

Secondly, even if a review is conducted in the designating state or some other state holding evidence, judges may not have access to the classified material, or even if they have, they may lack expertise in the analysis of intelligence.<sup>255</sup> This is in part why national courts generally pay high deference to executives when it comes to issues of national security.<sup>256</sup>

Thirdly, some states seem to have special courts where judges with relevant expertise assess evidence including classified material in cases involving terrorism.<sup>257</sup> Even supposing that some kind of evidential analysis can be done by such courts, however, the detailed modes of review, even if the basic procedures and standards of review were to be laid out by the SC, would likely diverge from state to state. Given the variance of review, as well as likely differences in the perceived impartiality and independence of national courts, national courts' findings can only practically be recommendatory. The final determination by the Committee of whether it accepts national courts' findings may be subject to the perceived trust in the legal culture of particular jurisdictions, or general political relationships with the Committee's Member States,

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<sup>255</sup> See Cameron, see note 15, 205.

<sup>256</sup> See Cameron, see note 15, 205-206.

<sup>257</sup> For instance, in the United Kingdom, the Special Immigration Appeals Commission (SIAC) and the Proscribed Organisations Appeal Commission (POAC). See generally for the SIAC, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates*, House of Commons (2004-05) 323-I, 7-14, available at: <<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/cmconst.htm>>.

which do not appear to serve to enhance fairness and transparency in the decision-making process.

## 2. Centralized Review Mechanism

If not Member States, a centralized body needs to be created by the SC, whose composition will be determined by either SC members or, more desirably, the SG independently of the SC. Several options for a centralized review at the UN level have already been put forward inside and outside the UN forum.<sup>258</sup> Among the many issues to be considered, the following points can be highlighted.

### a. UN Budgetary Constraints

Unlike decentralized review, any review mechanisms at the UN level incur additional operational costs. The GA's Fifth Committee has been reluctant to award additional funds to the SC-led counterterrorism programs.<sup>259</sup> However, it is worth recalling that the GA's documents themselves requested the sanctions regimes to ensure fairness and transparency in listing and delisting. Also, it may be equally unlikely that the Al Qaeda/Taliban sanctions regime would ever sustain the GA's budgetary scrutiny without ensuring appropriate due process.

### b. Functions of a Review Body and the Nature of Findings

As the SC is not bound by human rights norms in the same manner as Member States,<sup>260</sup> it would be wrong to expect the review mechanism for the Committee to act in the same way as national courts reviewing governmental decisions to designate terrorists. The expected function of a review mechanism is therefore not to identify whether the Committee is in breach of human rights obligations (in which case there is not much to review), but to hear petitioners' cases and to provide an independent analysis by experts as to the statements of case presented by the designating states.

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<sup>258</sup> See Paper by the Watson Institute, see note 13, 47-51; Cameron, see note 15, 208-211; Gutherie, see note 16, 530-535; Alvarez, see note 16, 141-142.

<sup>259</sup> Millar/ Rosand, see note 68, 30.

<sup>260</sup> See under II. 4. of this article.

What the review body can possibly conclude from such an evidential analysis depends on its ability to access evidence for the listing and also on whether the findings would be binding upon the Committee. The findings of the review body can be more flexible if they are recommendatory. Denmark has proposed a review mechanism in the form of an ombudsperson, who, according to the proposal, could accept petitions directly from listed parties as well as consider other cases acting *proprio motu*, and ultimately make a recommendation to the Committee.<sup>261</sup> The options proposed by the Watson Institute at the UN also include an ombudsperson and a panel of experts with recommendatory powers.<sup>262</sup>

The academic proposals also look beyond such recommendatory powers. For instance, Cameron proposes, as one of the options for a review mechanism, the creation of an arbitral judicial body consisting of judges experienced in dealing with intelligence material.<sup>263</sup> Likewise, the Watson Institute's above mentioned report refers also to the creation of a judicial body, either by way of *ad hoc* three-member panels which hear specific delisting requests, or a standing judicial body for SC sanctions committees.<sup>264</sup> In theory, it is clear that the SC has competence under the UN Charter to establish a judicial body to review the committee's decisions. Although the SC does not possess a purely judicial function, it has the authority to set up such a body under Article 7 (2) as far as its establishment is necessary for the SC's mandates under Article 41.<sup>265</sup> Following the *Effect of Awards* case (1954), the findings could bind the SC as far as it is so intended.<sup>266</sup> In practice, however, the conferral of a binding decision-making power is neither feasible nor desirable. Firstly, the findings can only be made from limited evidence submitted by Member States to the UN.<sup>267</sup> Furthermore, other, arguably more important, dimensions of review mechanisms, such as the scope of

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<sup>261</sup> 4th Report of the Monitoring Team, see note 96, para. 46; 5th Report of the Monitoring Team, see note 25, para. 49.

<sup>262</sup> Their model assumes that the ombudsman does not have access to confidential information while the panel of experts have such access, see Paper by the Watson Institute, see note 13, 48-50.

<sup>263</sup> Cameron, see note 15, 209-210.

<sup>264</sup> See Paper by the Watson Institute, see note 13, 50-51.

<sup>265</sup> See Sarooshi, "Subsidiary Organs", see note 47, 422-431.

<sup>266</sup> See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954, 47 et seq. (61).

<sup>267</sup> See Section (c) below.

functions, the standards of review and its composition, would be significantly restricted and compromised in order to derive agreement upon the binding nature of findings.

### c. Sharing Secrets

It is useful to note that the information relating to the listing can be one of the following: (i) publicly accessible information, (ii) accessible to Member States upon request, (iii) held by the Committee, and (iv) any other information held by the designating state.<sup>268</sup> An independent evidential analysis will only be possible if the review body has as much access to these sets of information as possible. Much less the confidential statements of case held by the Committee (i.e., (iii) above), but also certain other information which can be submitted to the review body upon its request (i.e., part of (iv)).

There are many barriers to sharing confidential information with the UN. One of the obvious reasons is the risk of leakage of information. Unless the information is properly dealt with, the introduction of a review procedure may further discourage Member States from submitting new names or sufficient supporting evidence in the statements of case. It would, therefore, be necessary to develop the UN's capacity in handling confidential information. Chesterman's study suggests that the UN indeed has a history of intelligence sharing.<sup>269</sup> The risk of leakage of information can be minimized by the UN introducing improved security protocols for the handling of sensitive information, security clearances for staff, and possibly disciplinary procedures in order to facilitate receipt of information.<sup>270</sup>

### d. Juridification of a Particularity

Whatever the form might be, a centralized review mechanism set up by the SC gives rise to a separate concern that this would be another example of the juridification (or quasi-juridification) of a particularity,<sup>271</sup> or in other words, a hegemonic way of legitimizing it. Some kind of standards of review would be set out through negotiation and bargain-

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<sup>268</sup> See Committee Guidelines 2007, see note 2, para. 6(d), Annex (cover sheet).

<sup>269</sup> See Chesterman, see note 85, 9-16.

<sup>270</sup> See Chesterman, see note 85, 4, 33-35.

<sup>271</sup> See the discussions within the context of global administrative law in general, Harlow, see note 32, 207-214.



ing at the SC, and the review body would consider evidence in view of them. The concern is that the standards of review and the findings would be presented as universally agreeable, even if this may not be the case. At the same time, such a review body confers (even stronger) authority to the Committee's listing decisions, whereby the potential for constant challenges to reflect diverse opinions over the listing/delisting or other accountability questions would be undermined.

However, three observations can still be made in support of a centralized review mechanism for the 1267 Committee. Firstly, from the individuals' perspectives, expert review through which they can be heard is indeed a way forward, despite many shortcomings. Secondly, a possible review mechanism for the Al Qaeda/Taliban Committee would ensure some of the fundamental components of human rights. In particular the right to be heard and the right to review and remedy are treated by the SG and the UN High Commissioner for Human Rights as minimum guarantees to be respected by the 1267 Committee.<sup>272</sup> Therefore, the adverse effects of juridifying a particularity or hegemonic values should be minimized (compared to liberal economic values etc.) as far as the overall good of the project is to ensure better respect for those human rights.

Truly, there is much disagreement among Member States as to how these procedural guarantees are to be observed and how much deference must be paid to the executives in matters relating to terrorism. In this respect, it is unavoidable that a centralized review body, set up by the SC, carries the substantial risk of applying standards which may be seen as either too lax or too stringent by states or non-state actors. It is submitted that, nevertheless, it is simply impossible to significantly impair constant sources of pluralistic challenges. This is due to the very nature of the decentralized international community, and this is what the earlier sections of this article tried to illustrate. Despite the fact that the decisions of the SC and the 1267 Committee are binding and override conflicting norms, it faced challenges through diverse channels aimed at holding it to account. Such a pluralistic process of administrative law is not as weak as being left out by the establishment of a review body even if it provides extra authority to the Committee.

This in turn indicates that any kind of review mechanism, however ideal in balancing the major interests concerned, would only bring a

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<sup>272</sup> See Doc. S/PV. 5474 of 22 June 2006, 5 (statement by Mr. Michel, Legal Council of the UN, presenting the Secretary-General's view); Report of the UNHCHR, see note 18, paras 25-26.

*provisional* closure in accountability calls:<sup>273</sup> some better ways of realizing fairness and transparency would be soon presented; accountability principles themselves might be challenged; or even new accountability holders could emerge.

## V. Conclusion

If the project of “global administrative law” has any overall objectives, some of them may be to constantly scrutinize *who* ought to be accountable, and *how* accountability could be improved if it is currently inadequate. Scrutiny needs to be made not merely over the dichotomy of states and non-state actors, but also over disparities among states and different non-state constituencies. However, the pursuit of accountability holders and the better realization of accountability will most likely be an issue-dependent analysis in large part; accountability holders diverge according to the activities of global administrative bodies, as a result of which there are no uniform answers as to the best construction of accountability mechanisms for them.

In relation to the Al Qaeda/Taliban sanctions regime, the impact is greater, and therefore the normative basis of accountability must be strengthened, with respect to those Member States in which the designated individuals and entities (or their assets) are believed to be located. Among non-state constituencies, the severe impact on human rights renders the development of a normative basis for listed individuals and entities a more pressing issue than other candidates of accountability holders such as financial institutions and immediate local communities.

In the global sphere where the institutionalized settings for accountability are less developed, the voices from these accountability holders by way of leveling criticism against the Committee may not be effective unless they are fully equipped with the power to influence the operational effectiveness of the sanctions regime. The analysis of such power cannot be self-contained within the sole context of the Al Qaeda/Taliban sanctions committee; each actor’s power in wider political contexts matters. Nevertheless, as for Member States, the limited observation from the administration of the sanctions regime suggests that, although no doubt the relevant authorities of major “provider” states are powerful accountability holders, the fact that Al Qaeda members are spread over many countries confers upon a wide range of states

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<sup>273</sup> See Krisch, see note 11, 266-267.

a certain degree of power to hold the SC to account: it places them in the position of becoming potential providers of the List; and it also necessitates their enhanced cooperation, including that of “recipient” states, in order to eliminate loopholes in combating the financing of terrorism. Even if not accompanied by the major providers, therefore, non-institutionalized reputational accountability may work if these states act in consort or in parallel to enhance accountability towards them. This in part explains why the Al Qaeda/Taliban sanctions triggered a greater number of challenges as well as responses aimed at enhancing the fairness and transparency of SC-led targeted sanctions, despite the fact that sanctions against listed individuals and entities existed before Resolution 1267 under the Haiti, Angola and Sierra Leone sanction regimes. Furthermore, the use of national courts helped some individuals and entities on the List to attract parallel, if not in consort, challenges from states and the wider UN membership.

Despite many shortcomings, the challenges and responses made to the administration of the Al Qaeda/Taliban sanctions regime provide evidence that the constant sources of pluralistic challenges in decentralized global society succeeded, to some extent, in shedding light upon the realization of community accountability. Not limited to accountability towards major provider states but also towards other affected states and non-state constituencies, by enhancing the communications with those states and enabling listed individuals to submit delisting requests through the focal point. A range of governmental and non-governmental actors who claim the status of accountability holders, in conjunction with the wider UN membership and other non-state institutions, directly or indirectly participated in the process or cycle of enhancing such community accountability.

As the operations of global administrative bodies increasingly and visibly permeate into the domestic sphere, in conjunction with individuals’ greater awareness that they are members of the international community, the former continue to be subject to coordinated or respective challenges by various governmental and non-governmental constituencies. As this paper has tried to illustrate, SC sanctions regimes will not be immune from such constant challenges, ones now built on the framework accountability principles of fairness and transparency.

## Appendix

### The SC and the Committee's responses to accountability calls

Date	Overall quality of the List and communication with the Committee	Protection of individuals (humanitarian exemptions and delisting)
Feb. 2000	<ul style="list-style-type: none"> <li>Introduced the first Guidelines (Press Release SC/6802)</li> </ul>	<ul style="list-style-type: none"> <li>Approved exemptions on flight ban for the Hajj (Press Release SC/6802)</li> </ul>
Dec. 2000	<ul style="list-style-type: none"> <li>S/RES/1333 (2000) of 19 December 2000 (para. 15(a)) introduced the Committee of Experts</li> </ul>	<ul style="list-style-type: none"> <li>S/RES/1333 (para. 12) introduced further humanitarian aid exemptions for flight ban</li> <li>S/RES/1333 (para. 15(b)) requests the SG to review the humanitarian implications of the measures (Doc. S/2001/241, S/2001/695, S/2001/1215)</li> </ul>
Jan. 2001		<ul style="list-style-type: none"> <li>Approved the list of humanitarian relief providers (Press Release SC/6994)</li> </ul>
Feb. 2001		<ul style="list-style-type: none"> <li>Approved procedures to add humanitarian relief providers (Press Release SC/7012)</li> </ul>
Mar. 2001		<ul style="list-style-type: none"> <li>The SG reported on humanitarian implications (Doc. S/2001/241)</li> </ul>
Jul. 2001	<ul style="list-style-type: none"> <li>S/RES/1363 (2001) of 30 July 2001 introduced the Monitoring Group</li> </ul>	<ul style="list-style-type: none"> <li>The SG reported on humanitarian implications (Doc. S/2001/695)</li> </ul>
Dec. 2001		<ul style="list-style-type: none"> <li>The SG reported on humanitarian implications (Doc. S/2001/1215)</li> </ul>
Jan. 2002	<ul style="list-style-type: none"> <li>S/RES/1390 (2002) of 28 January 2002 (para. 5(d)) requested the Committee to promulgate guidelines to facilitate the implementation</li> </ul>	<ul style="list-style-type: none"> <li>S/RES/1390 (para. 5 (d)) requested the Committee to promulgate guidelines to facilitate the implementation</li> </ul>

(Continued from the previous page)

Date	Overall quality of the List and communication with the Committee	Protection of individuals (humanitarian exemptions and delisting)
Aug. 2002		<ul style="list-style-type: none"> <li>• Announced delisting procedures (Press Release AFG/203-SC/7487)</li> <li>• Removed Aden and five other individuals and entities (Press Release SC/7490)</li> </ul>
Nov. 2002	<ul style="list-style-type: none"> <li>• Approved new Guidelines, listing up the basic identifying information to be included, to the extent possible, in the proposed listing (para. 5 (c)) (Press Release SC/7571)</li> </ul>	<ul style="list-style-type: none"> <li>• Approved new Guidelines, adopting delisting procedures (para. 6) (Press Release SC/7571)</li> </ul>
Dec. 2002		<ul style="list-style-type: none"> <li>• S/RES/1452 (2002) of 20 December 2002 developed mechanisms for exemptions for freezing assets</li> </ul>
Jan. 2003	<ul style="list-style-type: none"> <li>• S/RES/1455 (2003) of 17 January 2003 (para. 4) requested the Committee to communicate to states the list at least every three months</li> </ul>	
Feb. 2003	<ul style="list-style-type: none"> <li>• Convened open briefing by the Chairman of the Committee (Doc. S/2004/281, para. 21)</li> </ul>	
Apr. 2003	<ul style="list-style-type: none"> <li>• Revised Guidelines, adding new section on reviewing information (Press Release SC/7731)</li> </ul>	
Dec. 2003	<ul style="list-style-type: none"> <li>• Invited Member States to comment on report of Monitoring Group (Press Release SC/7948)</li> </ul>	

(Continued from the previous page)

Date	Overall quality of the List and communication with the Committee	Protection of individuals (humanitarian exemptions and delisting)
Jan. 2004	<ul style="list-style-type: none"> <li>• S/RES/1526 (2004) of 30 January 2004 (para. 6) introduced the Monitoring Team</li> <li>• S/RES/1526 (para. 11) provided states with discussion opportunities with the Committee (followed by Press Release SC/8208 (October 2004))</li> <li>• S/RES/1526 (para. 17) required states when submitting new names to include detailed identifying information and background information to the greatest extent possible</li> </ul>	<ul style="list-style-type: none"> <li>• S/RES/1526 (para. 18) “strongly encourages” states to inform, to the extent possible, individuals of the measures, guidelines and exemptions</li> </ul>
Jul. 2005	<ul style="list-style-type: none"> <li>• S/RES/1617 (2005) of 29 July 2005 (para. 2) defined those “associated with”</li> <li>• S/RES/1617 (para. 6) decided that the statement of case “may be used by the Committee in responding to queries from Member States whose nationals, residents or entities have been included”</li> </ul>	<ul style="list-style-type: none"> <li>• S/RES/1617 (para. 2) defined those “associated with”</li> <li>• S/RES/1617 (para. 5) “requests” states to inform, to the extent possible, individuals of the measures, listing/delisting procedures and exemptions</li> </ul>
Dec. 2005	<ul style="list-style-type: none"> <li>• Revised Guidelines, extending the time for considering listing submissions from two business days to five (Press Release SC/8602)</li> </ul>	
Apr. 2006	<ul style="list-style-type: none"> <li>• Introduced the procedures for the removal of deceased individuals (Note Verbale SCA/2/06(8))</li> </ul>	

(Continued from the previous page)

Date	Overall quality of the List and communication with the Committee	Protection of individuals (humanitarian exemptions and delisting)
Jul. 2006	<ul style="list-style-type: none"> <li>• Introduction of a standard “cover sheet” for listing proposals, with more details for identifying information and statements of case</li> <li>• Convened open briefing by the Chairman of the Committee, attended by 50 representatives (Doc. S/200759, para. 12)</li> </ul>	
Nov. 2006	<ul style="list-style-type: none"> <li>• Revised Guidelines, attaching the “cover sheet”, and introducing the provision of feedback to the designating state (para. 6(f)), and annual review (para. 6(i))</li> </ul>	<ul style="list-style-type: none"> <li>• Revised Guidelines, introducing the procedure to remind states of residence/citizenship to inform individuals (para. 6(h))</li> </ul>
Dec. 2006	<ul style="list-style-type: none"> <li>• S/RES/1735 (2006) of 22 December 2006 (para. 29) “strongly encourages” Member States to “send representatives to meet the Committee” (c.f., S/RES/1526 (2004) of 30 January 2004, para. 11 and S/RES/1617 (2005) of 29 July 2005 (para. 14))</li> </ul>	<ul style="list-style-type: none"> <li>• S/RES/1730 introduced focal point of delisting</li> <li>• S/RES/1735 (para. 11) calls upon states of location/nationality to notify individuals or entity and including a copy of the “the publicly releasable portion of statement of case, a description of the effects of designation”, delisting procedures and exemptions</li> <li>• S/RES/1735 (para. 15) extended the period for consideration of notifications of humanitarian exemptions from 48 hours to 3 working days</li> </ul>
Feb. 2007	<ul style="list-style-type: none"> <li>• Updated Guidelines following S/RES/1730 (2006) of 19 December 2006 and S/RES/1735 (2006) of 22 December 2006</li> </ul>	<ul style="list-style-type: none"> <li>• Updated Guidelines following S/RES/1730 and S/RES/1735</li> </ul>