Listing and De-listing of Terrorist Organizations: the Cases of the United Nations and the United States of America

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I. Introduction

This report examines the manner through which the United Nations ('UN') and the United States of America ('US') identify certain individuals and entities as terrorists and places sanctions on them.

In particular, the report first looks at the criteria used by the UN and the US for listing and de-listing such individuals and entities. It then explains specifically the legal consequences arising from inclusion in the lists for both individuals and entities. Finally, it looks at existing review and de-listing procedures that can be launched by both listed subjects and third parties, and assesses their effectiveness in providing redress.

The Report is written as the first part of a larger project which the Centre for Humanitarian Dialogue is pursuing, and which focuses on the impacts that the existence of these lists might have on peace-processes and mediation activities. The report keeps this overall goal in mind at all time when addressing the specific questions of this section and thus focuses on replying to questions that mediators may have.

II. Summary of Conclusions

The inclusion of certain individuals and entities in UN and US lists takes various forms and its legal effects differ, ranging from freezing of assets and travel bans to prohibition of providing support, contacts and membership.

The UN listing process is mainly political and diplomatic, rather than judicial, while US designation processes afford limited judicial remedies to listed individuals and entities.

1. UN List

The UN keeps only one list of 'terrorist suspects' which focuses on individuals and entities that are alleged to part or are associated with the Taliban regime or Al-Qaida (the 1267 Committee list). The list is kept and updated by a Committee specifically created by Resolution 1267 of UN Security Council (the 1267 Committee). The 1267 Committee is also assisted by a Monitoring Committee, whose membership consists of experts. Proposals for inclusions in the list can only be submitted by State Members, though both States and international organizations can submit further information on listed subjects.

Listing results in three types of sanctions that Member States must implement vis-à-vis listed persons or groups:

1. Freezing of assets and funds;
2. Restrictions/ban on entry and transit of Member States' territory;
3. Prohibition on supplying, selling, transferring or use of arms.

The application of these sanctions is compulsory on all Member States through their national legal system. Sanctions cannot be graded in any way.

Further, there is no periodic review of the listed names. The Committee guidelines, however, include specific procedures for de-listing and for request for some exemptions to implement the freezing of funds. Both mechanisms are explained below.

First, Member States are the only party that can challenge the inclusion of a subject on the list or launch an exemption request. Thus, if a listed subject wants to challenge the decision of the 1267 Committee, it must go through a Member State who supports its request.

De-listing can only be requested by the State of residence or of nationality of the listed subject, and the State which originally proposed the designation (the designating State) must also agree to the request. All decisions on de-listing must be made unanimously by the Committee. Practice has shown that, so far, de-listing remains a difficult and rare process, although there are proposals even from within the 1267 Committee for widening and simplifying it. In two cases, the support for de-listing by the designating State was given only after the listed individuals signed a public statement renouncing terrorism.

Second, in special circumstances, Member States can notify or request exemptions of the freezing of funds and assets. These exemptions are limited to basic and extraordinary expenses.

Further, listed individuals and entities can also seek direct redress for their inclusion in the listing by initiating litigation in domestic courts. The case law is limited, and so far has provided mixed signals. Several cases have been dismissed for lack of jurisdiction. Further, the success of some cases was limited to domestic remedies, as many courts

recognized the superiority of international law as indicated by the decisions of the Security Council under Chapter VII of the UN Charter.

Options for third party intervention in the process are very limited, and are confined to exerting pressure on a State to request a de-listing or allow for an exemption. There does not seem to be any space for consideration of on-going peace processes and negotiations in the Security Council decisions to include groups or individuals in their list.

2. US Lists

The lists kept by the US government are more complex and diverse than that maintained by the UN. There are more than twenty such lists, three of which are of particular interest:

1. The **Foreign Terrorist Organizations** list (FTO), which targets foreign organizations involved in terrorist activities against the US. The consequences of an FTO listing include freezing of assets, travel bans and a general prohibition to all US, or under US jurisdiction, physical and legal persons, to provide material support;
2. The **Travel Exclusion List** (TEL), which also targets aliens who are associated with or provide support to TEL-designated organizations. It imposes immigration sanctions, namely exclusions from entering the US and removal from the US if the alien is already present in its territory; and
3. The **Executive Order 13224 List** (E.O. 13224) which is directed at US entities and individuals that give financial support to terrorist organizations. E.O. 13224 gives the authority to specific US agencies to block the assets of financial institutions and US persons that hold or provide funds for designated terrorists.

Third parties cannot play any role in US listing procedures. Similarly, entities and individuals learn about their designation only once it has already occurred. No information is provided before, and the individual and entity cannot rebut information or provide new evidence while the process is pending.

The standard of proof for designation procedures is low. It is also not very clear, as information is evaluated by government agents without public access or overview. The decision-making procedure is not public, and confidential information may be used in the designation process. No special account is taken of on-going peace-processes. Sanctions cannot be graded, and are either imposed or not. Once they are imposed, they cannot be modified or personalized.

Space for review is limited. Entities listed under FTOs and E.O. 13224 may request periodic reviews to the agency that listed them, generally at the anniversary of their listing. However, the success of the reviews has been limited.

FTOs and E.O. 13244 listed entities and individuals may also file a suit in US domestic courts to challenge their designation. In this case also, however, the success has been limited, and courts have confirmed designations often based on classified information. However, several cases are still pending. Both procedures are only available to the entities/individual themselves and not to third party.

TEL listed individuals only have access to immigration proceedings to challenge their designation. Their rates of success have been equally limited.

3. Distinctive and Common Features

UN and US lists share the same common goals. In both cases, designation procedures aim at proscribing terrorist organizations, prohibiting their existence and actions, curbing their support and reducing their access to funds and personnel support.

Although they share similarities, the two listing procedures differ in several important aspects.

First, US designation procedures are more articulate and complex. Many different lists exist, with different listing criteria and review mechanisms. Each list targets different behaviors and results in different consequences and sanctions. Sanctions including freezing of assets, travel bans, and the prohibition of personal and material support.

UN listing targets only Islamist terrorism. There is only one list, which is unanimously agreed upon by a Security Council Committee. Sanctions include travel bans, prohibition of arms sales and freezing of assets.

Second, a major difference derives from the fact that while the UN is an international organization with limited powers given to it by its Member States, the US is a sovereign state with its own judicial system. US courts are competent to hear cases arising from listing, and all listed individuals and entities have direct access to national courts. However, challenges to listing procedures have not in general been successful, and courts have upheld listing decisions based on confidential information. Human rights lawyers have criticized this result, but there are, at the moment, no proposal to amend any procedures.

On the contrary, the UN system is only accessible to Member States and listed individuals and entities must find a supportive government to plead their case to the Security Council. At the moment, there are proposals to make de-listing procedures more accessible, but the preeminent role of Member States will remain. Access to national courts is only possible through the implementation of UN resolutions in national jurisdictions.

That said, UN and US lists also share several similarities.

First, entities and individuals to be listed play a very limited role in the listing process. They have no prior access to information and there is no space for providing evidence or rebut existing evidence before the listing procedure is completed.

Further both UN and US listing procedures leave only a limited space for reviews and de-listing procedures. The UN de-listing and exemption procedures can only be accessed by a limited number of Member States and all decisions must be taken unanimously. US reviews are based on limited grounds. In both cases, few requests for reviews have been successful.

Further, both US and UN lists afford only a limited role of third parties, which is confined to exercising diplomatic pressure and lobbying. Similarly, there is no consideration for peace processes or other conflicts situations, though political considerations probably make part of decisions process for both UN and US lists.

Additionally, neither the US nor the UN lists allow any space for gradation or personalization of sanctions.

III. The List of the United Nations

The United Nations maintains only one list (the '1267 Committee list' or 'the list') of names of individuals and entities that are linked to terrorist activities.

The list, which was introduced as part of the Taleban sanctions regime through Resolution 1267 (1999) of the Security Council, was subsequently amended and extended various times, especially in the aftermath of the September 11 attacks.[1] All Resolutions of the Security Council on this matter were taken under Chapter VII of the UN Charter, which makes them immediately mandatory for all UN Member States.

Resolution 1267 and successive Resolutions created a Security Council Committee[2] recently renamed the 'Committee Established Pursuant to Resolution 1267 (1999) Concerning al-Qaida and the Taliban and associated Individuals' ('1267 Committee' or 'the Committee') which oversees the implementation by States of the sanctions imposed by the Security Council on individuals and entities belonging or related to the Taliban, Usama Bin Laden and the Al-Qaida organization. The Committee maintains a list of individuals and entities for this purpose. Security Council Resolution 1526 (2004) requested the Committee to assume a central role in assessing information of the effective implementation of the sanction for the review of the Council.

In 2002, the Committee adopted guidelines which publicly clarified its composition, decision-making process and meeting procedures.[3] These guidelines are particularly interesting to properly assess the work of the Committee.

The Committee's membership consists of all the Members of the Security Council. Its membership changes yearly, except for the five permanent members. As a rule, the

Committee meets in closed sessions. However, the Committee can also invite other members of the United Nations to participate in its discussions, if their interests are specifically affected, or members of the Secretariat if their expertise and knowledge is requested. Non-Members of the Security Council can also request to send representatives to meetings of the Committee and may, upon request, meet with members of the Committee at other times for in-depth discussion of relevant issues.

Since its inception and as choice of one its first Chairman, most of the work of the Committee, as well as its decisions, have been completed at informal meetings. This makes it very difficult to evaluate its decisions and decision-making procedures of the Committee by outsiders, as no public records are available of informal meetings.[4]

The 1267 Committee is mandated to, *inter alia*:

1. Update regularly the 1267 Committee list;
2. Consider requests by all UN Member States for exemptions from the measures imposed by the resolutions and notifications thereof;
3. Request information from all UN Member States on their actions in application of the counter-terrorism resolutions, examine their reports on the implementation of sanctions and consider information brought to its attention by Members concerning noncompliance;
4. Consider requests by UN Member States for additional information and make relevant information available publicly;
5. Submit periodic reports to Security Council, and reports orally to the Security Council through its Chairman at least every 120 days.

It is worth emphasizing that the list kept by the United Nations is limited to individuals and entities linked to Al-Qaida and the Taliban regime, and is not a general list which is meant to include all forms of terrorism. In part, this is due to the fact that there is no agreed definition of terrorism in international law and the United Nations can only act and deal with very specific situations as mandated by its membership. As such, therefore, the scope of the UN list is much more limited than other national lists, including those kept by the US government.

The emphasis of the work of the Committee has shifted since its establishment in 1999. In fact, in the first period, from its formation to 2002, the Committee was mostly preoccupied with developing good practical mechanisms to implement the sanctions properly. In the period from 2002 to 2004, the Committee focused its attention on collaboration with Member States and solicited more pro-active information by States, especially for the formation and comprehensiveness of the 1267 Committee list. The focus of the Committee's work shifted substantially since then, and is now more focused on the development of guarantees for listed individuals and entities.

So far, only very few actions are available to UN Member States and listed subjects to review and appeal the Committee's decision. Once a name is entered in the 1267 Committee list, there are no periodic reviews and the entry in the list contains no review

or termination date. A recent proposal to allow an automatic review every five years is being discussed, together with a call by more than fifty Member States for more due process and transparency in listing and de-listing procedures.

The limited possibilities that UN Member States have to contest the listing of individuals and entities include exemptions and de-listing requests. First, in certain circumstances, UN Member States can notify or request certain exemptions of the application of the fund-freezing procedures. Second, they can propose a de-listing of listed subjects.

Further, a listed entity or individual also has only limited venues to challenge their inclusion in the list. First, they can plead to the State of citizenship or residence to initiate a de-listing procedure (diplomatic option). Second, they can initiate judicial proceedings in domestic courts (judicial option).

The rules of procedures applicable to listing, de-listing and other possible exemption and appeal procedures originating from the inclusion in the list are analyzed below.

Listing Criteria and Legal Effect of Listing

The rules of procedure of the Committee include specific provisions for listing individuals and entities, which rely on the pivotal role of all UN Member States.

Through the inclusion of individuals and entities on the 1267 Committee list, the 1267 Committee can mandate all Member States to freeze the assets, prevent the entry into or the transit through their territories, and prevent the direct or indirect supply, sale and transfer of arms and military equipment with regard to the individuals/entities included on a list.

Specifically, as of its last 2005 amendments, all Member States must, for all entities and individuals whose names are included in the list:

> (a) Freeze without delay the funds and other financial assets or economic resources [with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals, groups, undertakings and entities associated with them], 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;
>
> (b) Prevent the entry into or the transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfillment of a judicial process or the Committee

established pursuant to resolution 1267 (1999) determines on a case by-case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or training related to military activities.[5]

Individuals and groups that support or are associated with Al-Qaida, Usama bin Laden or the Taliban as well as entities or undertakings that are owned or controlled, directly or indirectly by Al-Qaida, Usama bin Laden or the Taliban are eligible for designation by the 1267 Committee.

Security Council resolutions also specifically qualify the meaning of 'associated with' Al-Qaida, Usama bin Laden or the Taliban, which include:

1. 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 Al-Qaida, Usama bin Laden or the Taliban;
2. Supplying, selling or transferring arms and related materiel to Al-Qaida, Usama bin Laden or the Taliban;
3. Recruiting for Al-Qaida, Usama bin Laden or the Taliban; or
4. Otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

Listing Procedure

The introduction of a name on the list is proposed by any UN Member State directly to the 1267 Committee, and the Committee has also encouraged the submission of names as well as other additional information by all UN Member States.

The proposing State must provide to the Committee a statement of case describing the basis of the proposal. The statement should include a narrative description of the information that forms the basis or justification for taking action and to the extent possible, relevant and specific information to facilitate their identification by competent authorities, including, for individuals: name, date of birth, place of birth, nationality, aliases, residence, passport or travel document number; and, for groups, undertakings or entities: name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business or activity, leadership. Any modification and addition to the list must be communicated expeditiously to all State Members and included on the Committee's website.

The Committee has five days to object to the inclusion of a new name on the list. In the absence of an objection within this timeframe, the new name is added to the list. However, Committee Members can also request a 'hold on' on a specific listing request, as a consequence of which the five-day time limit is suspended.

As of March 2006, 31 Member States have proposed names for listing. The proposals were not limited to Security Council members, but included all UN Members. There are, however, no public statistics available detailing which Member States have submitted proposals, nor if and when listing proposals have been put on hold.[6] Thus, it is impossible to know if Committee Members have been more active than non-Committee Members in requesting listing and de-listing.

Similarly, there is no formal standard of proof for assessing the information relating to listing procedures, although all decisions must be taken unanimously. In fact, individual decisions are taken at the level of capitals. Entities and individuals are included in the list for their alleged terrorist activities; the entire process is a political process, not a judicial one.

The Committee also agreed that the statement of case submitted by the designating State could be used by the Committee itself to respond to queries from UN Member States whose nationals, residents or entities have been included in the List. The Committee could also decide on a case-by-case basis to release the information to other parties, with the prior consent of the designating State, for example, for operational reasons or to aid the implementation of the measures. Other UN Member States could also continue to provide additional information which would be kept on a confidential basis within the Committee unless the submitting State agrees to the dissemination of such information.

The UN list consists of five sections:

1. The list of individuals belonging to or associated with the Taliban;
2. The list of entities belonging to or associated with the Taliban;
3. The list of individuals belonging to or associated with the Al-Qaida Organisation;
4. The list of entities belonging to or associated with the Al-Qaida organization;
5. Individuals and entities that have been removed from the list pursuant to a decision by the 1267 Committee.

Each section contains information on entities and individuals including names, addresses, aliases, nationality and relationships with other listed subjects.

Other Member States as well as regional and international organizations can provide additional information to update the existing information of the consolidated list. The Committee may also request further information from all states and organizations.

All information received by the Committee is reviewed by the Monitoring Team, a sub-committee first established under Resolution 1636 (2001) as a mechanism to monitor the implementation of measures imposed by Res. 1267 and subsequent resolutions. The

Monitoring Team consists of independent experts, not diplomats. The Team is mandated to monitor the implementation of all the measures imposed by the relevant resolutions, including in the fields of arms embargoes, counter-terrorism and related legislation and – because of the link to the purchase of arms and financing of terrorism - money laundering, financial transactions and drug trafficking. The Committee may also invite the Monitoring Team to attend its meetings.

If it is decided that new information provided will not be included in the consolidated list, such information will be stored by the Monitoring Team in a database for its use and for the use of the Committee. The Committee may share this information with Member States whose nationals, residents or entities have been included on the list, and may be released to other parties on a case-by-case basis.

In an effort to increase due process, the Committee is also mandated to request all relevant UN Member States to inform, once the listing is in place and to the extent possible, and in writing where possible, individuals and entities included in the Consolidated List of the measures imposed on them, the Committee's guidelines, and, in particular, the listing and de-listing procedures and certain exceptions provided for in Resolution 1452 (2002).

As of the end of March 2006, the list contains the names of:

1. 42 individuals belonging to or associated with the Taliban;
2. 1 entity belonging to or associated with the Taliban;
3. 208 individuals belonging to or associated with the Al-Qaida organization;
4. 122 entities belonging to or associated with the Al-Qaida organization.

The list was last updated on February 22, 2006.[7]

The guidelines contain no provisions for a periodic review of the list. Moreover, listings have no expiration date: once a name is included on the list, there are only limited mechanisms for deleting it. In fact, even the names of deleted entities and individuals continue to be published in the list in a separate section. However, proposals to introduce periodic reviews are pending.

During the listing process, the entity or individual to be listed plays no role: it has no access to information and no capacity of rebutting any assertion. This decisions was taken because Committee Members decided that pre-notification of listing would undermine the effect of the sanction by allowing capitals to be moved.

No other third party, besides Member States, has a role to play in the listing procedures.

De-listing and Review Procedures: Requests for Exemptions

Security Council Resolution 1452 (2002) introduced certain exceptions into the 1267 Committee sanctions regime. Specifically, Res. 1452 provides for two distinct kinds of exemptions to the application of the sanctions.

First, any UN Member State can notify the Committee of their intention to authorize access to frozen funds or other financial assets or economic resources to cover basic expenses. Such expenses include:

> payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.[8]

The Member State must notify the 1267 Committee of any decisions of granting an exemption, but it is important to note that it is for the Member State only to determine whether such expenses are within the meaning of the Resolution. The Committee, through the UN Secretariat, will inform the submitting State of receipt of the notification and the Committee's position within 48 hours. In the absence of a negative decision by the Committee within 48 hours of such notification, the exemption is deemed approved. It is not clear what procedures must be followed in the event of a negative decision by the Committee. The guidelines provide none, and there is no published case study on this matter

A second type of exemption is provided in the same Resolution 1452. Any UN Member can request the Committee to approve exemptions that are necessary for extraordinary expenses. In this case, however, the necessity of such expenses must be specifically approved by the Committee. The Member State must request an exemption and provide to the Committee sufficient supportive evidence of the necessity of proceeding with authorization of extraordinary expenses. The Committee has no time limit to provide its reply and approval is based on whether such exemption request is deemed appropriate. The discretionary power of the Committee is extensive and no reconsideration procedure is available if a request is denied.

Notifications and requests should include, as appropriate, the following information: the name and address of the Recipient as well as its relevant bank details, the purpose of the payment, the amount and number of installments, the payment starting date, whether the payment will be made by bank transfer or direct debit, interests will be given, the specific funds being unfrozen and other information as necessary.

As of March 2006 and since its inception, the Committee had received 29 requests for exemptions, involving 23 individuals and two entities, 25 of these were approved, one was withdrawn after the Committee asked for additional information, and three are under consideration. The approved requests authorized payments for a variety of items, including: 17 for basic expenses and accommodation, 2 for extraordinary expenses, 6 for

legal representation, and one each for miscellaneous bank charges, the sale of a home to settle an outstanding mortgage debt and expenses of an ongoing business. The first request on behalf of a designated entity (a Hotel in Italy) was accepted in January 2006.[9]

Exemption mechanisms provide UN Member States with a simple tool for granting payments to listed subjects for certain important basic expenses. For example, few listed organizations were allowed to provide humanitarian relief in Afghanistan in 2001. However, as noted above, there are no control mechanisms to assess the decisions of the Committee. Exemption requests and notification can be denied without explanation, and Member States have no recourse against a Committee's decision. Finally, because of the *modus operandi* of the Committee, only limited documentation is available to external scrutiny. Assessing the decision-making process of the Committee remains difficult.

Both exemption mechanisms should, however, be kept in mind as a possibility by a third-party to request specific exceptions, through the diplomatic role of a Member State, to Committee sanctions. This may be especially useful for certain activities by NGOs providing humanitarian relief.

De-listing and Review Procedures: Request for De-listing

The Security Council and the 1267 Committee have become increasingly aware of the need to develop appropriate procedures to ensure the possibility of de-listing of groups and individuals included in the 1267 list.

Listing and de-listing guidelines were first issued in a Statement by the Chairman of the 1267 in 2002, and were later included in the guidelines adopted by the 1267 Committee on November 7, 2002 and further amendments.[10] De-listing was also identified as one the issues that needed further consideration by the Committee in its 2005 Annual Report.[11]

Further, in its latest 2005 Resolution, the Security Council requested the Committee to continue its work on the Committee's guidelines, including on listing and de-listing procedures, and implementation of resolution 1452 (2002).

The Committee's guidelines include a specific five-step procedure for de-listing individuals and entities:

1. The individual, group, undertaking or entity ('the petitioner') may petition the government of residence and/or the government of citizenship to request a review of the case and support for de-listing. The petitioner must provide justification for the de-listing request, including all relevant information;

2. The petitioned government reviews the information and request, and then approaches the government that proposed the list designation originally (the 'designating government') to seek additional information and consult on the de-listing request;

3. The designating government can request additional information from the petitioner's country of citizenship or residency. The petitioned and the designating government may, as appropriate, consult with the Chairman of the Committee during the course of their bilateral consultations;

4. If, after reviewing all the information, the petitioned government wishes to pursue a de-listing request, it should first seek to persuade the designating government to submit jointly or separately a request for de-listing to the Committee. However, even without an accompanying request from the original designating government, the petitioned government can submit a request for de-listing to the Committee, pursuant to the no objection procedure;

5. Upon receiving the request of de-listing, the Committee must reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.[12]

The de-listing procedure is very important and it does guarantee a certain amount of scrutiny of the Committee's decisions. However, it is an imperfect system and includes several weaknesses.

First, It should be emphasized that listing and de-listing are not judicial processes but diplomatic ones. The authority to list and de-list remains solely on governments, and political negotiations play an important role in both getting on and off the list. De-listing remains a diplomatic option: it can only be initiated by a UN Member State. Individuals and entities have no direct access to the Committee. A de-listing request can only be made by the State of residence, or the State of nationality of the listed subject. If neither is sympathetic to the request of the listed subject, its request will not go forward. Moreover, the fact that the requesting state is urged to contact the designating government to reach an agreement on the de-listing request increases the complexity of the de-listing procedure and boosts the role of the designating government.

Second, de-listing has strict yet vague procedures. For example, the procedure for decision-making is very strict: all decisions on de-listing must be taken unanimously, which means that every member of the Committee maintains a power of veto on any de-listing request. However, procedures are also vague, as it is not clear which kind of information listed subjects must provide to make their case for de-listing. The documents upon which the Committee relied for listing an entity are normally not accessible to non-State actors, which makes rebutting refuting them difficult. Further, the Committee does not have a set time-limit to decide on a de-listing request, and decisions can be postponed at leisure. Moreover, even if a listed subject is de-listed, their names and personal information continue to be publicly available on the 1267 Committee web-site.

Third, the procedures for de-listing are not transparent. There are no records of de-listing hearings or meetings, and decisions on de-listing are issued as very brief press releases.[13] Since its inception, only 8 individuals and 11 entities have been de-listed. There is no information available on the number of de-listing requests that have been submitted, so assessing how many requests for de-listing have been accepted is difficult.

The example of three Swedish citizens of Somali origins is emblematic to show the difficulties faced by listed individuals and entities that wish to undertake a de-listing procedure.

In November 2001, three Swedish citizens and one Swedish entity (al-Barakaat International Foundation, a money transfer company serving the Somali diaspora) were included in the 1267 Committee list on a request from the US government. The listed subjects referred their case to the European Court of Justice, the European Parliament and the UN Human Rights Committee. Sweden decided to take up their case in 2002 and contacted the US government to submit a joint de-listing request. However, the US only agreed to support the request after two of the listed individuals agreed to sign a statement to the US authorities that they never had been and never would be involved in the support of terrorism, and that they would cease all contacts with Al-Barakaat. The US and Sweden then requested a de-listing action, which was granted in August 2002 for the two individuals.[14] The other individual and the entity itself are still included in the UN list. The cases of one individual and of Al-Barakaat International Foundation were dismissed by the European Court in September 2005.

Another similar case is that of two Swiss citizens of Egyptian origin, whose names were included in the list in 2001 because they were sitting on the board of a designated entity. The Swiss authorities investigated their situation and concluded that there was no evidence that suggested that they were linked to international terrorism. However, they had difficulties convincing US authorities, who had sponsored the listing, of their case. The two names were finally de-listed only in January 2006.[15]

These precedents show that obtaining a de-listing is not an easy endeavor, as it involves the synergetic action of several actors. It also shows that the designating State maintains significant power over any de-listing request.

The importance of fair de-listing procedures has been acknowledged by the Monitoring Team and by many UN Member States. In fact, the Monitoring Team reported in 2005 that during the course of bilateral meetings, several Member States had expressed their hesitation regarding the submission of names themselves for listing because of their concern over the lack of a robust de-listing mechanism, and because they were confronted with domestic challenges on the compatibility of the sanctions regime with fundamental rights.[16] The Monitoring Team reported also that more than fifty States raised the need for due process and transparency in listing and de-listing procedures to the President of the Security Council.[17]

In its 2005 Report, the Monitoring Team proposed several changes to the de-listing procedures that would address many of the procedural concerns expressed by Member States and in this report.[18] The proposed amendments include: the obligation by all requested State to forward a de-listing request to the Committee for its consideration; expanding the number of Member States that could submit de-listing requests to the designating State and possibly other States; imposing a time-limit for the Committee to decide on a de-listing request. These changes would improve the access to the de-listing procedures and improve the transparency of the decision-making process.

The precedents examined above also demonstrate that an explicit renunciation of terrorism activities could be useful to expedite the de-listing process. Following this example, de-listing could also be made available to those subjects that explicitly and publicly renounce terrorist activities, as well as to those subjects that were found to be wrongly designated. Other proposals also include the creation of an ombudsman office to deal with listing and de-listing issues.

To conclude, de-listing procedures are important because they guarantee some form of appeal to the decision of the Committee to include an individual or an entity in their list. However, as it stands now, de-listing has many limitations, mostly deriving from the fact that the Committee is a political and diplomatic organ, and not a judicial one.

In sum, it is important that both the Security Council and the 1267 Committee have identified listing and de-listing procedures as priority issues to be examined. Similarly, the work of the Monitoring Team is going in the right direction of guaranteeing more transparency and access to de-listing procedures. It is importantto continue to monitor the situation and ensure that the changes proposed by the Monitoring Team are included in the de-listing procedure.

Litigation in National Courts

Listed individuals and entities also have a direct, thought limited, mechanism to challenge the decision of the Committee to include their name in the list: domestic litigation. In fact, although, as seen above, there is no direct judicial recourse to the decisions of the Security Council Committee, it is possible for individuals to resort directly to their national courts to challenge the implementation of the listing decision of the 1267 Committee by a specific country or by the European Union. Thus, already in 2001, two cases were brought to the European Court of First Instance against the implementation by the EU of UN Security Council sanctions concerning alleged terrorists. As of the end of 2005, at least fifteen cases challenged directly the inclusion of individuals and entities in the 1267 Committee list in many different jurisdictions, including European Union courts, Belgium, Switzerland and Pakistan.[19] The outcomes of these litigations have been mixed, and none have been successful in securing a de-listing.

A case brought in front of the Belgian courts by two Belgian citizens is particularly interesting. The two individuals were listed in 2002, and sued Belgium asking the government to seek their de-listing by the United Nations and, consequently, the

European Union. After lengthy litigation, the Court rejected the Belgian government's defence. The Court reasoned that it lacked jurisdiction to interfere with decisions by the United Nations, and recognised that Belgium could only de-list its citizens if the United Nations did it first. However, the Court concluded that because the two individuals had not been indicted after two and half years of investigation, Belgium had to initiate de-listing procedures in front of the UN Committee, under the penalty of a daily fine for delay in performance. This judgment dates February 11, 2005, however, as of today, the two individuals are still listed in the 1267 Committee list.

Similarly, in a case brought on behalf of a Swiss listed entity seeking an end of criminal investigations which ensued from the inclusion of the entity on the UN list in 2001, a Swiss Court ruled in 2005 that the Swiss prosecutor had to either bring criminal charges or drop the case. As the prosecutor did not have sufficient evidence to pursue the case, he decided to stop the investigation. However, Switzerland continues to freeze the entity's assets because, as of today, its name is still included in the UN list.

All of the cases heard in front of the European Court of First Instance have been dismissed or are still pending in front of the Court of First Instance or the European Court. In the interim, however, the European Court found that it had to respect the decisions of the UN Security Council. It ruled that courts could review Security Council decisions to ensure that they comply with internationally recognized fundamental norms of human rights from which neither Member States nor the United Nations may derogate, but that the de-listing process provided fair trial and effective judicial remedy to all listed subjects.

Many cases, including the ones in Pakistan and Turkey are still pending. The Italian case was denied for want of jurisdiction and no appeal was launched.

Conclusion

The UN 1267 Committee list is a political instrument that allows Member States to impose sanctions on certain individuals and entities that are deemed to be involved in Islamist terrorism. The process is not a judicial one, and it should not be assessed as such. However, it is collegial, and all listing and de-listing decisions must be taken unanimously be all Committee members (i.e. Security Council members).

The role of non-State parties is limited, and is confined to lobbying and advocacy at the UN and at the national level, and no official role exists. Similarly, the role of listed individuals and entities is limited, as all decisions and requests must be made through the interface of a UN Member State.

Despite these limitations, it is important to note that the 1267 Committee is evaluating several useful proposals to make the de-listing process more transparent and to provide due-process guarantees.

IV. Terrorist Lists Kept by the United States

US law contains several provisions in relation to terrorist-watch lists. These provisions are significantly more complex than the ones establishing the UN list. At least three lists and their effects should be considered: first, the Foreign Terrorist Organization list (FTO list), the Terrorist Exclusion List (TEL list) and the Executive Order 13224 list (E.O. 13224 list).

These lists are not without confusion, and some of them overlap. For example, all FTOs are also designated under Executive Order 13244. However, because, FTO designation includes the immigration consequences of TEL designation, there is no need to designate FTOs under the TEL. Several organizations were first designated under TEL and subsequently as FTOs.

1. The Foreign Terrorist Organization List

Foreign Terrorist Organizations (FTOs) are foreign organizations designated in accordance with section 219 of the Immigration and Nationality Act (INA), as amended by the 2001 Patriot Act.[20] Inclusion in the FTO list provides the most serious consequences in US law, ranging from assets freezing, visa withholding and prohibition to receive material support.[21] As of the end of 2005, 42 FTOs have been listed in accordance with this legislation. The list contains mostly Islamic groups (e.g. Islamic Jihad), some Communist groups (e.g. Communist Party of the Philippines) and other groups that fit the definition of the law (e.g. ETA).

Listing Criteria

Under the provision, the Secretary of State in consultation with the Secretary of the Treasury and with the Attorney General can determine that an organization is a Foreign Terrorist Organization (FTO), if three criteria are fulfilled. Namely:

1. It is a foreign organization;
2. It engages in terrorist activity;
3. Its activity threatens the security of U.S. nationals or US national security (national defense, foreign relations, or the economic interests).

The Listing Procedure

The process for listing an organization as an FTO is complex and involves three US Government departments, and a final overview by Congress. The Secretary of State is in charge of the process.

At first, the office of the Coordinator for Counterterrorism in the State Department (S/CT) identifies the groups to be included in the list based upon their past and planned activities and using both public and classified information. Based upon this information, the S/CT subsequently prepares an 'administrative record' for the Secretary of State

demonstrating that the statutory criteria for designation have been satisfied. If necessary, the Secretary of State would then make an FTO designation decision in consultation with the Attorney General and Secretary of the Treasury.

Seven days before the publication of an FTO designation decision, the Department of State provides classified FTO notification to Congress. Upon the expiration of the seven-day waiting period and in the absence of Congressional legislative action to block the designation, the notice of the designation is published in the *Federal Register*, at which point the designation takes effect.

There is no notification to the foreign organization that a designation is pending, and no challenge is possible at this time of the process. However, all FTOs have thirty days from the date of the publication of the designation decision on the *Federal Registry* to challenge the decision.

Legal Effects of Designation

As a consequence of designation (i.e. inclusion in the FTOs list):

1. It is unlawful for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to a designated FTO. The term 'material support' is defined broadly by 18 U.S.C. § 2339A(b) as "currency or monetary instruments or financial security, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communication equipment, facilities, weapons, lethal substances, explosive, personnel, transportation and other physical assets, except medicine or religious materials."
2. Representatives and certain members of a designated FTO, if they are aliens, can be denied visas to the US and, in certain circumstances, can be removed from the United State.
3. All U.S. financial institutions that have become aware that they may have possession of or control over funds in which a designated FTO or its agent has an interest must retain possession of or control over the funds and report the funds to the Office of Foreign Assets Control of the U.S. Department of the Treasury.
4. Aliens are deportable for any kind of associational activity with the terrorist organization, irrespectively of the conduct of the alien and kind of violence or terrorist activity.[22]

Importantly, the Patriot Act does not require the support given to the designated entity to have any specific connection with the organization's criminal activity. In fact, as seen above, the Act defines material support broadly. So for example, providing currency, personnel or communication equipment to a designated Foreign Terrorist Organization may be considered as material support regardless of their connection with the FTO's terrorist activity. The provision of medical and religious supplies is exempt.

The legal effects of an FTO designation in domestic law are serious and may impair all kinds of relationships with FTOs. However, it is important to underline that only US (both physical and legal) persons or persons subject to US jurisdiction may engage in sanctionable material support as provided by the Patriot Act. Moreover, listed organizations can be prosecuted only in the US. However, prosecution could include organizations' actions committed outside the US.

De-listing and Review Procedure of FTO Designation

The law allows groups to be added to the list at any time, following a decision by the Secretary of State in consultation with the Attorney General and the Secretary of the Treasury. Designations do not automatically lapse. The Secretary of State may revoke designations after determining that there are grounds for doing so and notifying Congress. The 2004 Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) provides that an FTO may also request the Secretary of State to review an FTO designation, and file a petition for revocation at set times after the designation occurred, specifically:

1. two years after the first designation date;
2. in case of a re-designated FTO, two year after the most recent re-designation date;
3. two years after the determination date of its most recent petition for revocation.

If no review has been conducted during a five-year period with respect to a designation, the Secretary of State is required to review the designation to determine whether revocation would be appropriate. The petitioning FTO must provide evidence that the circumstances forming the basis for the designation are sufficiently different as to justify the revocation in order to provide a basis for revocation.

Under the statute, designations are subject to judicial review. An organization designated as an FTO may seek judicial review of the designation in the US Court of Appeals for the District of Columbia within 30 days from the day in which the designation was published in the Federal Register.

In the event of a challenge to a group's FTO designation in federal court, the U.S. government relies upon the administrative record to defend the Secretary's decision. However, administrative records often contain intelligence information and are classified.

Challenges to FTOs designation can also be obtained by Court order. However, no challenge of a designation has so far been successful. Court review is based on administrative records, but the government may also submit classified information used in the designation process for *ex parte* and *in camera* review.[23]

The Secretary of State may at any time revoke a designation (i.e. de-list) based on a finding that the circumstances forming the basis for the designation have changed in such a manner as to warrant revocation, or that the national security of the United States warrants a revocation. Revocations require the same procedural requirements by the

Secretary of State as designations. A designation may also be revoked by an Act of Congress, or set aside by a Court order.

Moreover, the provision that prohibits providing material support to FTOs and which makes them criminally liable have been challenged in Courts by several affected third Parties. These challenges have been unsuccessful. For example, in *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit held that there was no First Amendment right to provide material support to the ostensibly humanitarian or political activities of a designated FTO. US Courts have also ruled, on appeal, that third parties could not challenge the FTO designation in their proceeding. For example, in *US v. Hammoud*, the appeal courts held that a criminal defendant charged with providing material support to a designated FTO may not challenge the validity of the underlying FTO designation in the course of the criminal prosecution. The Court also rejected claims that the material support prohibition violated First Amendment rights of free association and expression because "giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts."

2. The Terrorist Exclusion List

A second relevant terrorist-watch list, the Terrorist Exclusion List (TEL), was created by Section 411 of the Patriot Act. It authorizes the Secretary of State, in consultation with or upon the request of the Attorney General, to designate terrorist organizations for immigration purposes. A TEL designation excludes aliens associated with listed entities from entering the US. Individual aliens that provide support to or are associated with TEL entities may also be prevented from entering the US or, if already in the US, may be deported under certain circumstances. There are about 60 TEL designated organizations as of the end of 2005.[24]

Listing Criteria

An organization can be placed on the TEL if the Secretary of State finds that the organization:

1. commits or incites to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
2. prepares or plans a terrorist activity;
3. gathers information on potential targets for terrorist activity; or
4. provides material support to further terrorist activity.

A terrorist activity is defined under the Statute as any activity that is unlawful under U.S. law or the laws of the place where it was committed and involves: hijacking or sabotage of an aircraft, vessel, vehicle or other conveyance; hostage taking; a violent attack on an internationally protected person; assassination; or the use of any biological agent, chemical agent, nuclear weapon or device, or explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage

to property. The definition also includes any threat, attempt, or conspiracy to do any of these activities.

Activities that may render an alien inadmissible include:

1. membership in a TEL-designated organization;
2. use of the alien's position of prominence within any country to persuade others to support an organization on the TEL list;
3. solicitation of funds or other things of value for an organization on the TEL list;
4. solicitation of any individual for membership in an organization on the TEL list; and
5. commission of an act that the alien knows, or reasonably should have known, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material for financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training to an organization on the TEL list.

Listing Procedure

The Secretary of State may designate groups as TEL organizations in consultation with, or as requested by the Attorney General. When an organization of concern is identified, or a request is received from the Attorney General to designate a particular organization, the State Department works with the Department of Justice and the intelligence community to prepare a detailed 'administrative record', similar to the record prepared for FTO designation.

The administrative record is a compilation of information, including both classified and open sources information, and showing that the statutory criteria for designation are met. Once completed, the administrative record is sent to the Secretary of State who decides whether to designate the organization. Notices of designations are published in the Federal Register. In contrast to FTO designation, Congress does not get involved in the TEL designation process.

A designated entity is not forewarned of the designation process and is in no way involved in it. Similarly, no other third party is involved in the decision process.

Legal Effects of Designation

The legal consequences of a TEL designation (i.e. inclusion in the TEL list) are confined to immigration measures. Thus, individual aliens that provide support to or are associated with TEL-designated organizations may:

1. be found "inadmissible" to the U.S. and
2. may be prevented from entering the US.

If they are already in the US, they may be deported.

Similarly to designations for other lists, TEL designation serves other purposes, as well. Namely, it seeks to:

1. Deter donations or contributions to named organizations;
2. Heighten public awareness and knowledge of terrorist organizations;
3. Alert other governments to US concerns about organizations engaged in terrorist activities;
4. Stigmatize and isolate designated terrorist organizations.

De-listing and Review Procedure of TEL Designation

There are no set, separate procedures to request a de-listing or a review of a TEL designation. The only option available to a designated individual is to initiate immigration proceedings. Thus, if an individual is excluded from entering the US or deportation proceedings are initiated against him, the individual can challenge the decision in front of an immigration judge. However, in case of exclusion proceedings, the person may be detained until the immigration hearings. Moreover, in case of expedite removal, the exclusion order produced by the Immigration and Naturalization Service (INS) Inspector has the same weight as one made by an Immigration Judge. Five years must elapse before an individual may apply for re-entry once an expedite removal order is issued.

3. The Executive Order 13224 List

A third example of terrorist-watch list is found in the Executive Order 13224 of September 23, 2001 (E.O. 13224 list). The E.O. 13224 list and its amendments[25] also implement UN obligations deriving from UN listing in the US legal system.

The Executive Order targets the financial support network for terrorists and terrorist organizations by blocking the property and interests in property of foreign persons and entities which the US President or the Secretary of State have determined commit, or pose a significant risk of committing, acts of terrorism threatening the security of the US or its nationals, if that property is within the US or within the possession or control of US persons. Decisions are made in consultation with the Secretary of the Treasury, the Attorney General, and the Secretary of Homeland Security. The Order also authorizes the U.S. government to block the assets of individuals and entities that provide support, services, or assistance to, or are otherwise associate with, terrorists and terrorist organizations designated under the Order, as well as their subsidiaries, front organizations, agents, and associates.

The E.O. 13224 list contains the highest number of individuals and organizations. As of the end of 2005, there were over 350 listed subjects. All FTOs are also listed in the E.O. 13224 list.[26]

From September 11, 2001 to April 2003, the US froze a total of USD 36.3 million in 102 accounts of terrorists and terrorist supporters. Of this amount, the United States froze

USD 3.24 million in Al Qaida-related assets and originally froze $26.64 million in Taliban-related assets within U.S. jurisdiction. However, the US Government has also authorized access to USD2.2 million for basic living expenses and reasonable professional fees of persons whose assets are frozen pursuant to E.O. 13224.

A well-known controversial result of E.O. 13224 listing is the freezing of the assets of major Islamic charities which provided humanitarian aid to Muslims worldwide (including Global Relief Foundation, the Holy Land Fund). As a consequence of their designation, several of them have since their designation ceased their operations.[27]

Listing Criteria

The first draft of E.O. 13224 contained the names of 29 individuals and entities designated by the President as listed subjects. The Secretary of State and the Secretary of Treasury, in consultation with the Attorney General, also have the authority to add new subject to the list. Specifically:

1. The Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, may designate foreign individuals or entities that s/he determines have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the U.S.;
2. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, may designate individuals or entities that are determined:
    a. To be owned or controlled by, or act for or on behalf of an individual or entity identified as having committed or pose a significant risk of committing acts of terrorism against US nationals or US interest and security by the President or Secretary of State;
    b. To assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated by the Order itself;
    c. To be otherwise associated with certain individuals or entities designated in or under the Order.

Listing Procedure

As seen above, E.O. 13224 authorizes both the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, or the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate individuals and entities pursuant to the specified criteria described.

Once the Secretary of State or the Secretary of the Treasury designates an individual or entity, the Office of Foreign Assets Control (OFAC) of the Department of the Treasury takes appropriate action to block the assets of the individual or entity in the United States or in the possession or control of U.S. persons, including notification of the blocking

order to U.S. financial institutions, directing them to block the assets of the designated individual or entity.

Notice of the designation is published in the Federal Register. OFAC also adds the individual or entity to its list of Specially Designated Nationals, by identifying such individuals or entities as Specially Designated Global Terrorists (SDGTs), and posts a notice of this addition on the OFAC website. The SDGT list also includes all FTOs. There is no consultation with Congress required during the listing process and no prior notice need to be provided to any person or entity subject to EO 13244 listing for security reasons. Moreover, the standard of proof required for listing seems to be very low, and classified information may be used to approve a listing.

Legal Effects of Designation

The effects of E.O. 13224 listing (i.e. designation) are limited to financial measures, which are, however, severe. Once an entity or an individual is designated in the EO 13224 list:

1. All property and interests in property of individuals or entities that are in the United States or that come within the United States, or that come within the possession or control of US persons are blocked;
2. Any transaction or dealing by United States persons or within the United States in property or interests in property blocked is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed;
3. Any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in the order is prohibited;
4. Any conspiracy formed to violate any of the prohibitions set forth in the order is prohibited.

However, persons who violate E.O. 13224 may be subject to civil or criminal penalties. Criminal penalties may result in up to 10 years in prison, or fines of $500,000 for corporations and $250,000 for individuals, or both. Civil penalties may be imposed administratively in amounts up to $11,000 per violation.[28]

De-listing and Review Procedure of E.O. 13224 Designation

Designations remain in effect until: it is revoked, the Executive Order lapses, or it is terminated in accordance with U.S. law, for example by Court order. Reviews may be requested once a year, at the anniversary of the listing date. However, so far very few entities and institutions have been taken out of the list. These include some Somalis convenience stores linked to Al-Barakaat.

Listed individuals may also file suits in domestic courts. Further, Section 10 of the E.O. 13224 provides that "because of the ability to transfer funds or assets instantaneously,

prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual [it is] determined that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order."

However, OFAC has published guidelines (Anti-Terrorist Financing Guidelines, Voluntary Best Practices for U.S.-based Charities) that charity groups may follow to ensure that their actions do not incur in proscribed behavior.[29] The Guidelines, which are voluntary, are intended to assist charities to guard against the threat that their charitable funds are diverted for use by terrorists. They do not supersede or modify any legal requirements applicable to all U.S. persons, including non-profit institutions.

An individual or an organization may also request an opinion to OFAC in relation to activities that they want to pursue. These opinions are not binding, but they provide a guidance to act. Moreover, Charities that are funded by USAID may also sign a Waiver Form that provides specific information on the use of funds.

Domestic Litigation

Besides filing a request for review with OFAC, entities and individuals may have their case heard in US domestic courts. So far, several listed entities and one individual filed suit in U.S. courts challenging their designation under the domestic authority of E.O. 13224 and the International Emergency Economic Powers Act (IEEPA). However, few cases have brought positive results for listed entities, and several challenges are still pending or have been dismissed.[30]

For example, in the Holy Land Foundation (HFL) cases, the Court upheld Treasury's decision to designate the organization and freeze its assets, however it noted that its review was limited to the records provided by the agency and that secret information could be used and not disclosed by the agency.[31] Criminal aspects of the case are still pending. Similar conclusions were reached in the case of the Global Relief Foundation and Benevolence International Foundation.[32]

Apparently, the only successful challenge to an E.O. 13224 designation is the case of US-based Al-Barakaat, whose majority of frozen assets in the US were mostly unfrozen and money returned after US based money remitters filed a suit challenging the action.[33]

Several lawyers, even within the US Administration, have raised civil liberties concerns over freezing procedures, and have denounced the lacking of due process in listing procedures.[34]

4. Other US Lists

Several departments of the US administration also keep other list of names of individuals for 'look-out' or other anti-terrorist grounds. For example, organizations that threaten to disrupt the Middle East Peace Process are designated under Executive Order 12947 of 23

January 1995 (amended in 1998). The Order blocks the property and interests in property in the US or in the Control of US persons of several organizations and authorizes the Secretary of State to further name foreign individuals or entities that have committed or pose a significant threat of committing acts of violence with the purpose of effect of disrupting the Middle East process and who have provided support for or services in support of such acts of violence. The Order further allows the Secretary of Treasury to block the property of persons that own or control or act ion behalf of persons designated in the Order. All transactions and dealing in such property is prohibited.[35] (al-Qa'ida was added to the Executive Order 12947 list by Executive Order 13099). All entities named in EO 12947 are also included in SDGT.

The National Counter-terrorism Center (NCTC), created in 2004, also holds a central repository of 325,000 names of international terrorism suspects (given possible double entries, the database is likely to hold 200,000 names).[36] The list is put together from reports supplied by the CIA, the FBI, the National Security Agency (NSA) and other government agencies. The classified list provides information to intelligence analysts, and forms one of the basis upon which official lists are formed. It is unclear the consequences entailed in the inclusion in such a list, but they range from no-fly, to look-out and visa-denial.

Conclusion

In the aftermath of September 11, the US Government has created a number of terrorist lists that designate entities and individuals suspected of terrorist connections. Inclusion in such lists has diverse consequences, ranging from freezing of assets to deportation and exclusion from the US territory. Providing material support to proscribed organizations may entail criminal prosecution.

Three lists are particularly important:

1. The Foreign Terrorist Organization list (FTO), which targets foreign organizations involved in terrorist activities against the US. The consequence of an FTO listing include freezing of assets, travel bans and a general prohibition to all US, of under US jurisdiction, persons to provide material support. FTOs designation is made by the Secretary of State in conjunction with the Secretary of Defense. Congress has a limited oversight on the process, and it must be informed of listing procedures. Neither the entity nor the individual that is going to be listed is involved in a way in the listing process. Once the listing procedure is finalized and published in the Federal Report, the designated entity/individual may challenge the decision in Court within 30 days. Designation reviews can also be requested every two years;

2. The Travel Exclusion List (TEL), which also targets aliens who are associated with or provide support to TEL-designated organizations. It imposes immigration sanctions, namely exclusions from entering the US and removal from US if the alien is already present in its territory. The designation process excludes any

involvement of the entity/person that is going to be listed. TEL designation does not afford any specific review mechanism. The only available mechanism to challenge a TEL designation is immigration proceedings;

3. The Executive Order 13224 List (E.O. 13224) which is directed at US entities and individuals that give financial support to terrorist organizations. E.O. 13224 gives the authority to specific US agencies to block the assets of financial institutions and US persons that hold or provide funds for designated terrorists. Similarly to others

None of the three lists afford any role for third parties. Only listed individuals and entities may request reviews of their cases or have access to domestic courts. Moreover, even entities and individuals have no access in the listing process until it is finalized.

Reviews and court challenges have proved to afford only limited redress to listing. Courts have mostly confirmed agencies decisions to list certain subjects and reviews have seldom been successful.

Human rights and criminal lawyers have raised concerns over the use of confidential evidence in certain courts decisions, as well as limited due process. However no plans to amend any procedures exist.

V. Conclusions

UN and US designation procedures aim at proscribing terrorist organizations, prohibiting their existence and actions, curbing their support and reduce their access to funds and personnel support.

Although they share similarities, the two listing procedures differ in certain important aspects.

First, US designation procedures are more articulate and complex. Many different lists exist, with different listing mechanisms. Each list targets different behaviors and results in different consequences and sanctions. Sanctions including freezing of assets, travel bans, and the prohibition of personal and material support.

UN listing targets only Islamist terrorism. There is only one list, which is unanimously decided by a Security Council Committee. Sanctions include travel bans, prohibition of arms sales and freezing of assets.

Second, a major difference arises from the fact that while the UN is an international organization with limited powers given to it by its Member States, the US possesses full state sovereignty.

As a consequence of this difference, the US has its own national jurisdiction, and all listed individuals and entities have direct access to national courts. However, challenges to listing procedures have not in general been successful, and courts have upheld a listing decision based on confidential information. Human rights lawyers have criticized this, but there are, at the moment, no proposal to amend any procedures.

On the contrary, the UN system is only accessible to Member States and listed individuals and entities must find a supportive government to plead their case to the Security Council. At the moment, there are proposals to make de-listing procedures more accessible, but the preeminent role of Member States will remain. Access to national courts is only possible through the implementation of UN resolutions in national jurisdictions.

However, UN and US lists also share several similarities.

First, entities and individuals to be listed play a very limited role in the listing process. They have no prior access to information and there is no space for providing evidence or rebut existing evidence before the listing procedure is completed.

Further both UN and US listing procedures leave only a limited space for reviews and de-listing procedures. The UN de-listing and exemption procedures can only be accessed by a limited number of Member States and all decisions must be taken unanimously. US reviews are based on limited grounds. In both cases, few requests for reviews have been successful.

Further, both US and UN lists afford only a limited role of third parties, which is confined to exercising diplomatic pressure and lobbying. Similarly, there is no consideration for peace processes or other conflicts situations, though political considerations probably make part of decisions process for both UN and US lists.

Additionally, neither the US nor the UN lists allow any space for gradation or personalization of sanctions.

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[1] S.C. Resolution 1267(1999) was amended by the following resolutions of the Security Council: 1333(2000), 1363 (2001), 1388 (2002), 1390(2002), 1454(2002), 1455(2003), 1526(2004), 1617(2005)

[2] The 1267 Committee is only one of the four committees created by the Security Council to deal with terrorism. The others are: the Counter-Terrorism Committee, created by Res. 1373 of 2001, the 1540 Committee, created by Resolution 1540 (2004) and dealing with anti-proliferation issues, and the 1566 Working Group, established by res. 1566 (2004) tasked to examine practical measures to be imposed on terrorists other than those implemented by Committee 1267 and studying the possibility of establishing a fund to compensate victims of terrorism.

[3] Security Council Committee Established Pursuant To Resolution 1267 (1999) Concerning Al-Qaida And The Taliban And Associated Individuals And Entities Guidelines Of The Committee For The Conduct Of Its Work. The Guidelines were adopted on on 7 November 2002, and amended on 10 April 2003 and revised on 21 December 2005)

[4] See Doc. S/2004/1039 of 31 December 2004.

[5] Resolution 1617 (2005).

[6] See para. 37, Fourth Report of the 1267 Monitoring Committee, UN Doc. S/2006/154 of 10 March 2006.

[7] The New Consolidated List Of Individuals And Entities Belonging To Or Associated With The Taliban And Al-Qaida Organisation As Established And Maintained By The 1267 Committee, available on: http://www.un.org/Docs/sc/committees/1267/tablelist.htm

[8] Security Council Resolution 1452, adopted on December 20, 2002, para. 1(a)

[9] See para. 55, Fourth Report of the 1267 Monitoring Committee, UN Doc. S/2006/154 of 10 March 2006.

[10] See Statement of Chairman of 1267 Committee on De-listing Procedures dated August 16, 2002, UN Doc. No, SC/7487. The de-listing guidelines were included in the report of the 1267 Committee dated November 7, 2002, and were further amended on April 10, 2003 and December 21, 2005. See also the Annual Report of the Committee of December 26, 2002 (UN Doc. S/2002/1423), which also briefly reports on discussions held by Committee members on the issue of de-listing procedures.

[11] Annual Report of the 1267 Committee dated January 17, 2006, UN doc. S/2006/22.

[12] Resolution 1617 (2005).

[13] See, for example, the following UN Documents: SC/8613 of January 18, 2006, SC/8534 of October 25, 2005, SC/8280 of December 23, 2004, SC/7490 of August 27, 2002, SC/7279 of January 24, 2002, SC/7264 of January 14, 2002.

[14] See N. Birkhäuser, Sanctions of the Security Council Against Individuals – Some Human Rights Problems, in www.esid-sedi.org/english/pdf/birkhauser.pdf. See also: Swedes Taken Up the Case of Three on US Terror List, New York Times, 26 January 2002, and US Drops Names of Two Swedes from Al Qaeda List at UN, New York Times, 23 August 2002.

[15] See Birkhäuser, supra. In general on de-listing see also *"Terrorist" lists: monitoring proscription, designation and asset-freezing* and *Terrorizing the rule of law: the policy and practice of proscription*, both prepared by Statewatch, and available on www.statewatch.org

[16] See Monitoring Group reports S/2005/83 of February 15, 2005 and S/2005/572 of September 9, 2005.

[17] See para. 37, letter from the Chairman of the 1267 Committee to the President of the Security Council of 6 December 2005, UN Doc. S/2005/761.

[18] See S/2005/572, paras. 55-57

[19] See S/2005/572, Annex II.

[20] http://www.state.gov/s/ct/rls/fs/37191.htm

[21] The list is updated regularly, it is found at http://www.state.gov/s/ct/rls/fs/37191.htm.

[22] The text of the section is available on: http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-22/slb-4440?f=templates&fn=document-frame.htm

[23] See S.D. Murphy, *International Law, the United States and the Non-Military War on Terrorism,* in EJIL (2003), Vol. 14, No.2, 347 – 364.

[24] The updated list of TEL organizations is found in: http://www.state.gov/s/ct/rls/fs/2004/32678.htm

[25] The Executive Order was amended by Executive Order 13286 of July 2, 2002, Executive Order 13284 of January 23, 2003, and Executive Order 13372 of February 16, 2005.

[26] The updated list is available on: http://www.ustreas.gov/offices/enforcement/ofac/programs/terror/terror.pdf

[27] See OBM Watch, Muslim Charties and the Wat on Terror: Top Ten CONcerns and Status update, February 2006.

[28] Report of the Government of the United States called for under Security Council resolution 1455 (2003), UN Doc. S/AC.37/2003/(1455)/26 of April 22, 2003.

[29] Available at: http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf

[30] See, for example: *Global Relief Foundation v. Snow*, No. 02-CV-674 (N.D. Ill. filed Jan. 28, 2002) (pending); *Benevolence International Foundation v. O'Neill*, No. 02-CV-763 (N.D. Ill. filed Jan. 30, 2002) (case dismissed by plaintiff Feb. 25, 2003); *Aaran Money Wire Service, Inc. v. United States*, No. 02-CV-789 (D. Minn. filed Apr. 15, 2002) (entities and individual delisted under E.O. 13224, motion to dismiss pending); *Holy Land Foundation v. Ashcroft,* No. 02-CV-442 (D.D.C. filed March 8, 2002) appeal pending before the D.C Court of Appeals.

[31] See Holy Land Foundation for Relief and Development v. J. Ashcroft et al, 219 F. Supp. 2d 67, confirmed on appeal by the US Circuit Court for the District of Columbia in 333 F. 3d 156, 2003.

[32] For information on these and all other cases listed by OFAC See: http://www.treasury.gov/offices/enforcement/key-issues/protecting/charities_execorder_13224-a.shtml#a

[33] National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission, p. 10 and Al-Barakaat Case Study, p. 67-86.
[34] See National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission.
[35] Found in http://www.treas.gov/offices/enforcement/ofac/legal/eo/12947.pdf and as amended in http://www.fas.org/irp/offdocs/eo-980822.htm.
[36] As reported by the Washington Post, in 325,000 Names on Terrorism List, February 15, 2006.