

UN Terrorist Designation System Needs Reform

Victor D. Comras

Introduction/Background

The European Court of Justice is now grappling with a serious conundrum. It has to decide whether to uphold the application of UN mandated “sanctions measures” against those designated as terrorists and terrorist financiers by the UN Al-Qaida and Taliban Sanctions Committee,[1] even when such action does not conform to the standards of the European Convention on Human Rights and Fundamental Freedoms.[2] This is the issue presented in *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*. [3] In this case Yassin Kadi, who was designated as a terrorism financier by the UN Al-Qaida and Taliban Sanctions Committee in October, 2001,[4] is seeking to void EU directives requiring that his assets be frozen. Kadi maintains that the EU order freezing his assets violates his “right to property,” and his “right to a fair hearing” as guaranteed by the European Convention of Human Rights and Fundamental Freedoms.[5] This follows, he claims, from the failure of the United Nations, and/or the European Union, to provide an adequate forum or procedures for him to be heard, or to allow for judicial review of his designation. And he has won the support of the EU Advocate General, Miguel Poiares Maduro, for this position.[6]

This case represents one of several judicial and political challenges now questioning the legal effect of designation and the equity and fairness of the procedures employed by the UN Al-Qaida and Taliban Sanctions Committee in making designations or considering petitions for delisting. According to the UN Al-Qaida Committee’s own Monitoring Team, there are more than 15 major lawsuits underway, in at least seven countries, now challenging UN designations.[7] This includes cases in the United States, Belgium, Italy, Netherlands, Pakistan, Switzerland, and Turkey. Most recently the United Kingdom High Court,[8] in April 2008, overturned as *ultra vires* a UK freezing order against 5 individuals designated by the UN Al-Qaida and Taliban Sanctions Committee. That case is likely now to require new legislation in the United Kingdom to remedy the court’s enumerated defects. Political challenges are also being debated in the European Parliament, the Council of Europe, and national parliaments around the world.[9] And voices are being raised within the United Nations calling for current 1267 Committee designation procedures to be reformed.[10] This controversy has already led many governments, never eager to participate in the designation process, to refrain from submitting names to the 1267 Committee; and now threatens to seriously undercut designation as a primary weapon and methodology in the war against terrorism financing.

The Designation Process

UN designation involves the identification and listing of individuals or entities against which specific restrictive measures are applied. Designation was initially envisioned as a

positive measure to help narrow the unintended consequences of broad based economic and trade embargoes. The idea was “to target” those specific “groups of persons responsible for the breaches of the peace or the threats to international peace and security, while ideally leaving other parts of the population and international trade relations unaffected.”[11] This seemed to make imminent sense when the targeted individuals and entities were state actors; but with terrorism, the targeted entities are often non-state actors, and include private individuals, businesses, charities, and other nonprofit organizations.

The UN Al-Qaida and Taliban Sanctions Committee (which has the same membership as the Security Council) maintains a so-called “Consolidated List” of designated individuals and entities associated with al-Qaeda and the Taliban. All countries are obligated under UN Law to impose specified sanctions against those designated on this list. In the absence of a universally agreed definition of terrorism, the list has become critically important as a means of identifying those persons and entities that the international community agrees are terrorists or material supporters of terrorism. Those named include al-Qaeda and Taliban leaders and activists, as well as individuals and groups providing them material support. But, it is on those providing support to al-Qaeda and the Taliban that this list has its greatest impact. Known terrorist activists, when located, are usually arrested or captured, but this has not been the case with respect to those that have engaged in financing terrorism. And when it comes to dealing with these terrorism financiers, the UN list often provides the only legal authority many countries have to take action against them.[12]

The “Consolidated List” of designated individuals and entities maintained by the 1267 Committee was first established pursuant to UNSC resolution 1267 (1999) following the bombing of the US embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, and the refusal of Afghanistan’s then-ruling Taliban to turn over Osama bin Laden and other al-Qaeda leaders for trial. That resolution originally directed, *inter alia*, that all countries:

“Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, **as designated by the Committee** ..., and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly by the Taliban ...”(emphasis added)

These measures were further extended in resolutions 1333 and 1390 to cover “Usama bin Laden and individuals and entities associated with him ... including those in the Al-Qaida organization...” These resolutions also empowered the Al-Qaida and Taliban Sanctions Committee to designate individuals and entities associated with al-Qaeda, and instructed the Committee “to maintain an updated list, based on the information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.”[13]

Subsequent UN resolutions strengthened further these designation procedures, “stress{ing} to all Member States the importance of submitting to the Committee the names and identifying information, to the extent possible, of and about members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them so that the Committee can consider adding new names and details to the list.”[14] Nevertheless, the Resolution also recognized that countries might wish to withhold such information if “to do so would compromise investigations or enforcement actions.”

Designations are made by the members of the Security Council under consensus procedures and upon presentation by member countries of information concerning the individuals and entities proposed to be designated. Any Security Council member can hold up, and/or prevent, the requested designation. Likewise, any member country can block the removal of such designation.

Controversy and Complaints

The premise that individuals and entities can be designated by the Security Council, and thereby stigmatized or penalized, has, over time, proved increasingly disturbing to civil rights advocates around the world. The open-ended freezing of assets takes on a punitive character, which is particularly disturbing given the lack of transparency, procedural protections, and judicial oversight to assure accuracy, fairness, and due process. Those [15] supporting the designation process argue, however, such designations are a very necessary tool for combating terrorism. The designation process is directed at inhibiting the mobility of terrorists and the flow of funds that supports terrorism. Identification of those to be designated, they say, entails sensitive intelligence sources and methods, which does not lend itself to international judicial consideration, review or oversight. Few countries would be willing to present candidates for designation, or supply such intelligence information, if judicial review was likely.

The vast majority of those named on the list have been submitted by the United States, although some other countries occasionally joined with the United States in making the request. Still, relatively few countries have answered the Security Council’s call to submit names or additional information with regard to those already listed. This reluctance, evident from the outset, has stiffened since, resulting in an incomplete and outdated list which fails to adequately identify or reflect the known al-Qaeda and Taliban membership in its present form, as well as those providing material assistance to them. Rather, countries now seem to prefer to use their own national means and/or to work through bilateral channels to deal with these terrorists and their supporters. The results have been spotty at best, leaving many known terrorism financiers free to continue their funding activities unfettered by the UN sanctions measures.

In its first report to the Security Council, dated May 15, 2002,[16] the UN’s Al-Qaida Monitoring Group noted substantial dissatisfaction with the designation process and the Consolidated List itself. This included complaints with regard to inaccuracies and the insufficiency of identifying information contained in the list, as well as concerns with the

methodology used in putting the list together. Of particular concern was the lack of transparency and information sharing to bolster the rationale for such listing. In September 2006, the re-constituted Al-Qaida Monitoring Team reported[17] that “activity with respect to the fairness and transparency of listing and delisting procedures has reached a crescendo.... with the distribution of a variety of relevant papers and a flurry of debate.”

In 2006, Germany, Sweden, and Switzerland convened a private group of experts to review the Committee’s listing and delisting procedure. The resulting report called for the establishment of new detailed criteria for, and biennial review of, designations, and the establishment of a “focal point” within the UN Secretariat to handle delisting requests. It also recommended the establishment of a delisting procedure that would include mechanisms to review, consider, and make recommendations concerning delisting petitions.[18] Similar calls were made by the Council of Europe’s Committee of Legal Advisors on International Law.[19] The Legal Counsel of the United Nations also told the Security Council that those designated should, at a minimum, be given a right to be heard and to have their designation impartially reviewed. They should also be given access to knowledgeable assistance or representation for this purpose.[20]

Responding to this criticism, the Security Council in resolution 1730 (2006) established new procedures to consider delisting requests. But these measures fell well short of the steps recommended. There was a strong reluctance on the part of several countries, including the United States, to subject national judgments on delisting to third party review. The resolution did establish a Focal Point in the Secretariat to receive delisting requests, but limited its function to forwarding the requests to appropriate governments, and following up with these governments to determine if the request should be reviewed by the full committee. The principle of requiring consensus for delisting was retained, meaning that any one committee member country could block such delisting. Advocate General Maduro dismisses this system as insufficient to meet established international standards of fairness and due process. “There is no obligation,” he complains, “on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the delisting procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality.”

Doing What Needs To Be Done

It now seems clear that whatever the outcome of the Kadi case, further reform will be necessary to maintain and improve the effectiveness of the UN designation system. Such reform must take into account the importance of impeding terrorist mobility and funding; the sensitivities of intelligence gathering, which is essential to this process; the right of those designated to be heard in their defense; and the need for independent oversight to guard against abuse.

The first step in reforming the current designation system must be to put in place improved procedures, guidelines and standards for accurately identifying and listing those organizations, actors and supporters that manage, run and maintain al-Qaeda and the Taliban. While including all al-Qaeda and Taliban foot-soldiers would be impracticable, targeting key personnel and entities, including those providing resources and funding to them, is essential. The current procedures seriously fail in this regard. A way must also be found to reduce the political and intelligence sensitivities often associated with presenting names to the Al-Qaida and Taliban Committee for designation. One way to handle this problem might be to empower an independent monitoring group, such as the one initially established under UN Security Council Resolutions 1267, 1330, and 1390, to propose names (along with supporting justifications) to the committee. INTERPOL and other international enforcement agencies might also be enlisted in this process. This would provide additional insulation to governments sensitive about themselves initiating the designation process.

Special care must also be given to assuring that adequate information is presented to justify designation. While only a very few individuals have been erroneously or mistakenly designated (and they have since been delisted), the absence of transparency, and of independent or third party review procedures, has cast doubts concerning the legitimacy of the designation process. This problem must be addressed. Perhaps, the American experience can serve as a model in this respect.

The United States maintains several different designation lists which are administered in conjunction with various US sanctions programs. Designations are made pursuant to specific powers granted by Congress to the President, who, in turn has delegated them to various members of his cabinet. Designation is considered an executive administrative action, and is subject to judicial review and restraints. The standard for judicial review in such cases relates to whether the action is based on “reasonable cause.” This standard may not rise to the high standard required for criminal convictions, but it assures that designation is not carried out in an arbitrary or capricious manner. Likewise, UN guidelines also ought to ensure that there is sufficient information present, and shared with member countries, to demonstrate at least a sufficient “reason to believe” that those designated fall within the Security Council Resolution’s purview as members or associates of al-Qaeda and the Taliban. Once such information has already been shared among the members of the Security Council, there does not seem to be any strong reason not to provide it, at least in some redacted form, to those designated.

The Focal Point concept, which now provides little more than postmen services, should be allowed to take on an expanded expert/advocacy role – that is, to also serve as a panel empowered to consider substantiating or rebutting information provided by a petitioner seeking delisting. If the panel finds some merit in the petition, it might then invite the interested countries, including those that had requested the designation, to respond. The sufficiency of the responses received from the Committee or its member countries would then determine whether the panel was satisfied that a reasonable basis existed for the designation, or it might then decide to espouse the petitioner’s case directly before the Al-Qaida and Taliban Sanctions Committee. In such cases the Committee would be

called upon to make a final determination, establishing as much of a public record as it could agree upon. While this arrangement might not satisfy all concerns, it would provide all parties more assurance, than is now the case, that due considerations are being paid to all the evidence in determining if there is a reasonable basis for designation.

Renewed confidence in the UN Al-Qaida and Taliban Sanctions Committee procedures could only result in a win-win situation for all. Such renewed regard for the list would certainly help reinforce its utility and effectiveness as a tool against terrorism and terrorism financing.

Victor D. Comras is an attorney and consultant on terrorism, terrorism-financing, sanctions and international law. He led the US State Department's sanctions and export control programs for nearly a decade and served as one of five International Monitors appointed by the Security Council to oversee the implementation of measures imposed against al-Qaeda, the Taliban, and associated terrorist groups.

Notes

[1] UN Security Council Resolution 1390 (2002), and successor resolutions, provides, in part that all countries (a) Freeze without delay the funds and other financial assets or economic resources of {designated} individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory”

[2] The provisions of UN Security Council Resolutions adopted pursuant to Chapter VII of the UN Charter are binding on all countries and impose an obligation on all countries to carry out the directives therein. However, such directives are not self executing, and it is up to each country to assure that its laws conform to these obligations. Article 103 of the UN Charter provides: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ It is generally recognised that this obligation extends to binding Security Council decisions. See the Order of 14 April 1992 of the International Court of Justice in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3, at paragraph 39.

[3] Appeal of an initial decision by the European Court of First Instance ruling against Kadi.

[4] According to the US Treasury Department Yasin al Qadia (aka Yassin Kadi) was directly implicated in funding Al Qaeda, and his “Blessed Relief” charity was linked to funding those responsible for bombing the US embassies in Kenya and Tanzania.

[5] Protocol One, Article 1 to the European Convention provides that: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” Protocol One, Article 6 provides: “In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

[6] In his Opinion the Advocate General argues that there is no basis in Community law for according supra-constitutional status to measures adopted by the EU Commission that are necessary for the implementation of resolutions adopted by the Security Council.

[7] See Annex II to UN Doc S/2005/572 at

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/407/94/PDF/N0540794.pdf?OpenElement>

[8] See Winer, Jonathan; UK Court invalidates Terrorist Freezing Regime as Unconstitutional, at http://counterterrorismblog.org/2008/04/uk_court_invalidates_terrorist.php

[9] See, for example, “European Rights Watchdog Slams EU, UN Terrorism Blacklists, Deutsche Welle World, January 24, 2008 at <http://www.dw-world.de/dw/article/0,2144,3087767,00.html>

[10] Several UN Member Countries, including Germany, Switzerland, Sweden and Liechtenstein have submitted proposals calling for reform of the UN Al Qaeda Committee’s Designation and De-listing Procedures. See, for example, Statement by Liechtenstein Ambassador Christian Wenaweser before the Security Council on 14 November 2007 at <http://www.liechtenstein.li/en/pdf/fl-aussenstelle-newyork-dokumente-counterterrorism-scbriefing-2007-11-14.pdf>

[11] See Targeted Financial Sanctions, A Manual For Design and Implementation, Contributions From the Interlaken Process, P vi, at <http://www.watsoninstitute.org/tfs/TFS.pdf>

[12] Many countries have in place special legislation authorizing the implementation of UN Chapter VII sanctions measures in order to avoid having to seek the judicial action normally required to freeze assets in their countries.

[13] See UN Security Council Resolutions Related to the Al Qaeda and Taliban Sanctions Committee at <http://www.un.org/sc/committees/1267/resolutions.shtml>

[14] See UN Security Council Resolution 1455 (2003) Para 4

[15] Ibid.

[16] UN Doc S/2002/541 at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/366/13/IMG/N0236613.pdf?OpenElement>

[17] UN Doc S/2006/750 at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/529/76/PDF/N0652976.pdf?OpenElement>. The report, Strengthening Targeted Sanctions Through Clear and Fair Procedures, was published under the auspices of the Watson Institute and can be found at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

[18] The report, Strengthening Targeted Sanctions Through Clear and Fair Procedures, was published under the auspices of the Watson Institute and can be found at http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf

[19] Iain Cameron, The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions, located at www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf.

[20] See Bardo Fassbender, Targeted Sanctions and Due Process, 20 March 2006, located at www.un.org/law/counsel/info.htm.