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JUDICIAL POWERS, DUE PROCESS AND EVIDENCE IN THE  
SECURITY COUNCIL 1267 TERRORIST SANCTIONS REGIME:  
THE *KADI* // CONUNDRUM

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GLOBAL GOVERNANCE PROGRAMME

*Judicial powers, due process and evidence  
in the Security Council 1267 Terrorist Sanctions Regime:  
the Kadi II conundrum*

LISA GINSBORG AND MARTIN SCHEININ

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## **Abstract**

The United Nations Security Council regime of listing Al Qaida and Taliban terrorists under Resolution 1267 (1999), as subsequently amended, has been subject to increasing criticism, including through litigation and judicial pronouncements. The role of EU courts in voicing the criticism, and quashing EU-level implementation measures of the sanctions required under the 1267 regime, has become important. The authors assess the current status of the 1267 regime, notably after the adoption of Resolution 1904 (2010) and the establishment of the office of a delisting Ombudsperson. In the view of the authors, also after the reforms, the 1267 regime falls short of international or European standards concerning fair trial or due process. After discussing the Kadi II ruling by the General Court of the EU, the authors propose a political solution to the tension between the legal orders of the UN and the EU, namely that those EU Member States that sit on the Security Council should block any terrorist listing proposal, where the proposing state does not accept the disclosure of information used for the listing decision in a manner that will enable the EU courts to exercise judicial review over the implementation of the resulting sanctions, to a degree that will be acceptable to these courts. As to the issue of the required degree of disclosure, the authors propose that EU courts, departing from the Kadi II ruling by the General Court, should be prepared to accept a more modest degree of disclosure than the sharing of all evidence with the listed individual or entity.

## **Keywords**

Terrorism, sanctions, United Nations, courts



## Introduction\*

This Working Paper about the 1267 Security Council Sanctions regime discusses the legal limitations to the powers conferred to the Security Council under Chapter VII of the UN Charter and the implications in relation to international human rights standards. It holds that the Security Council has taken on a quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. In particular it addresses the question of judicial review of sanctions in light of the recent establishment of the Office of the Ombudsperson to receive requests for delisting from the 1267 'Consolidated list' and the recent *Kadi II* judgment by the General Court of the European Union (EU). It concludes that, while effective judicial procedures for review are necessary, but deficient in the 1267 regime in its current form, the disclosure of evidence appears to present particular challenges in this respect.

## The 1267 Sanctions Committee and the powers of the UN Security Council

The Al-Qaida and Taliban Sanctions Committee was established pursuant to Security Council Resolution 1267 (1999)<sup>1</sup> for the purpose of overseeing the implementation of sanctions imposed on Taliban-controlled Afghanistan for its support and harbouring of Osama bin Laden. The sanctions regime has been modified by subsequent resolutions,<sup>2</sup> all adopted under Chapter VII of the UN Charter so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, Osama bin Laden or the Taliban wherever located. In addition to overseeing States' implementation of the sanctions measures, the Committee maintains a list of individuals and entities belonging to or associated with Al-Qaida or the Taliban ("the Consolidated List") to whom the sanctions are to be applied. Once the name of an individual or an organization is placed on the list, through initiative by any Security Council member and a quick tacit approval by other members, all states have the obligation to freeze the assets of the designated person/organization and ban their travel.

It is contested whether the 1267 Regime, in its current form, is compatible with the powers of the Security Council under Chapter VII of the UN Charter. In particular, concerns followed Security Council Resolution 1390 (2002),<sup>3</sup> which was adopted following the defeat of the Taliban regime in Afghanistan to modify the 1267 regime, and constitutes the first example of an open-ended sanctions resolution, adopted under Chapter VII of the Charter, without any link to a specific territory or state. Original Resolution 1267 could be seen as a temporary emergency measure by the Security Council, using its Chapter VII powers to address a specific threat to peace and security, and the specific circumstance of the Taliban exercising de facto power in Afghanistan justifying sanctions being imposed on the Taliban and not a State. However with the shift to a sanctions regime resulting in a global list of persons associated with the Taliban or Al-Qaida, and subjecting individuals to sanctions of potentially indefinite duration, the regime no longer is limited in time or space, and its relationship to a specified threat to peace and security can be contested.

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\* This Working Paper (May 2011) builds upon and updates a report to the General Assembly on how the United Nations organization complies with human rights while countering terrorism, submitted by the second author in his capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Doc. A/65/258). The first author assisted the second one in the research for, and drafting of, the report.

<sup>1</sup> Security Council resolution 1267, UN Doc. S/RES/1267 (1999)

<sup>2</sup> Including Security Council resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009).

<sup>3</sup> Security Council resolution 1390, UN Doc. S/RES/1390 (2002)

As an organ of an international organization, the Security Council is bound by its constituent instrument, the United Nations Charter. The Charter, in particular its Chapter VII, provides the foundation for and limit to action by the Security Council. Moreover, Article 24 (2) demands that the Council act in accordance with the purposes and principles of the United Nations which include, in Article 1 (3), the promotion of and respect for human rights when discharging its duties. Article 39 of the Charter regulates the determination by the Security Council of the existence of a threat to peace, breach of peace, or act of aggression. On the basis of this determination, the Council may decide what measures may be taken to maintain or restore international peace and security, including measures not involving the use of armed force, under Article 41 of the Charter.

While the Council is granted a great deal of discretion to determine what amounts to a threat to peace, scholars have argued that this determination must always be linked to a specific concrete situation.<sup>4</sup> The Council should use its exceptional powers solely to take measures deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security. Moreover, measures taken by the Council under Chapter VII should be taken on a case-by-case basis according to the principle of proportionality. The inherent limits to the exercise of the powers of the Security Council under Chapter VII for counter-terrorism purposes are even more pressing in the light of the persistent problem of the lack of a universal, comprehensive and precise definition of “terrorism”.<sup>5</sup> While acts of terrorism remain atrocious crimes, the abstract phenomenon of international terrorism is not, on its own, a permanent threat to peace within the meaning of Article 39 of the Charter. Compared to the situation at the time of the adoption of Resolution 1267 (1999) or Resolution 1373 (2001)<sup>6</sup>, the rapid progress in State ratifications of the International Convention for the Suppression of the Financing of Terrorism nowadays provides a proper legal basis for States’ obligations in the field of countering financing of terrorism.

In its current form, the sanctions regime of the Security Council has been said to have judicial or ‘quasi-judicial’ character.<sup>7</sup> The Security Council is thereby exercising supranational sanctioning powers over individuals and entities, through a permanent global terrorist list. In legal doctrine, there is wide support for a narrow understanding of the judicial or quasi-judicial powers the Security Council can exercise under Chapter VII. Such powers are difficult to reconcile with the legal order of the UN Charter,<sup>8</sup> and with the provisions of Article 41 of the Charter.<sup>9</sup> In cases of doubt, legal determinations by the Security Council should always be limited to a particular situation and should be interpreted as being of a preliminary rather than a final character.<sup>10</sup>

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<sup>4</sup> See M. Happold, ‘Security Council resolution 1373 (2001) and the constitution of the United Nations’ (2003) *Leiden Journal of International Law* 16; V. Santori, ‘The United Nations Security Council’s (broad) interpretation of the notion of the threat to peace in counter-terrorism’, in G. Nesi (ed.) *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Hampshire, UK: Ashgate Publishing Limited, 2006).

<sup>5</sup> The issue of a draft comprehensive convention on international terrorism was referred in 2001 to the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and continues to be pursued by States, including after the call by the General Assembly in the 2005 World Summit Outcome (resolution 60/1) for the adoption of the convention by the General Assembly during its sixtieth session.

<sup>6</sup> Security Council Resolution 1373, UN Doc. S/RES/1373 (2001)

<sup>7</sup> E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) pp.352-354.

<sup>8</sup> Article 92 of the UN Charter clearly identifies the International Court of Justice as “the principal judicial organ of the United Nations”. In relation to the Security Council, Harper asked: “Should such a political institution, conferred with executive powers, answer purely juridical questions [...] when there are appropriate fora for the adjudication of such issues?”, in K. Harper, ‘Does the United Nations Security Council Have the Competence to Act as Court and Legislature?’ (1994) *New York University Journal of International Law and Politics* 27, p.135.

<sup>9</sup> Although Article 41 is phrased in permissive terms, it does not envisage the Council making legal determinations.

<sup>10</sup> See F. Frowein and N. Krisch (2002), ‘Introduction to Chapter VII’ in B. Simma (ed.), *The Charter of the United Nations: a Commentary* (New York : Oxford University Press, 2002) p.708.

Further, if the Security Council is to take on such quasi-judicial functions, it is proper to require that it must observe the procedural requirements universally applied to courts and tribunals, or at least guarantee an equivalent level of due process.<sup>11</sup> In the case of the 1267 regime, it is essential for the Security Council to uphold all relevant due process rights when imposing sanctions on individuals. In this respect, targeted sanctions under the 1267 regime have come under frequent criticism for their human rights shortcomings, by legal scholars and reports commissioned by international organizations,<sup>12</sup> and they have been challenged indirectly in legal proceedings.<sup>13</sup> Most recently the UN High Commissioner for Human Rights has emphasized: “[...] the gulf between the 1267 regime and due-process related requirements in international human rights law and the need for more comprehensive reform remain. There is still no recourse to independent judicial or quasi-judicial review either of a decision to list or denial of a request to de-list”<sup>14</sup>.

In the context of the 2010 report by the UN Special Rapporteur on human rights and counter-terrorism to the UN General Assembly, the authors have taken the view that the 1267 regime amounts to action *ultra vires*, and the imposition by the Security Council of sanctions on individuals and entities under the current system exceeds the powers conferred on the Security Council under Chapter VII of the UN Charter. Through the work of the 1267 Sanctions Committee, established under Chapter VII of the UN Charter, the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. The following section investigates in what way the 1267 Regime continues, after the most recent round of reforms, to fall short of guaranteeing due process-related rights for individuals suspected of terrorism.

### **Procedural standards in the Office of the Ombudsperson of the 1267 Committee**

Over the years and in response to the growing criticism of due process concerns, including from regional and national courts, the 1267 regime has been subject to a number of reforms by the Security Council, including incremental improvements for the status of affected individuals, such as the notification of listed individuals,<sup>15</sup> the dissemination of statements and narrative summaries of reasons for listing<sup>16</sup> and the mandatory review of all entries on the list.<sup>17</sup> The adoption of Resolution 1904 (2009), brought about further improvements to the Committee’s procedures for listing and de-listing, and established an Office of the Ombudsperson to receive requests from individuals and entities seeking to be removed from the Consolidated List.<sup>18</sup>

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<sup>11</sup> Harper, ‘Does the United Nations Security Council Have the Competence to Act as Court and Legislature?’, p.106. See fn.8.

<sup>12</sup> E.g. see B. Fassbender, ‘Targeted Sanctions and Due Process’. Study commissioned by the United Nations Office of Legal

Affairs, Office of the Legal Counsel. (Berlin: Humboldt-Universität zu Berlin, 2006); Cameron, I. (2006) ‘The European Convention on Human Rights, Due Process, and United Nations Security Council Counter-Terrorism Sanctions’. Report commissioned by the Council of Europe, 6 February 2006, available at [www.coe.int](http://www.coe.int).

<sup>13</sup> See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union*, European Court of Justice (Grand Chamber), 3 September 2008; *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), Final Views of the Human Rights Committee, 22 October 2008.

<sup>14</sup> Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/16/50, December 2010, para. 21

<sup>15</sup> Security Council resolution 1735, UN Doc. S/RES/1735 (2006), paras. 10-11.

<sup>16</sup> Security Council resolution 1822, UN Doc, S/RES/1822 (2008), para. 12.

<sup>17</sup> Security Council resolution 1822 (2008), paras. 25-26, fn.16 above.

<sup>18</sup> Security Council resolution 1904, UN Doc. S/RES/1904 (2009), para. 21.

The new delisting procedures under Resolution 1904 present a number of positive elements which may ensure a greater consideration by the Committee of delisting requests, and could improve the fairness of the system. These include the introduction of an independent and impartial Ombudsperson to assist the 1267 Sanctions Committee in the handling of requests for delisting;<sup>19</sup> a greater focus on information gathering and flow of information between the Committee, states (including states of residence and nationality), the Ombudsperson and persons and entities listed, including the possibility for a direct dialogue between the Ombudsperson and the petitioner seeking delisting;<sup>20</sup> the submission of a Comprehensive Report by the Ombudsperson to the Committee laying out the principal arguments concerning the delisting request;<sup>21</sup> a clear timetable for the de-listing procedure, which limits the entire process to a maximum of 6 months; and the obligation for the Committee to provide explanatory comments when rejecting a delisting request<sup>22</sup> and for the petitioner to be informed, to the extent possible of the process and publicly releasable factual information gathered by the Ombudsperson.<sup>23</sup> In June 2010, Ms Kimberly Prost, a Canadian judge, was appointed as Ombudsperson.<sup>24</sup>

Nonetheless, the procedures for delisting under Resolution 1904 (2009) continue to fall short of the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>25</sup> In particular the 1267 regime fails to provide individuals and entities that have been listed with the right to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy.<sup>26</sup> Under Resolution 1904 the Ombudsperson does not have the decision-making power to overturn the listing decision by the Committee and lacks the authority to grant appropriate relief in cases where human rights have been violated, or provide adequate reparation, including compensation, to individuals and entities unfairly listed. The Ombudsperson is not even mandated to make recommendations to the Committee, and delisting decisions are still taken confidentially and by consensus by a political body, the 1267 Sanctions Committee, as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson still depends on the willingness of States to disclose information. States may choose to withhold any information which they deem appropriate to safeguard their security or other interests. The system continues to lack transparency as there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner. Without decision-making powers, the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights. The lack of due process for individuals in the 1267 regime continues to be the subject of criticism from legal commentators and regional and national courts alike.<sup>27</sup>

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<sup>19</sup> Security Council resolution 1904 (2009), para. 21, fn. 18.

<sup>20</sup> Security Council resolution 1904 (2009), Annex II, para. 5, fn. 18.

<sup>21</sup> Security Council resolution 1904 (2009), Annex II, para. 6(c), fn. 18.

<sup>22</sup> Security Council resolution 1904 (2009), Annex II, para.12, fn.18.

<sup>23</sup> Security Council resolution 1904 (2009), Annex II, para.13(b), fn.18.

<sup>24</sup> Press release 'Al-Qaida and Taliban Sanctions Committee welcomes appointment of Judge Kimberly Prost to serve as ombudsperson' 7 June 2010, available at <http://www.un.org/News/Press/docs//2010/sc9947.doc.htm>

<sup>25</sup> A similar assessment can be found in D. Cortright and E. De Wet, 'Human Rights Standards for Targeted Sanctions', Sanctions and Security Research Program, January 2010, available at: [http://www.fourthfreedom.org/pdf/10\\_01\\_HR\\_STANDARDS\\_FINAL\\_WEB.pdf](http://www.fourthfreedom.org/pdf/10_01_HR_STANDARDS_FINAL_WEB.pdf).

<sup>26</sup> For an overview of the applicable legal framework relating to the right to fair trial in the fight against terrorism see 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', August 2008, UN Doc. A/63/223.

<sup>27</sup> See also C. Murphy, 'Case-Note on Mollendorf & Mollendorf, M v HM Treasury & Criminal Proceedings Against E & F' (2011) 48(1) Common Market Law Review.

The authors have developed the argument that the 1267 regime continues to be in need of urgent major reform in order to solve these tensions within United Nations law.<sup>28</sup> As long as there is no independent review of listings at the United Nations level, and in line with the principle that judicial or quasi-judicial decisions by the Security Council should be interpreted as being of a preliminary rather than a final character, it is essential that listed individuals and entities have access to domestic judicial review of any measure implementing the 1267 sanctions.<sup>29</sup> In its resolution 63/185 (2009) the General Assembly urged states ‘while ensuring full compliance with their international obligations’, to include ‘adequate human rights guarantees’ in their national procedures for the listing of terrorist individuals and entities.<sup>30</sup> This statement should be seen as an appeal to States to implement sanctions against persons listed by the Security Council, not blindly, but subject to adequate human rights guarantees. Indirect review in relation to acts by an individual state or the European Union has been exercised at the domestic and regional levels in a number of cases, including by the Human Rights Committee in the case of *Sayadi and Vinck v Belgium*<sup>31</sup> and in the judgment by the European Court of Justice (ECJ) in the cases of *Kadi and Al Barakaat*<sup>32</sup>.

Despite Resolution 1904’s attempts to remedy these shortcomings, the rising tide of judicial discontent has not been tamed.<sup>33</sup> This is evident from the most recent judgments by national and regional courts. In *A v. HM Treasury*, while noting that the Security Council had implemented a number of procedural reforms in recent years, including Resolution 1904 and the establishment of the Office of the Ombudsperson, the Supreme Court of the United Kingdom concluded that “While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.”<sup>34</sup> Further it noted that nothing in resolution 1904 affected the basic problems that there exists no judicial procedure for review and no guarantee that individuals affected will know sufficient about the case against them (or even know the identity of the Member State which sought their designation) in order to be able to respond to it.<sup>35</sup>

With even more open criticism of the 1267 regime and its newly established delisting procedures, the European Union General Court (EGC) noted in the *Kadi II* judgment<sup>36</sup> that “the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee”.<sup>37</sup> They concluded that the current 1267 procedures cannot be equated with the provision of an effective judicial procedure for review of decision by the Sanctions Committee for a number of reasons. These included the fact that removal from the list requires the consensus of the 1267 Committee and that no mechanism is available to ensure that sufficient

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<sup>28</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, August 2010, UN Doc. A/65/258, para. 75.

<sup>29</sup> See also M. Scheinin, ‘Is the ECJ Ruling in *Kadi* Incompatible with International Law?’ (2009) *Yearbook of European Law* 28.

<sup>30</sup> General Assembly resolution 63/185 (2009), UN Doc. A/RES/63/185, para. 20.

<sup>31</sup> *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), see fn. 13.

<sup>32</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council*, see fn. 13.

<sup>33</sup> See also J. Genser and K. Bath ‘When Due Process Concerns Become Dangerous: The Security Council’s 1267 Regime and the Need for Reform’ (2010) *Boston College International and Comparative Law Review* 33, p.22.

<sup>34</sup> *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC)*, [2010] UKSC 2, para. 78.

<sup>35</sup> *Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC)*, para 239, see fn. 34 above.

<sup>36</sup> Case T-85/09, *Yassin Abdullah Kadi v European Commission*, General Court of the European Union, 30 September 2010.

<sup>37</sup> Case T-85/09, *Kadi v Commission*, para. 128, fn. 36 above.

information be made available to the person concerned in order to allow him to defend himself effectively.<sup>38</sup>

### ***Kadi II* and the issue of disclosure of evidence**

The *Kadi* ‘saga’ has brought to the forefront the issue of due process in the 1267 Sanctions regime, and has been the subject of wide discussions by legal scholars.<sup>39</sup> While the *Kadi II* judgment by the EGC broadly follows the ECJ’s path, it deserves further consideration as it raises a number of important questions which go to the heart of the problems inherent in the 1267 listings and their judicial review. In particular the EGC explicitly addressed the much debated issue of preventative versus punitive nature of the sanctions and the even more thorny issue of disclosure of the evidence on which a particular blacklisting is based.

As is well known, in 2005 the Court of First Instance (CFI) had rejected the challenge by *Kadi* and *Al Barakaat* to their listing, by arguing that there had been no violation of *jus cogens* norms and the CFI therefore had no jurisdiction to review the lawfulness of blacklisting decisions.<sup>40</sup> In 2008 the ECJ overturned the decision and held that EU Courts must ensure the full review of the lawfulness of all Community acts, including those implementing Security Council resolutions, to ensure their compliance with fundamental rights.<sup>41</sup> In doing so the ECJ created a kind of ‘*Solange*’ distinction between the imposition of sanctions by the Security Council through the listing of terrorists and their implementation at the regional or national level.<sup>42</sup> The ECJ ruled that there had been a violation of the rights of the defence, the right to be heard and the right to effective judicial review.<sup>43</sup> The ECJ’s decision was important in highlighting the need for judicial review of national or EU level listing decisions, in the absence of adequate procedures at UN level and came to constitute perhaps the strongest challenge to the legitimacy of the UN sanctions regime and catalyst for subsequent reforms.<sup>44</sup>

Subsequent to the ECJ ruling in *Kadi I*, in 2008, a new regulation maintaining the freeze of Mr *Kadi*’s funds was adopted by the European Commission,<sup>45</sup> which Mr *Kadi* sought to annul before the EGC. In September 2010 the Court found that the regulation was adopted in breach of Mr *Kadi*’s rights of defence, right to effective judicial review and right to property and once again annulled the regulation in so far as it concerned Mr *Kadi*. In this decision the EGC has been seen as ‘grudgingly’

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<sup>38</sup> Case T-85/09, *Kadi v Commission*, para. 128, fn. 36.

<sup>39</sup> For an overview see S. Poli and M. Tzanou ‘The *Kadi* Rulings: A Survey of the Literature’ (2009) *Yearbook of European Law* 28(1).

<sup>40</sup> Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, European Court of First Instance, 21 September 2005.

<sup>41</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council*, fn. 13.

<sup>42</sup> As proposed by Advocate General Miguel Poiares Maduro in his opinion in *Kadi* (Case C-402/05 P *Yassin Abdullah Kadi V Council of the European Union and Commission of the European Communities*, Opinion of AG Maduro, 16 January 2008, para. 38 and fn. 46) who on this point referred to an earlier report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, (August 2006): “The Special Rapporteur is of the view that if there is no proper or adequate international review available, national review procedures — even for international lists — are necessary. These should be available in the States that apply the sanctions” (UN Doc. A/61/267, para. 39).

<sup>43</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council*, paras. 348-349, fn. 13.

<sup>44</sup> *Blacklisted: Targeted sanctions, preemptive security and fundamental rights*, Report by the European Center for Constitutional and Human Rights (ECCHR), December 2010, p. 61

<sup>45</sup> Commission Regulation (EC) No 1190/2008 of 28 November 2008.

following the decision by the ECJ while not appearing to be completely comfortable with it.<sup>46</sup> In fact, the Court opened its reasoning by highlighting a number of criticisms which have been raised by the institutions and intervening governments and voiced in legal circles in response to the ECJ's judgment, and which it explicitly stated "are not entirely without foundation".<sup>47</sup> These criticisms included the risk that the UN Sanctions regime would be disrupted if judicial review were instituted at the national or regional level;<sup>48</sup> that such judicial review is liable to encroach on the Security Council's prerogatives;<sup>49</sup> that it may not be wholly consistent with international law<sup>50</sup> and that although the ECJ did not intend to challenge the primacy of Security Council resolutions, the necessary consequence of such a judgment would be to render that primacy ineffective in the Community legal order.<sup>51</sup> The EGC however concluded that, despite the complexities linked to the ECJ judgment, it was not advisable for the Court to revisit points of law which had been decided by the ECJ.<sup>52</sup>

After its somewhat insubordinate opening, the EGC nonetheless went on to detail the full consequences of the ECJ findings and took it upon itself to "ensure 'in principle the full review' of the lawfulness of the contested regulation in light of fundamental rights".<sup>53</sup> Such a review, it argued, is all the more justified when considering the draconian nature and long-lasting effects of fund-freezing measures on the fundamental rights of the person concerned:

"In the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one".<sup>54</sup>

This is in line with the view taken by the second author in the context of his mandate as UN Special Rapporteur and in other forums: because of the indefinite freezing of the assets of those listed, the 1267 listings amount to 'a criminal charge' under international human rights law owing to the severity of the sanctions.<sup>55</sup>

The Court went on to conclude that, in light of the lack of an effective judicial procedure for review of decisions of the Sanctions Committee at UN level, despite the creation of the Office of the Ombudsperson, "the review carried out by the Community judicature of Community measures to freeze funds can be regarded as effective only if it concerns, indirectly, the substantive assessments of the Sanctions Committee itself and the evidence underlying them"<sup>56</sup>.

The most problematic issue which emerges from the General Court's judgment lies in the issue of disclosure of evidence, which goes to the heart of the legal problems resulting from the 1267 regime. As pointed out by the ECJ, when dealing with issues of national security and terrorism, the courts must apply techniques which accommodate, on one hand, legitimate security concerns about the

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<sup>46</sup> 'Case T-85/09, Kadi II' post by T. Stahlberg on ECJBlog.com, 26 October 2010, available at <http://courtofjustice.blogspot.com/2010/10/case-t-8509-kadi-ii.html>

<sup>47</sup> Case T-85/09, *Kadi v Commission*, para. 121, fn. 36.

<sup>48</sup> Case T-85/09, *Kadi v Commission*, para. 113, fn. 36.

<sup>49</sup> Case T-85/09, *Kadi v Commission*, para. 114, fn. 36.

<sup>50</sup> Case T-85/09, *Kadi v Commission*, para. 115, fn. 36.

<sup>51</sup> Case T-85/09, *Kadi v Commission*, para. 118, fn. 36.

<sup>52</sup> Case T-85/09, *Kadi v Commission*, para. 121, fn. 36.

<sup>53</sup> Case T-85/09, *Kadi v Commission*, para. 126, fn. 36.

<sup>54</sup> Case T-85/09, *Kadi v Commission*, para. 150, fn. 36.

<sup>55</sup> See Report of the Special Rapporteur on human rights while countering terrorism, UN Doc. A/63/223, para. 16, fn. 26. For criteria what constitutes a 'criminal charge' for purposes of ICCPR Article 14, see General Comment No. 32 by the Human Rights Committee, para. 15. However, in *Sayadi and Vinck v. Belgium* (para. 10.11, fn. 13, above) the same Committee considered that the sanctions imposed under Resolution 1267 did not constitute a criminal charge.

<sup>56</sup> Case T-85/09, *Kadi v Commission*, para. 129, fn. 36.

nature and sources of information, and on the other the need to accord the individual a sufficient measure of procedural justice.<sup>57</sup> However, in *Kadi II* the EGC concluded that it must be able to review lawfulness and merits of Community measures to freeze funds without it being possible to raise objections that the evidence and information used by the competent Community institution is secret or confidential. Furthermore

“the Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.”<sup>58</sup>

The extent and intensity of the judicial review carried out by the EGC are those set out in the *OMPI* case,<sup>59</sup> which it argues have also been indirectly endorsed by the ECJ.<sup>60</sup> The *OMPI* listing resulted from the EU’s implementation of Security Council resolution 1373, which requested all UN member states to implement a number of binding obligations intended to enhance their legal and institutional ability to counter terrorist activities nationally and internationally, including by freezing the funds of persons who commit, or attempt to commit, terrorist acts.<sup>61</sup> Listing under the 1373 regime differs from the 1267 regime in that lists are decentralized and administered at the regional and national level, through autonomous sanctions lists. In the *OMPI* case, the Court held that the judicial review of the lawfulness of a Community decision to freeze funds extends to the assessment of the facts and circumstances relied on as justifying it, and to the evidence and information on which the assessment is based.<sup>62</sup> While the *OMPI* case admits that the use of confidential information may be necessary, this does not imply that national authorities are free from any review by national courts. The *OMPI* case did not however rule on the separate question of whether the applicant and/or his/her/its lawyers could be provided with evidence alleged to be confidential, or whether they could be or had to be provided only to the Court.<sup>63</sup>

On this basis the EGC went on to find that Mr. Kadi was not allowed even the most minimal access to the evidence against him, and that no balance had been struck between his interests and the need to protect the confidential nature of the information. It argued that “the few pieces of information and imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to be able to launch an effective challenge to the allegations against him”.<sup>64</sup> The EGC applied the same criteria as the European Court of Human Rights in the *A. and Others v United Kingdom* case,<sup>65</sup> which held that the guarantee of procedural fairness under Article 5 of the European Convention on Human Rights requires providing an opportunity to effectively challenge allegations, which as a general rule requires that all the evidence against a person be disclosed. Limitations on the right to disclosure of all material may be possible for important public interest matters provided the person still has the possibility effectively to challenge the allegations against him. This is not the case if the disclosed material consists purely in general assertions and the decision is based solely or to a decisive degree on undisclosed material. Therefore, given that the contested regulation was adopted without any real guarantee being given as to the disclosure of the evidence used against the applicant or as to his

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<sup>57</sup> Case T-85/09, *Kadi v Commission*, para. 134, fn. 36.

<sup>58</sup> Case T-85/09, *Kadi v Commission*, para. 142, fn. 36.

<sup>59</sup> Case T-228/02, *Organisation des Modjahedines du peuple d’Iran (OMPI) v Council of the European Union*, European Court of First Instance (Second Chamber), 12 December 2006, paras. 154, 155 and 159.

<sup>60</sup> Case T-85/09, *Kadi v Commission*, para. 138, fn. 36.

<sup>61</sup> Security Council Resolution 1373 (2001), OP 1(c), fn.6.

<sup>62</sup> Case T-228/02, *OMPI v Council*, para. 154, fn. 59.

<sup>63</sup> Case T-85/09, *Kadi v Commission*, para. 147, fn. 36.

<sup>64</sup> Case T-85/09, *Kadi v Commission*, para. 174, fn. 36.

<sup>65</sup> *A and Others v. United Kingdom*, Application no. 3455/05, European Court of Human Rights, 19 February 2009.

actually being properly heard in that regard, the General Court concluded that the rights of the defence were not observed, which resulted in the principle of effective judicial protection also being infringed.<sup>66</sup>

However the EGC briefly noted in a couple of paragraphs one of the most sensitive issues inherent in the 1267 Sanctions regime. While certain restrictions to the disclosure of full evidence to the applicant may be conceivable – and which may allow for the reproduction of truncated evidence or the use of special advocates as the European Court of Human Rights has allowed in particular circumstances<sup>67</sup> - what happens in cases where the Court does not have access to the gist of the evidence either? The Court of First Instance had already found in *PMOI II* that the refusal by the Council and the French authorities to communicate, even to the Court alone, certain information on which the decision to freeze the funds was based, had the consequence that the court was unable to review the lawfulness of contested regulation, and as a result the applicant's right to effective judicial protection had been violated.<sup>68</sup> In paragraph 182 the EGC notes that the infringement of the right to effective review was not remedied in the course of the legal action by Mr Kadi:

“Indeed, given that, according to the fundamental position adopted by the Commission and supported by the Council and the intervening governments, no information or evidence of that kind may be the subject of investigation by the Community judicature, those institutions have adduced no information to that end”.<sup>69</sup>

The question is not only whether the EU administrative organs will be more cooperative in the future and willing to provide the thrust of the case to the court, but whether this information is actually available for the EU or national courts to be able to exercise effective judicial review. As noted in other contexts,<sup>70</sup> the listings are often the result of political decisions taken by the diplomatic representatives of States within political bodies, based on classified information not necessarily evenly shared between the deciding States. De Wet has suggested that the solution to the problem would largely depend on the willingness of the 1267 Sanctions Committee to provide the courts with the relevant information and be willing to give deference to those courts. “For the time being,” she argues “the jury is still out on whether the attempts of the ECJ and domestic courts will encounter (extensive) cooperation at the level of the Sanctions Committees”,<sup>71</sup> but unless the 1267 Sanctions Committee admits for the disclosure of evidence to the courts effective judicial review may be inherently impossible.

However, we are afraid that the problem goes even further than this. Reports of the 1267 Sanctions Committee's practice indicate that the Committee itself does not have access to the evidence, and is listing individuals on the basis of undisclosed intelligence.<sup>72</sup> Such intelligence may be discussed

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<sup>66</sup> Case T-85/09, *Kadi v Commission*, para. 184, fn. 36.

<sup>67</sup> On this issue see also Report of the Special Rapporteur on human rights while countering terrorism, UN Doc. A/63/223, paras. 36-41, fn. 26.

<sup>68</sup> Case T-284/08, *People's Mojahedin Organization of Iran v Council of the European Union (PMOI II)*, European Court of First Instance, para. 76.

<sup>69</sup> Case T-85/09, *Kadi v Commission*, para. 182, fn. 36.

<sup>70</sup> Report of the Special Rapporteur on human rights while countering terrorism, UN Doc. A/61/267, para. 39, fn. 42 above; Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?', p.652, fn. 29 above.

<sup>71</sup> E. De Wet, 'Human Rights Considerations and Enforcement of Targeted Sanctions in Europe' forthcoming in B. Fassbender (ed.) *The United Nations Security Council and Human Rights* (collected courses of the Academy of European Law), (Oxford University Press, Oxford, forthcoming 2011), p.37

<sup>72</sup> To illustrate the seriousness of the problem, it can be mentioned that during 2008 and 2009 Libya was a member of the Security Council, at a time when the 1267 was conducting its review of all entries in the Consolidated List. One need not even ask the question whether, for instance, the United States was sharing with Libya the actual evidence it possessed, even though at the material time the relationship between Gaddafi's Libya and the Bush administration in the US was warmer than average.

bilaterally between concerned member states of the Security Council in advance of reaching consensus on a particular listing but is actually not presented collectively to the 1267 Committee as a whole. Unfortunately, the EU Commission or Council cannot share with the EU Courts evidence that they do not possess, and the 1267 Committee of the Security Council cannot share with the EU evidence it does not possess.

Although the EGC is insisting on the same level of protection of procedural rights, a fundamental difference exists in the possibility for judicial review of cases listed under the 1267 regime (e.g. *Kadi*) and those listed under the 1373 regime (e.g. *OMPI*). While the independent listing and de-listing responsibility of States and the EU under the 1373 regime allows them discretion to balance potential conflicts between human rights and security considerations,<sup>73</sup> things are more complicated at the level of the 1267 regime. In particular, when the designating state at UN level is not the same as that in which the measure is implemented and whose domestic court is to provide judicial review, the availability of the evidence necessary for engaging in a merits based review may prove impossible.<sup>74</sup> The problems inherent in a system based on secret intelligence appear ever more pressing in light of the judicial challenges which it is facing. There are very basic questions surrounding the disclosure of evidence in the 1267 Committee: Who has the evidence? Who can the evidence be shared with? Who can review the evidence? Will courts or the Ombudsperson ever be guaranteed full access to the gist of the evidence? And if so, will the 1267 Sanctions Committee respond to their de-listing recommendations? Unless these questions are asked, and answered, it is difficult to see how effective independent review will ever be possible for an unaccountable body, shrouded in secrecy, like the 1267 Sanctions Committee.

There is, however, a political solution to the dilemma. Currently there are four EU member states that serve on the Security Council and its 1267 Committee: the United Kingdom, France, Germany and Portugal. As the two first ones are permanent members, there is no composition of the Security Council that would not include at least two EU member states. If the issue of disclosure of information is taken seriously, the EU members of the Security Council will need to block any listing proposal made to the 1267 Committee, where the proposing state does not accept the disclosure of information used for the listing decision in a manner that will enable the EU courts to exercise judicial review over the implementation of the resulting sanctions, to a degree that is acceptable to these courts. In our view they should be prepared to accept a more modest degree of disclosure than the sharing of all evidence with the listed individual or entity, and it will be a task for the ECJ to determine the required level.

We are aware of the fact that the proposed solution does not, on its own, remedy the additional problem that also delisting decisions are made by consensus and therefore any member of the Security Council may block a delisting proposal, even without providing any reasons for its refusal. Hence, the automatic lapsing of any listing decision after a certain number of months, unless renewed by consensus, should, as a new improvement to the legal framework, accompany the political solution proposed above.

A number of problems linked to the 1267 Security Council sanctions regime are raised in this paper. While the Security Council has assumed a judicial or quasi-judicial role in imposing sanctions on individuals and entities under the 1267 sanctions regime, its procedures continue to fall short of guaranteeing due-process related rights for individuals suspected of terrorism. These shortcomings have not been remedied by the establishment of the Office of the Ombudsperson of the 1267 Committee, as is evident also from recent judgments by national and regional courts. The analysis of the *Kadi II* judgement by the EGC contained in this paper highlights further difficulties linked to the judicial review of measures implementing the 1267 sanctions. The current practice by the 1267

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<sup>73</sup> De Wet, 'Human Rights Considerations and Enforcement of Targeted Sanctions in Europe', p.9, fn. 71.

<sup>74</sup> See also Genser and Bath 'When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform', p.34, fn. 33.

Committee of listing individuals on the basis of undisclosed intelligence may, in fact, make it impossible for national or regional courts (EU courts in the case of Mr. Kadi) to have access to the evidence that would be necessary to engage in a full merits based review. While the 1267 regime in its current form continues to be in need of urgent reform, the authors have suggested a political solution by which EU member states sitting on the Security Council could require the disclosure of information used for listing decisions in order to enable EU courts to exercise judicial review over the implementation of the resulting sanctions, to a degree that is acceptable to these courts. This solution should be accompanied by the automatic lapsing of any listing decision after a certain number of months, unless renewed by consensus.

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