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The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?

By Clemens A. Feinäugle[*]

A. Introduction

Some time ago, one could read in the news about Mr. Abdelghani Mzoudi, the friend of the terror pilots of 9/11. He was acquitted of the accusation of aiding and abetting murder but he was not paid the owed compensation for wrongful imprisonment because his name was entered on a sanctions list of the UN. Many readers will have wondered how this could happen. Few if any will have guessed that we are in the middle of a case of international institutional law here, a process with actors on several levels (including a sanctions committee on the UN level), with different procedures and jurisdictions which can affect payments to an accused even after his acquittal. It is precisely this UN sanctions committee and its actions which form the subject of this paper.

Arguably no other subsidiary body of the UN Security Council has drawn so much attention of legal scholarship in recent years as the Al-Qaida and Taliban Sanctions Committee (in the following "the Committee"), which targets individual terrorist suspects with individual sanctions.[1]

[*] Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Email: cfeinaeu@mpil.de. The author would like to thank Prof. Dr. Armin von Bogdandy, Prof. Dr. Jan Klabbers and Matthias Goldmann for valuable comments on earlier drafts of this article and Eric Pickett and Eva Richter for checking the language and footnotes.

[1] On the background and further development of this sanctions regime, *see* Jochen Abr. Frowein, *The UN Anti-Terrorism Administration and the Rule of Law, in* VÖLKERRECHT ALS WERTORDNUNG. COMMON VALUES IN INTERNATIONAL LAW. FESTSCHRIFT FÜR/ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 785 *et seq.* (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw & Karl-Peter Sommermann eds., 2006); Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions,* 98 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 745 (2004); Vera Gowland-Debbas, *Sanctions Regimes Under Article 41 of the UN Charter, in* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS, 3 *et seq.* (on sanctions in general) and 15 (on the sanctions regime under Resolution 1267) (Vera Gowland-Debbas ed., 2004); Luca Radicati di Brozolo & Mauro Megliani, *Freezing the Assets of International Terrorist*

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The Committee's activities are directed toward the fight against international terrorism. To take up this fight, the Security Council gave the Committee the task of keeping and updating a list of individuals and entities designated as being associated with Usama bin Laden, Al-Qaida and/or the Taliban, all of which are subject to the freezing of assets, travel bans and an arms embargo. "International terrorism"[2] implies by definition that this UN policy was deemed to be an international issue from the outset. It is true that in the past States have handled the issue of terrorism as a matter of domestic policy. However, with Usama bin Laden's terrorism reaching beyond Afghanistan's borders, the decentralized structure of his network, and the increasing mobility of terrorists the issue became internationalized. Therefore, the members of the UN Security Council decided to tackle this internationalized problem in the international forum of the UN, which, in the context of this sanctions regime, exercises public authority[3] through legally binding decisions. What they did not do was to provide the corresponding opportunities of review for the persons concerned by a listing. The members of the UN Security Council might thus have tried to use the international level in order to escape national standards of human rights protection and judicial review.

While the question of legal protection against the listing as a terrorist suspect is at the forefront of the legal discussion, the precise procedure of the listing and de-listing of terrorist suspects and the work of the Committee has so far taken a back seat. This paper takes a closer look at the Committee's tasks and procedures and tries to identify principles of international institutional law. Its principal argument is that, after repeated amendments to its guidelines, the Committee's procedures contain the germ of an administrative procedure based on the rule of law which may, to some extent, balance the lack of judicial review on the UN level. However, there is still a long way to go until a standard comparable to national judicial review has been achieved.

In the course of the legal analysis of the sanctions regime the article explains the institutional framework and the concretizing rules as well as the listing of terrorist suspects (B. I.-II.). It then focuses on the procedural regime with the listing and de-

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Organisations, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 377, 381 *et seq.* (Andrea Bianchi ed., 2004); ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 170 *et seq.* (2004).

[2] SC Res. 1267 of 15 October 1999, fifth recital.

[3] On the exercise of international public authority as the focus of the research project of which this contribution forms part, *see* von Bogdandy, Dann & Goldmann, *Developing the Publicness of Public International Law*, in this issue.

listing procedure (B. III.) before surveying the review and enforcement mechanisms (B.IV.). The concluding section extrapolates what could be emerging legal principles for the exercise of public authority by international institutions (C.).

B. Legal Analysis

I. Institutional Framework and Concretizing Rules

1. Institutional Framework

On the international level, the governance regime, i.e. the legal regime governing the sanctions regime, is located within the UN. The UN Charter, the founding document of the UN, forms the legal basis of this regime. It explicitly cites as one of the purposes of the UN the maintenance of international peace and security.[4]

The Security Council is the UN body entrusted with the responsibility for the maintenance of international peace and security. After the historical development in international law from the *ius ad bellum* to the prohibition of the use of force,[5] the Security Council has the singular responsibility of declaring a situation to amount to a threat to or breach of peace or an act of aggression (Art. 39 UN Charter). Apart from self-defense (Art. 51 UN Charter) this is the only case in which measures may be taken that include the use of force. In exercising this responsibility, the Security Council has a wide discretion.[6] It adopts resolutions prescribing measures to be taken in the concrete case. Thus, the Security Council adopted resolutions 1267 (1999) of 15 October 1999 and 1333 (2000) of 19 December 2000, which established the Consolidated List of terrorist suspects and the Sanctions Committee, which was mandated to administer the sanctions regime. These resolutions of the Security Council are binding on UN Member States (Art. 25 UN Charter) and prevail over any other obligations under any other international agreement (Art. 103 UN Charter).

The Security Council has established the Sanctions Committee in accordance with Art. 29 UN Charter and delegated its responsibilities for the sanctions regime to the Committee. The Committee is thus a subsidiary organ of the Security Council, administering the Consolidated List of terrorist suspects and deciding on listings

[4] Art. 1(1) UN Charter.

[5] Albrecht Randelzhofer, *Art. 51, in* I THE CHARTER OF THE UNITED NATIONS – A COMMENTARY, paras. 1-3 (Bruno Simma ed., 2002).

[6] Jochen Abr. Frowein & Nico Krisch, *Art. 39, in* I THE CHARTER OF THE UNITED NATIONS – A COMMENTARY, para. 4 (Bruno Simma ed., 2002).

and de-listings. The Sanctions Committee is composed of all the members of the Security Council.[7] Its Chairman and the two Vice-Chairmen are appointed by the Security Council.[8] The UN Secretariat assists the work of the Committee by providing secretariat services.[9] The Committee is also supported by the Analytical Support and Sanctions Monitoring Team[10] ("the Monitoring Team") of eight experts appointed by the Secretary-General. The members of the Monitoring Team have specialized knowledge in counter-terrorism, financing of terrorism, arms embargoes, travel bans and related legal issues. The Monitoring Team operates under the direction of the Committee, but the views and recommendations expressed in its reports do not necessarily reflect the views of the Committee or the United Nations. The Monitoring Team assists the Committee, *inter alia*, by evaluating the Member States' implementation of the sanctions regime and reporting on developments that have an impact on the sanction regime's effectiveness, such as the changing nature of Al-Qaida and its continued threat.

On the European Union ("EU") level, the EU Council adopts a Common Position as part of its Common Foreign and Security Policy pursuant to Arts. 11, 15 EU. The EC Council then adopts regulations based on Arts. 60, 301, 308 EC implementing this Common Position. To the extent to which the sanctions are governed by EC regulations, the sanctions are binding and directly applicable in the EC Member States.[11] As far as a sanction does not fall under EC competences, as in case of an arms embargo, that sanction must be implemented by the competent bodies on the national level. Thus, the governance of the sanction regime is carried out within a multi-level structure: the Security Council and the Sanctions Committee acting on the UN level, the EU Council acting on the European level and various national authorities acting on the national level.

2. The Concretizing Rules: The Guidelines of the Committee

In resolution 1390 (2002) of 16 January 2002 the Security Council mandated the Committee to promulgate such guidelines and criteria "as may be necessary" to facilitate the implementation of the sanctions measures.[12] In these "Guidelines of

[7] Committee Guidelines in the amended version of 12 February 2007, para. 2(a).

[8] *Id.* at para. 2(b) and (c).

[9] *Id.* at para. 2(d).

[10] This Monitoring Team was first established by SC Res. 1526 of 30 January 2004, para. 6 and was the successor of the Monitoring Group established by SC Res. 1363 of 30 July 2001, para. 4(a).

[11] Art. 249 (2) EC.

[12] *See* UN Res. 1390 of 16 January 2002, para. 5(d).

the Committee for the Conduct of its Work," last amended 12 February 2007, the Committee set forth, *inter alia*, the procedure of the listing and de-listing of terrorist suspects. These guidelines are the decisive legal instrument that facilitates the implementation of the measures adopted by the Security Council. The Committee decides upon the guidelines and amendments thereto by consensus.[13]

3. The Binding Nature of Human Rights Standards for the Security Council

Since targeted sanctions have a significant impact on individuals, the question arises whether the Sanctions Committee and the Security Council have to respect certain human rights standards such as the right of due process when implementing the sanctions regime. If the answer is in the affirmative, due to the lack of judicial review on the international level this could impose a standard of review on national and regional courts, which they must apply when deciding de-listing cases.

The question whether international human rights bind the UN Security Council in its actions has been a matter of continuous debate and is only outlined shortly here.[14] There are two main positions: one argues that the Security Council is – at least when acting under Chapter VII – not bound to respect human rights because they are overridden by the interest in maintaining international peace and security.[15] This view may be supported by UN Charter's drafters' aims and goals. The world was just emerging from the ravages of World War II and the framers intended to form a functioning Security Council with central decision-making powers; indeed, Art. 1 of the UN Charter (Purposes and Principles) mentions human rights concerns only after the maintenance of international peace and security, which is the first purpose listed. Furthermore, the wording of Chapter VII UN Charter is very broad and does not mention human rights.[16] The other position takes the view that the UN Security Council is bound by international human rights in all its actions, including under Chapter VII.[17] Although not a party to the

[13] Committee Guidelines in the amended version of 12 February 2007, para. 4(a).

[14] *See* August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AJIL 851 (2001) (also citing the different positions).

[15] *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS 294 (1951).

[16] *See* Anna M. Vradenburgh, *The Chapter VII Powers of the United Nations Charter: Do They "Trump" Human Rights Law?*,14 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL 175, 177, 180, 183 (1991). *See also* Gabriel H. Oosthuizen, *Playing the Devil's Advocate: the United Nations Security Council is Unbound by Law*, 12 LEIDEN JOURNAL OF INTERNATIONAL LAW 549 (1999).

[17] Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), U.N.

respective human rights instruments, the UN must respect the UN Charter[18] which grants, *inter alia*, a right to due process and a right to a fair trial.[19] One systematic argument is that Art. 24 (2) UN Charter obliges the Security Council to act in accordance with the purposes of the UN and that Art. 1 UN Charter explicitly mentions the respect for human rights as one of these purposes. Another argument is that the UN, by contributing to the development of international human rights law, created the legitimate expectation that the UN itself will observe standards of due process.[20]

The former position, which denies that the Security Council is bound by international human rights, disregards the possibility that a historical perspective might be inappropriate where the Security Council targets individuals with sanctions. This development was not foreseen when the Charter was drafted. Rather, the latter position, arguing for the binding nature of international human rights, is convincing when it says that the Member States could not opt out their customary law obligations by founding the UN.[21]

II. The Listing as Terrorist Suspect

From an administrative perspective, the crucial element for the operation of the governance regime is the listing as a terrorist suspect on the Consolidated List maintained and managed by the Committee. The Committee takes the decision on whom to list as a terrorist suspect by examining whether the respective individual or entity is associated with the Taliban, Usama Bin Laden or the Al-Qaida organization.[22] The decision is taken with respect to a specific individual or

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Doc. E/C.12/1997/8 (1997); DE WET (note 1), at 199; Hans-Peter Gasser, *Collective Economic Sanctions and International Humanitarian Law,* 56 ZAÖRV 871, 880 (1996); see *International Law Association Berlin Conference (2004), Accountability of International Organisations*, 1 INTERNATIONAL ORGANIZATIONS LAW REVIEW (IOLR) 221, 250 (2004).

[18] DE WET (note 1), at 199; Bardo Fassbender, *Targeted Sanctions Imposed by the UN Security Council and Due Process Rights*, 3 IOLR 437, 449 (2006).

[20] Fassbender (note 18); De Wet & Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YEARBOOK OF INTERNATIONAL LAW 166, 173 (2002).

[21] *See* Reinisch (note 14), at 858 ("... the assumption that the UN member states could have succeeded in collectively "opting out" of customary law and general principles of law by creating an international organization that would cease to be bound by those very obligations appears rather unconvincing.").

[22] SC Res. 1333 of 19 December 2000, para. 8(c); SC Res. 1617 of 29 July 2005, para. 2.

entity.[23] It is followed by listing the name and other identifying data in the Consolidated List which triggers the legal consequences of the imposition of the sanctions on the listed person or entity. The Consolidated List thus has a double function: on the one hand, it reflects the decision of the Committee to subject a person to the sanctions regime. On the other hand, the Consolidated List serves as a database for the administrating levels of the EU and the UN Member States.

1. The Consolidated List of Terrorist Suspects

The Consolidated List[24] is divided into four sections: the first section contains the individuals considered as belonging to or associated with the Taliban, the second deals with the respective entities, the third section comprises the individuals considered as belonging to or associated with Al-Qaida and the fourth the respective entities. In June 2008, 380 individuals and 113 entities were listed.[25] Only eleven individuals and 24 entities were recorded as removed from the Consolidated List.[26] The names of the individuals and entities on the Consolidated List[27] are arranged in alphabetical order.

In case of individuals, the Consolidated List contains the following identification information: a permanent reference number, up to four names, title, designation, date and place of birth, aliases of good and low quality, nationality, passport number, national identification number, address, the date of entry into the Consolidated List and other data. In case of entities, the Consolidated List provides the following information: permanent reference number, name, present and former aliases, address, the date of entry into the Consolidated List and other data.

The maintenance of a list is also a typical feature of the exercise of public authority in multi-level systems: with its help, the competent authority on the national level may – on the basis of implementing national laws – act *vis-à-vis* the individual whereas at the international and regional level, the lists are necessary to ensure (or at least try to ensure) that there is legal certainty through a database explicitly identifying the suspects subject to the sanctions and that the lower levels implement the measures in a uniform manner.

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[23] See for details of the listing procedure, *infra*, B. III.1.

[24] The Consolidated List was first introduced by SC Res. 1333 of 19 December 2000, para. 16(b).

[25] *See* http://www.un.org/sc/committees/1267/consolist.shtml.

[26] *Id.*

[27] A document on the "Guidance for Searching the Consolidated List" of 18 October 2006 is available at: http://www.un.org/sc/committees/1267/pdf/sguidance.pdf.

2. The Legal Effect of the Listing

Every listed individual or entity is subject to the sanctions of a freeze of assets, a travel ban and an arms embargo by all UN members.[28] Only both elements – the listing and the sanctions – taken together generate the intended regulatory impact: the identification of the individual or entity listed and the legal consequence of the application of the sanctions.

The element of the listing may be likened – with all the prudence necessary with such comparisons - to the "*Verwaltungsakt*" that the German administrative law uses as its main instrument.[29] The difference between the sanctions regime and German administrative law, however, is that with the German "*Verwaltungsakt*" the acting authority directly addresses the citizen by prescribing a concrete behavior which directly applies to this individual.[30] In case of the listing there is *de iure* no such direct effect on the individual: e.g., in the context of the travel ban, transit through the territory of UN Member States is not automatically prohibited since the individual is not the immediate addressee of the sanction. Assets are not frozen in the very moment when the UN takes the listing decision. It is still the UN Member State as the classical subject of international law that has to implement the listing by adopting a national law. For example, the freezing of assets still requires a transforming act providing for the asset freeze within the Member States' territory. The UN Member State remains the addressee of the UN sanctions regime. There is no direct effect on the individual. In this regard the phenomenon examined here may be referred to as a classical[31] international administrative act – compared to other international acts having *de iure* direct effect on the individual.[32]

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[28] SC Res. 1333 of 19 December 2000, para. 2.

[29] The "*Verwaltungsakt*" requires by definition that there is a measure by an administrative body regulating a concrete, singular case with an effect on an individual outside this administration (Art. 35 of the German Administrative Procedure Act). With the "international administrative act" of the sanctions regime, the measure would be the listing and the administrative body would be the Committee. The Committee regulates because the listing triggers the legal consequence of the imposition of the sanctions. The listing concerns a concrete, singular case because the listing identifies and individualizes the targeted person. This listing has an impact on the individual outside the administration since it concerns not merely UN internal matters but imposes on UN Member States an obligation to subject – without further discretion of the UN Member States – a specific individual or entity to the sanctions. On the different instruments of international public authorities see Goldmann, in this issue.

[30] Directly comparable to the German "*Verwaltungsakt*" is WIPO's international registration of trademarks, see Kaiser, in this issue.

[31] Alluding to the classical period of international law with the States as the sole actors.

[32] As in the case of WIPO, see Kaiser, in this issue.

A special feature of the UN Charter, however, generates a *de facto* effect of a listing on the listed individual: Art. 25 UN Charter says that UN Member States agree to accept and carry out the decisions of the Security Council in accordance with the UN Charter. This makes the listing decision of the Committee, which is a subsidiary body[33] of the Security Council binding on the Member States. Furthermore, since the final addressee of the sanction is individually identifiable by the information included in the Consolidated List, the Member State does not have any discretion as to whether it implements the sanctions or not or as to whom to sanction.[34] The national level becomes the mere executing assistant of the Committee.

3. Multi-level Aspects

This leads to another particularity of the sanctions regime: its multi-level aspects. There are several different levels involved in the governance of the sanctions regime.

First, one must distinguish between the preconditions and the legal consequences of the sanctions regime. There are two preconditions: the decisive, formal precondition is the listing of the respective individual or entity. Prior to the listing, however, the Committee must come to the conclusion that there is a certain relationship between the individual or entity and the Taliban, Al-Qaida or Usama bin Laden. For the individual or entity to be put on the list, they must be "associated with" them.[35] Both preconditions were laid down in resolutions by the Security Council.[36] It is, however, the Committee that decides whether these preconditions are fulfilled. As far as the listing is concerned, the Committee even has the opportunity to influence the listing procedure by amending the respective section of its guidelines.

The legal consequences of a listing, i.e., the application of the sanctions, are to be implemented by the UN Member States. There is no discretion as to the implementation. However, a similar distinction as in the German administrative law could apply here which could make a difference with regard to legal

[33] *See* Committee Guidelines in the amended version of 12 February 2007, para. 1.

[34] That is the difference to the general fight against terrorism that was started with SC Res. 1373 of 28 September 2001. This resolution provides for sanctions similar to the 1267 sanctions regime but does not foresee the maintenance of a Consolidated List at the UN level. That gives discretion to the States, which decide themselves whom to subject to the sanctions.

[35] *See* on this standard, *infra*, B.III.1.b.

[36] SC Res. 1333 of 19 December 2000, para. 8(c).

protection: German law differentiates between the discretion of the administrative body whether to act at all, and discretion regarding the means of action the administrative body chooses itself to fulfill its tasks.[37] The binding nature of the Security Council's decisions, as seen above, does not leave any discretion to the Member States as to "whether" they will act. Whether the Member States have full discretion on "how" they implement the measure remains an unanswered question. That, in turn, very much depends on the precision of the measures and the notions of asset freeze, travel ban and arms embargo. The more these measures leave room for interpretation, the wider the discretion of the national authorities implementing them. The interpretation of these terms would be national acts which could be challenged before national courts. In many national jurisdictions courts will have to take the resolutions of the Security Council into account in their findings. It might have been for this reason that the Committee has released a more precise explanation of what constitutes an "arms embargo."[38]

The fact that different levels are involved in the administration and implementation of the sanctions regime obstructs legal protection of the listed individual or entity since the competences of the different authorities are not easy to perceive and the standards of review are blurred.

4. The "Sanctions Provision" as a Concise Formula for the Sanctions Regime

It would be useful to distill the results which were found above with regard to the legal effects of the listing, its multi-level aspects, and the institutional framework of the sanctions regime into one concise formula in the form of a "sanctions provision" which may read:

> Whenever an individual or entity is listed in the Consolidated List of the Committee as being associated with Usama bin Laden, Al-Qaida and/or the Taliban, all UN members are obliged to impose an asset freeze, a travel ban and an arms embargo on this individual or entity.

This "sanctions provision," on the one hand, puts the preconditions of the imposition of the sanctions (stemming from different legal documents) as well as

[37] HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT 135 (2006, 16th ed.).

[38] Paper "Arms Embargo: Explanation of Terms" of 1 November 2006, available at: http://www.un.org/sc/committees/1267/pdf/ArmsEmbargo.ExplanationTermsEng.pdf. It is the only explanation of this kind so far.

the legal consequences of being listed into one sentence. On the other hand, it is formulated as a conditional "if – then" statement, which means that only if the preconditions are fulfilled do the legal consequences of imposing the sanctions follow.

Such a formulation of the sanctions provision enables the legal observer to recognize the preconditions required for the regime to become operative and to see the legal consequences that are triggered if these preconditions are fulfilled. Even more importantly, regarding the multi-level dimension, this sanctions provision paradigm facilitates a comprehensive understanding of the roles of the various levels involved: on the international level the Security Council as the authority prescribing the "associated with" precondition for being listed, the Sanctions Committee as the authority mandated with the listing and on the national level the UN Member States responsible for implementing the assets freeze, travel ban and arms embargo. At the same time, the subsequent question of (judicial) review of the sanctions regime can be examined more easily, since the sanctions provision allows for a clearer distinction between the named levels involved.

III. The Procedural Regime

The procedure[39] for amending the Consolidated List is laid down in the Committee guidelines. To gain an insight into the administrative law aspects of the sanctions regime evolving from the amendments of the guidelines, it is worthwhile looking at the previous listing and de-listing procedure and to compare those standards to those now in force.

1. The Listing Procedure

a) The Previous Listing Procedure

According to the previous listing procedure the Committee was to update the Consolidated List regularly once it had agreed to include relevant information it had received from UN members or international or regional organizations.[40] Proposed additions to the Consolidated List were to include, to the extent possible, a description of the information that formed the basis for the listing.[41] They were also to include relevant and specific information to facilitate the identification by

[39] Generally on procedures in international institutions von Bernstorff, in this issue.

[40] Committee Guidelines in the revised version of 21 December 2005, para. 6(a).

[41] *Id*. at para. 6(b).

competent authorities of the persons and entities concerned, such as – in the case of individuals - the name, date of birth, place of birth, nationality etc. and in case of groups, undertakings or entities the name, acronyms, address, headquarters, subsidiaries, etc.[42] The Committee had to consider expeditiously requests to update the Consolidated List on the basis of relevant information received. It decided by consensus. If consensus could not be reached – even after further consultations – the matter had to be submitted to the Security Council.[43] The Committee had to communicate any modification to the Consolidated List immediately to the Member States and to make the updated Consolidated List available on the internet.[44]

b) The Amended Listing Procedure

According to the guidelines of 12 February 2007 the Committee is to update regularly the Consolidated List once it has agreed to include relevant information received from Member States or international or regional organizations.[45] The Member States are encouraged to establish a national mechanism or procedure to identify and assess appropriate candidates for listing.[46] They are further encouraged to seek additional information from the State(s) of residence and/or citizenship of the individual or entity concerned.[47] Member States must provide a statement of case with as much detail as possible on the basis(es) for the listing, including specific findings demonstrating the association or activities alleged, the nature of the supporting evidence (e.g., intelligence, media, etc.), other supporting evidence and details of any connection with an already listed individual or entity.[48] Furthermore, Member States must use the cover sheet attached to the resolution[49] when proposing names for the Consolidated List. In addition to the information requested by the former guidelines, the information to be furnished under the amended guidelines should now include the following information for the purpose of accurate identification:

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[42] *Id*. at para. 6(c).

[43] *Id*. at para. 4(a).

[44] *Id*. at para. 6(d) and (e).

[45] Committee Guidelines in the amended version of 12 February 2007, para. 6(a).

[46] *Id*. at para. 6(b).

[47] *Id*. at para. 6(c).

[48] *Id*. at para. 6(d).

[49] Annex I to SC Res. 1735 of 22 December 2006.

i. for individuals all available names, citizenship, gender, employment/occupation, national identification number, addresses and current location, and
ii. for entities, the tax or other identification number and other names by which it is known or was formerly known.[50]

The Committee will then consider the proposed listings on the basis of a standard which is called the "associated with" standard.[51]

The Committee takes the decision by consensus as under the previous procedure.[52] When new entries are included in the Consolidated List, the publicly releasable portion of the statement of case must be included in the communication to the Member States.[53] It is for the State proposing a listing (the "designating" State/government) to identify those parts of the statement of case which may be released publicly.[54] The Secretariat shall, after publication but within two weeks after a name is added to the Consolidated List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national. Furthermore, the Committee shall also include the publicly releasable portion of the statement of case, a description of the effects of designation, as set forth in the relevant resolutions, the Committee's procedures for considering the delisting requests, and the provisions of resolution 1452 (2002), which governs the possible exceptions from the asset freeze.[55] After having received this notification the Member States are called upon to take reasonable steps to inform the listed individual or entity of the measures imposed on them, the Committee's guidelines, the listing and de-listing procedures, and the provisions of resolution 1452 (2002) governing exceptions.[56]

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[50] Committee Guidelines in the amended version of 12 February 2007, para. 6(e).

[51] *See*, *infra*, in this section.

[52] Committee Guidelines in the amended version of 12 February 2007, para. 4(a).

[53] *Id*. at para. 6(g).

[54] *Id*. at para. 6(d).

[55] *Id*. at para. 6(h).

[56] *Id*.

The Committee has to decide on a listing by applying the "associated with" standard, which means that a relationship between the potential terrorist suspect and Usama bin Laden, Al-Qaida and/or the Taliban must be established. The establishment of such a relationship does not, however, trigger legal consequences for the UN members, least of all for the individual concerned. It is rather by virtue of the listing on the basis of this preliminary examination that the UN members are under a duty to implement the sanctions against the named individual or entity.

Paragraph 2 of resolution 1617 (2005) sets forth that "acts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Usama bin Laden or the Taliban include:

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- supplying, selling or transferring arms and related material to;
- recruiting for; or
- otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

c) Assessment

Although the new requirements for being listed are not in a well prepared order, the different aspects form a picture of an evolving administrative procedure which can (compared with the earlier standards) at least improve the protection of the individual already in the stadium before being listed. The main elements of protection for the individual are the requirements of a statement of case,[57] the accompanying cover sheet,[58] the express introduction of the "associated with" standard, and the short time periods for notifications as well as the requirement of detailed information relating to the individual. Also, it is expressly mentioned that the Committee must agree to include someone in the Consolidated List.[59]

[57] This requirement can be seen as the principle of stating reasons as an element of the rule of law, see von Bernstorff, in this issue.

[58] This requirement can be seen as an element of good governance, specifically transparency, see von Bernstorff, in this issue.; International Law Association Berlin Conference (note 17),221, 229.

[59] Committee Guidelines in the amended version of 12 February 2007, para. 6(g).

The statement of case imposes a duty on the designating State to provide explanations. The designating State has to justify the proposal not only by a narrative description of the respective information but also by a detailed collection of evidence that allows the Committee to assess the case objectively and to apply its "associated with" standard. The requirement of a cover sheet which is mandated by resolution[60] and annexed to the resolution as a form[61] guarantees the necessary factual background: all the information is collected by the Committee in the same way, so that nothing is forgotten and the prescribed written form ensures that nothing gets lost. The level of detail of the information reduces the risk that the wrong persons are listed or that errors concerning names occur. After the listing, the detailed data facilitates the identification of the individual or entity against which the competent national authorities are to take action. The application of the "associated with" standard gives the Committee's decision-making process an impetus away from a political decision and towards a decision according to written legal standards. The potential advantage for the individual is that there is at least some legal certainty as to the standards applicable to listings. The rule that the Committee must agree to any inclusion in the Consolidated List indicates that listing new individuals or entities is not merely to be thought of as being an automatic procedure after the information of the designating State is submitted to the Committee but requires a formal and informed decision. The mandate of the Secretariat to notify the Permanent Mission within two weeks after a name is added to the Consolidated List avoids putting the individual into limbo about the status of the listing and permits the person or entity to institute timely remedies against this listing. However, for the listed persons this only works in conjunction with the call upon States to inform them of the designation. This notification after a new listing is thus simultaneously the first and most important step for a de-listing. The notification should inform the individual or entity of the measures imposed on them and include the Committee's guidelines, the listing and de-listing procedures and the provisions of resolution 1452 (2002) governing exceptions. While there is no disclosure of the reasons for the listing, as is known from national administrative law,[62] the details provided in the notification, in addition to the plain information of the listing itself, make the person or entity concerned aware of the consequences of such a listing and enable them to challenge the listing by pursuing a de-listing procedure or at least by applying for an exception from the asset freeze. Thus, the protection of the individual is improved by the new amendments to the listing procedure.

[60] SC Res. 1735 of 22 December 2006, para. 7.

[61] Annex I to SC Res. 1735 of 22 December 2006.

[62] Section 39 of the German Administrative Procedure Act.

2. The De-listing Procedure

a) The Previous De-listing Procedure

The previous de-listing procedure[63] had to be initiated by the petitioner (individual, groups, undertakings, entities) by asking the government of residence and/or citizenship to request a review of the case in the Sanctions Committee.[64] At the same time, the petitioner had to provide justification for the de-listing request, offer relevant information, and request support for de-listing.[65] The petitioned government was then to approach the government originally proposing designation bilaterally to seek additional information and to hold consultations on the request.[66] Also, the designating government(s) could request additional information from the petitioned government. The governments involved could also consult with the Chairman of the Committee during their bilateral consultations.[67] If the petitioned government, after having reviewed any additional information, wished to pursue a de-listing request, it was to seek to persuade the designating government(s) to submit jointly or separately a request for de-listing to the Committee. However, the petitioned government was also able to submit a de-listing request without such an accompanying petition from the designating government.[68] The Committee decided by consensus. If consensus could not be reached, even after further consultations, the matter was to be submitted to the Security Council.[69]

b) The Amended De-listing Procedure

A recent novelty was the creation of the so-called "focal point," which can receive de-listing requests directly from individuals, entities etc.[70] It was established as part

[63] The latest version to be found in the Guidelines of the Committee at: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

[64] Committee Guidelines in the amended version of 29 November 2006, para. 8(a).

[65] *Id*. at para. 8(a).

[66] *Id*. at para. 8(b).

[67] *Id*. at para. 8(c).

[68] *Id*. at para. 8(d).

[69] *Id*. at para. 8(e).

[70] SC Res. 1730 of 19 December 2006, para. 1.

of the Security Council's endeavor to ensure fair and clear procedures for removing individuals and entities from sanctions lists.[71] The focal point is an entity which the Secretary-General was requested to establish within the Secretariat (Security Council Subsidiary Organs Branch).[72] It is "focal" because it works for *all* active Sanctions Committees.[73] Its main tasks are, *inter alia*, to receive de-listing requests from petitioners, i.e., individual(s), groups, undertakings, and/or entities on the Sanctions Committee's list,[74] to acknowledge receipt of the request, to inform the petitioner of the general procedure for processing that request,[75] to forward the request to the designating government(s) and to the government(s) of citizenship and residence,[76] and to inform the petitioner of the Committee's decision to grant the de-listing petition or to dismiss it.[77] It is thus clear that the function of the focal point is of a purely auxiliary nature: it merely receives and forwards requests and other information.

The petitioner for a de-listing is free to choose the previous de-listing procedure via their government of residence or citizenship instead of addressing the focal point.[78] When the focal point receives the de-listing request, it forwards the request to the designating government(s) and to the governments(s) of citizenship and residence for their information and possible comments. Those governments are encouraged to consult with the designating government(s) before recommending de-listing.[79] If, after these consultations, any of these governments recommends de-listing, that government will forward its recommendation with an explanation either through the focal point or directly to the Chairman of the Sanctions Committee, who will then place the request on the Committee's agenda.[80] The Committee decides by

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[71] SC Res. 1730 of 19 December 2006, 5th recital; see also the statement of the President of the Security Council of 22 June 2006 (S/PRST/2006/28) and the respective call upon the Security Council of the Heads of State and Government in the World Summit Outcome Document of 16 September 2005 (GA Res. 60/1 of 16 September 2005, para.109).

[72] SC Res. 1730 of 19 December 2006, para. 1.

[73] *See* SC Res. 1730 of 19 December 2006, para. 2.

[74] Committee Guidelines in the amended version of 12 February 2007, para. 8(d)(i).

[75] *Id*. at para. 8(d)(iv).

[76] *Id*. at para. 8(d)(v).

[77] *Id*. at para. 8(d)(viii).

[78] *Id*. at para. 8(b).

[79] *Id*. at para. 8(d)(v).

[80] *Id*. at para. 8(d)(vi)(a).

consensus. If consensus cannot be reached, further consultations are undertaken. If consensus still cannot be reached, the matter shall be submitted to the Security Council.[81] If any of the consulted governments opposes the request, the focal point will so inform the Committee. All Committee members are encouraged to share information they possess in support of the de-listing request with the designating government(s) and the government(s) of residence and citizenship.[82] If, after a reasonable time (3 months), none of the consulting governments comment or indicate that they are still working on the request and require additional time, the focal point will so notify all members of the Committee and provide copies of the de-listing request.[83] Any Committee member may then, after consultation with the designating government, recommend de-listing. If, after one month, no Committee member recommends de-listing, the request shall be deemed rejected. The Chairman of the Committee shall inform the focal point accordingly.[84] The focal point will inform the petitioner of the decision once it has been taken.[85]

c) Assessment

The fact that the focal point can receive de-listing requests directly from a petitioner provides the individual with the opportunity to access directly the UN level instead of asking the State of residence or citizenship for diplomatic protection – a procedure which entails the uncertainty of the petitioned State's discretion,[86] often involves political considerations, and which usually takes some time for the decision to be taken. This is particularly detrimental when such drastic measures as an asset freeze apply, as is the case under the sanctions regime examined here. In this regard, the amendment of the de-listing procedure is no doubt an advantage for the individual.

However, this benefit of direct access to the level where the listing decision is taken which seems to promise an effective remedy is put into perspective by the fact that the focal point does not decide on the de-listing and does not even forward the de-listing request to the Sanctions Committee for decision. Instead, the designating

[81] *Id*. at para. 8(f).

[82] *Id*. at para. 8(d)(vi)(b).

[83] *Id*. at para. 8(d)(vi)(c).

[84] *Id*.

[85] *Id*. at para. 8(d)(viii).

[86] *See* Wilhelm K. Geck, *Diplomatic Protection*, *in* I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1045, 1051 (Rudolf Bernhardt ed., 1992).

government(s) and the government(s) of residence and citizenship remain the "guards at the gates to the Committee." If they object the request unanimously, there will be no de-listing decision by the Committee.

Given this background, the search for principles of international institutional law in the de-listing procedure with regard to the focal point is not as fruitful as it is for the listing procedure.

IV. Review and Enforcement of the Sanctions Regime

Apart from several general obligations – mainly of the Committee - to report on the sanctions regime[87], the determination of Usama bin Laden, Al-Qaida and the Taliban as a threat to peace, the decision to impose sanctions and the review of these decisions are measures under Chapter VII of the UN Charter and thus exclusively within the scope of the Security Council's competence. The question whether the Security Council is subject to review by other bodies, e.g., by the International Court of Justice, is still a contentious issue.[88]

This must be distinguished from the review of the listing procedure and the listing itself: while amending the listing procedure is generally within the Committee's competence[89], the review of an established listing is highly disputed.

1. Internal Review of the Listing

The established listing on the Consolidated List is in practice the most controversial issue of review with regard to the legal protection of the listed individual.[90] The decision on the de-listing of a person or entity is initially an internal one taken by

[87] Committee Guidelines in the amended version of 12 February 2007, paras. 4(d), 5(b), 5(f), 7, 11(a), 6(i).

[88] Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 520 (1999) (with references to further opinions on the topic in footnote 5).

[89] Committee Guidelines in the amended version of 12 February 2007, para. 5(h). The guidelines may, however, also be influenced by resolutions of the Security Council, see the annex to SC Res. 1730 of 19 December 2006. Before the Security Council influenced the procedure here by prescribing details of the procedure, the former de-listing procedure regulated solely by the Committee was applied for more than four years, *cf.* the adoption of the Guidelines on 7 November 2002. This internal review of the guidelines must be distinguished from judicial review which will meet the same difficulties as the judicial review of the Security Council whose subsidiary organ the Committee is.

[90] *See e.g.* Frowein (note 1), at 793 *et seq.*; Merhdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrats durch staatliche und überstaatliche Gerichte*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV) 41 (2006); Fassbender (note 18), at 477 (with further references in footnote 88).

the Sanctions Committee on the UN level.[91] If the necessary consensus cannot be reached within the Committee, the matter may be submitted to the Security Council.[92]

There is no clear and objective standard of review to be applied in the de-listing procedure. In its latest resolution on the sanctions regime, the Security Council merely decided that the Committee "may" consider *inter alia* whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or no longer meets the criteria of the "associated with" standard,[93] because, for example, the person is deceased or has demonstrably severed all associations with Al-Qaida and its supporters.[94] Since the Committee decides by consensus, one opposing vote can block the decision for a de-listing. There is also no duty in the Guidelines of the Committee to give reasons if the petition for de-listing is rejected. The only provision which could be said to relate to evidence within the de-listing procedure puts the petitioner at a disadvantage: it is on him to justify the de-listing request, offer relevant information and request support for de-listing.[95] This is the opposite of the presumption of innocence.

As an internal procedure conducted by the Committee itself and subject to no clear legal standard, the de-listing is a procedure that falls far short of a judicial review which would include a decision by an independent judge examining the cases on the basis of legal rules. Such legal protection is not available on the UN level.

2. External Review of the Listing

The question thus arises whether such legal protection could be provided by an external review of the listing by regional or national courts. Before the question is addressed as to what implications the assumed obligation of the Security Council to respect human rights[96] may have for an external review, the current practice of the European Court of First Instance (CFI) concerning cases challenging listings will be presented.

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[91] Committee Guidelines in the amended version of 12 February 2007, para. 8(f). For the details of the de-listing procedure see, *supra*,, B.III.2.

[92] Committee Guidelines in the amended version of 12 February 2007, para. 8(f).

[93] As described above, B.III.1.b.

[94] SC Res. 1735 of 22 December 2006, para. 14.

[95] Committee Guidelines in the amended version of 12 February 2007, para. 8(a).

[96] *See* B. I. 3.

a) Practice of Regional Courts

In the sense of an *external* review within the multi-level system, the European Court of First Instance had to deal with cases brought to annul listings in the terrorist suspects list on the European level which is based on the Consolidated List entries on the UN level. The CFI has so far decided on four cases on the 1267 sanctions regime examined here, all of which are now pending before the European Court of Justice (ECJ).[97] As to the scope of review, the CFI held that the EC was bound by the obligations under the UN Charter[98] and that therefore a review of EC regulations based on Security Council resolutions was generally precluded,[99] though in case of an infringement of *ius cogens*, judicial review was possible.[100] However, with regard to the alleged infringements in the first two cases[101] of the applicants' right to property, their right to a fair hearing and their right to judicial review, the Court held that there had been no violation of *ius cogens*. In his Opinion on these two cases, the Advocate General argues that the ECJ must annul the Council regulation that lists the appellant because the regulation violates human rights guaranteed under the EC legal order.[102] In the other two cases[103] the Court held with regard to the relationship of the different jurisdictions (UN, EC, national)

[97] Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2005 ECR-II 3533 (appealed to the ECJ, C-415/05); Case T-315/01, Kadi v. Council and Commission, 2005 ECR-II 3649 (appealed to the ECJ, C-402/05); Case T-253/02, Chafiq Ayadi v. Council of the European Union, 2006 ECR-II 2139 (appealed to the ECJ, C-403/06) and Case T-49/04 Faraj Hassan v. Council of the European Union and Commission of the European Communities, 2006 ECR-II 52 (appealed to the ECJ, C-399/06).

[98] *See* Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (note 97), at para. 243.

[99] *Id*. at para. 276.

[100] *Id*. at para. 277.

[101] Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (note 97); Case T-315/01, Kadi v. Council and Commission (note 97).

[102] Opinion of Advocate General Poiares Maduro in Case T-315/01, Kadi v. Council and Commission (note 97), appealed to the ECJ, C-402/05, para. 56, and Opinion of Advocate General Poiares Maduro in Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (note 97), appealed as Case C-415/05, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, para. 56.

[103] Case T-253/02, Chafiq Ayadi v. Council of the European Union (note 97); Case T-49/04 Faraj Hassan v. Council of the European Union and Commission of the European Communities (note 97).

that it was for the national courts to grant diplomatic protection to the individual seeking to be removed from the Consolidated List on the UN level.[104] In the *Hassan* case, the CFI developed certain supranational fair trial principles that shall guide the decisions of Member States on granting diplomatic protection in cases of de-listing requests.[105]

The obligation of the Member States under EC law to allow their citizens effectively to argue their case for de-listing before the competent national authorities can be likened to the right to be heard and to defend oneself.[106] The obligation not to refuse considering a petition for de-listing too hastily based merely on the fact that the petitioner has not furnished precise and relevant information might be seen as a facilitation of defense. It should be noted, however, that this is not the same as the presumption of innocence. Thus, in multi-level terms, EU law obliges the national authorities to file a de-listing request on the international (UN) level.[107]

b) What Elements Constitute a Right of Due Process?

If we assume at this point that the UN Security Council is bound[108] by international human rights, including the right of due process, [109] the question of what the elements of this right are arises.

A recent study commissioned by the UN Office of Legal Affairs argues that as a minimum standard of "fair and clear procedures" the right of due process should include *inter alia* the right of a listed person or entity to an effective remedy against an individual measure before an impartial institution or body previously

[104] Case T-253/02, Chafiq Ayadi v. Council of the European Union (note 97), at paras. 147-149.

[105] Case T-49/04 Faraj Hassan v. Council of the European Union and Commission of the European Communities (note 97), at paras. 115, 122.

[106] It must be kept in mind here, however, that these rights are based on European law and do not form part of an independent international administrative law, although they might inspire discussion on it. *See* Case T-49/04 Faraj Hassan v. Council of the European Union and Commission of the European Communities (note 97), at paras. 115, 122.

[107] The case law of the European Court of Human Rights (ECtHR), which also had to decide on a case on UN sanctions (s*ee* Eur. Court H. R., Bosphorus Hava Yollari Turizm Ve Ticdaret Anonim Sirketi (Bosphorus Airways) v. Ireland, Judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI, not yet reported) could also be surveyed when examining external reviews of listings by regional courts.

[108] *See* B. I. 3.

[109] On the discussion of due process standards in the context of decisions on the Refugee status, *see* Smrkolj, in this issue.

established.[110] This minimum standard could be derived from a comparative analysis of the respective guarantees in international human rights treaties and national constitutional law.[111]

Specifying the single elements of the right to an effective remedy, the study clarifies that "remedy" means the establishment of any of several different options available to the Security Council, such as an international tribunal, an ombudsman office, an inspection panel, a commission of inquiry or a committee of experts.[112] "Effectiveness" includes considerations such as accessibility and speed of procedure, the fair opportunity to put forward one's case, a well reasoned decision and compliance with the decision.[113] According to a strict interpretation of the term, an effective remedy requires that the competent body has the power to take binding decisions.[114] "Impartiality" requires that matters are decided on an impartial basis, on the basis of facts and in accordance with the law, without any restrictions or improper influences.[115]

c) Application of the Due Process Standards to the Current State of Legal Protection Against UN Sanctions

If these standards are applied to the current state of legal protection of the listed individual, the suspicion that legal protection against UN sanctions is inadequate is corroborated: the "remedy" is merely the request for a delisting addressed to the Sanctions Committee. Notwithstanding the improvement of the individual's legal situation by the option of directly petitioning the UN, rather than requesting diplomatic protection, both the State(s) of residence and/or citizenship and the designating State(s) can still prevent a delisting request from reaching the Sanctions Committee. The newly established "focal point" thus does not improve the individual's legal protection: it is only a body that administers a request but does not have the power to decide on the delisting. With regard to "effectiveness," accessibility is slightly improved by the establishment of the focal point. However

[110] Fassbender (note 18), at 480.

[111] *Id*.

[112] *Id*. at 483-484.

[113] *Id*. at 484.

[114] *See* White Paper "Strengthening Targeted Sanctions Through Fair and Clear Prcedures," prepared by the Watson Institute Targeted Sanctions Project, Brown University of 30 March 2006, 55 note 94. The paper is available at: http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.

[115] Fassbender (note 18), at 484-485.

the Sanctions Committee is still not directly accessible for individuals or entities. Even if the delisting request reaches the Committee, the decision is not taken "impartially," i.e., in accordance with established law and procedure and without any undue influence since the Sanctions Committee, with its members being identical with those of the Security Council, remains a political body driven by the individual States' interests. It is unreasonable to assume that such a committee will objectively apply existent legal rules. Thus, legal protection with due process standards is still not available on the UN level. On the EU level, the CFI provides a remedy and is accessible and impartial within the sense of the above definition. However, as seen above, the case law of the CFI limits the legal protection against UN sanctions to violations of *ius cogens* and denies such a violation in the cases surveyed.

3. Enforcement

The enforcement of the sanctions regime[116] is the Security Council's major interest and corresponding provisions can be traced back to the regime's initial resolution 1267 (1999). Much more than the review of the listing or the sanctions themselves, it was central to the UN´s efforts from the very beginning to ensure that its Member States implement the adopted sanctions. The Committee was established at a time when there was not yet a Consolidated List to manage and was tasked with seeking information from all Member States regarding the action taken by them, monitoring violations of the regime and improving the monitoring of the implementation of the measures.[117] Soon after the Committee was formed, a committee of experts was asked to make recommendations regarding the way the sanctions could best be monitored[118] which led to the establishment of a Monitoring Group of five experts, which was to monitor implementation.[119] Later, the Monitoring Group was succeeded by the Monitoring Team of eight experts. The Monitoring Team was provided a much more detailed catalog of responsibilities, primarily dealing with monitoring and reporting to the Committee.[120] Recent mandates have also given it the responsibility of evaluating cases of non-compliance and the submission of case studies of respective States.[121] The Monitoring Team only assists the Committee

[116] On the enforcement authority of international institutions see Röben, in this issue.

[117] SC Res. 1267 of 15 October 1999, paras. 6(a), 6(d) and 12.

[118] SC Res. 1333 of 19 December 2000, para. 15(a).

[119] SC Res. 1363 of 30 July 2001, para. 4(a).

[120] SC Res. 1526 of 30 January 2004, para. 6 and Annex to the resolution.

[121] SC Res. 1735 of 22 December 2006, para. 32 and Annex to the resolution.

and is not competent to impose any measures on States found not to be in compliance.

C. Concluding Thoughts

In summation, it may be concluded that the Al Qaida Sanctions Committee is a particularly fruitful subject-matter of study with regard to the enhancement of the law of international institutions. There are findings with respect to different categories of principles of international institutional law. Further, adding the ideas of the "sanctions provision" and of the listing as an international administrative act from the legal documents underlying this regime may facilitate scholarly debate.

I. Principles Enabling the Exercise of Public Authority on the International Level

The Security Council's actions are autonomous from the Member States. It decides itself whether Chapter VII is applicable and which measures are to be taken. Furthermore, its decisions are binding and the Member States do not have discretion as to whether or not to implement them. In implementing the sanctions regime the UN Member States must cooperate with the UN. This is not only true with respect to the implementation of the measures in their territory but also the provision of the necessary information to the Committee to enable it to decide about a listing.

II. Principles Restraining the Exercise of Public Authority on the International Level

There are weighty arguments in favor of the view that the Security Council, and with it the Committee, are bound by human rights.[122] This suggests that listings should be examined using human rights as a standard. The listing procedure has also experienced some interesting developments: it is now expressly provided that the Committee must first 'agree' before it includes information in the list. This procedural requirement implies the rule of law in a manner similar to two procedural obligations imposed on the Member States: the obligation to provide a statement of case with the reasons for the listing and a cover sheet for a clear identification of the individual or entity concerned.[123] The "associated with" standard is an element (even if a weak one) of legal clarity and certainty, i.e., rule of law. It is reminiscent of domestic administrative law, which requires an explicit statutory basis for decisions that affect human rights. The obligations of the UN to notify the Member State of the listed person or entity of the listing and the Member State's obligation to inform the individual accordingly can be seen as laid down in the interest of transparency and in order to enable the listed person to challenge the

[122] *See* B. I. 3.

[123] This overlaps with the enabling principle of cooperation seen above.

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listing. Nevertheless, participation and transparency are not yet sufficiently developed,[124] and reasoned decisions[125] are not available. The restraining principles must be further developed and must include the provision of reasons for the listing decision and the application of the principle of proportionality, i.e., the drastic effect the listing has for the individual must be balanced and weighed against the goal of fighting terrorism.

III. The Sanctions Regime as an Example of an International Composite Administration

The sanctions regime is an example of an international composite administration.[126] Listings as well as other decisions concerning the sanctions regime are taken on the international level by the UN as centralized decisions, whereas the concomitant obligations to implement the listing decisions are decentralized, lying with the UN Member States.

IV. Principle of Accountability

The Security Council's general decision to impose sanctions on Al-Qaida, the Taliban and its supporters is a political decision and not subject to review initiated by individuals. Concerning the listing, the Security Council (and thus the Committee) can be assumed to be bound by human rights as principles restraining its actions, as seen above. These restraining principles would be meaningless if the Security Council could not be held accountable in case of human rights violations. In this regard, national or regional courts may examine listings by applying human rights as a standard of review as long as international mechanisms of judicial review are lacking. Thus, potential plans of national political actors to pursue unhindered a strict terrorism policy on the international level may boomerang on them and may be frustrated by the national or regional judiciary. Such scrutiny by national or regional courts may not disrupt effective implementation and functioning of the sanctions regime too much since such national decisions are valid only within the territory of the respective UN member or in the respective region. Rather, the UN may be motivated by this to establish judicial review on the UN level.

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[124] *See* de Wet, *Holding International Bureaucracies Accountable*, in this issue.

[125] As stipulated by the International Law Association (note 17

_Ref201509351 \h * MERGEFORMAT 17), 238.

[126] *See* von Bogdandy & Dann, *International Composite Administration*, in this issue.