ASIL The American Society of International Law

ASIL Insight

October 30, 2009
Volume 13, Issue 20
PDF Print Version

The European Court of Justice *Kadi* Decision and the Future of UN Counterterrorism Sanctions

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Introduction

The UN Security Council's use of "targeted sanctions" against suspected terrorists – an important counter-terrorism tool designed to immobilize assets and limit travel – has come under increasing challenge by regional and national courts.[1] The challenge is simple: the sanctioning of a person amounts to the imposition of a penalty, yet the normal due process afforded alleged criminals does not apply.

The most serious challenge, a 2008 decision by the European Court of Justice (ECJ), *Kadi & Al Barakaat Int'l Found. v. Council of the E.U. & Comm'n of the E.C.* (Kadi),[2] nullified the implementation of the sanctions regime with regard to two parties for violations of constitutionally protected rights. *Kadi* challenges the core framework of UN terrorist sanctions and forces UN member states to tackle difficult legal questions or else face possible collapse of the UN's terrorist sanctions regime. This Insight explores those concerns and considerations affecting fundamental reform.

I. The UN Terrorist Sanctions Regime

In 1999, UN Security Council Resolution 1267 required all states to impose aircraft and financial sanctions and an arms embargo against the Taliban. In addition, to monitor implementation of the measures, the resolution mandated the creation of the so-called Sanctions Committee.[3] In subsequent measures, Osama Bin Laden and persons and entities associated with him were added to the list of designated persons, as were other alleged financiers and facilitators.[4] Subsequent resolutions arising out of the 1267 terrorist sanctions regime require enforcement by UN Member States against any person or entity designated on the "Consolidated List" created by the Sanctions Committee.[5] While the United States and a handful of other countries maintain their own national blacklists of alleged terrorists, many countries rely solely on the UN Consolidated List as the legal authority to impose the sanctions against these suspects.[6]

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II. Challenges to the 1267 Regime

Although there is strong evidence that the sanctions regime has had a serious impact on terrorist operations, controversy has accompanied the UN sanctions success.[7] The Security Council's power to enforce and compel has generally been used against states, not individuals, even after the establishment of international criminal tribunals for the former Yugoslavia and Rwanda beginning in 1993. Yet in the case of the 1267 regime, Security Council resolutions directing an asset freeze or travel ban on a person or entity intrude on perhaps the most sensitive sovereign power of a state: deciding on the liberty and property rights of citizens.

When it has authorized direct action against individuals on other occasions, such as in the statutes of the international criminal tribunals, the Security Council has built elaborate protections for the rights of the accused.[8] But the 1267 regime contains minimal allowance for due process: decisions to list or de-list a party are by Committee consensus; little information about the grounds for being listed is shared with the listed parties; listees are not represented before the Sanctions Committee; and no judicial review or remedy is available.[9] The lack of procedural protections has sparked widespread criticism from governments, international organizations[10] and human rights advocates.[11]

III. The Genesis and Inevitable Dilemma of UN Terrorist Sanctions

The United States' long established framework for blacklisting terror suspects and freezing their assets provided the model for the UN regime.[12] For example, the U.S., judicial review of sanction decisions is deferential to the executive branch, affected parties lack discovery rights and face a low standard of proof, and assets may be frozen before investigations produce sufficient evidence to designate.[13] The fact that many countries participating in the UN 1267 regime now follow the U.S. approach has created a structural problem: although most persons and entities on the UN Consolidated List were designated by the U.S., they and their assets may be located elsewhere. When designations originating in a U.S. legal setting must be enforced in another, where different legal standards operate, there is a risk they may be overturned.

IV. *Kadi*

The *Kadi* decision illustrates this weakness at the heart of the 1267 regime.[14] At U.S. insistence, Yassin Abdullah Kadi, a Saudi national, and Al Barakaat International Foundation (Barakaat), registered in Sweden, were designated by the Sanctions Committee[15] and thereafter added to the EC blacklist.[16] Both challenged the Council of the European Union and the Commission of the European Communities and lost at the Court of First Instance (CFI),[17] thereafter appealing to the ECJ and prevailing on most counts.[18]

The ECJ held that the procedure followed by the EU Council afforded the appellants no opportunity to be heard upon initial listing[19] or de-listing, did not disclose the reasons for listing,[20] used extrajudicial means (the UN

Rome Statute of the International Criminal Court

Council Regulation (EC) 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban

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ORGANIZATIONS OF NOTE

UN Sanctions Committee

UN Security Council

UN Human Rights Committee

European Court of Justice

Council of the European Union

Commission of the European Communities

U.S. Department of Treasury

Sanctions Committee) to make listing decisions,[21] and provided for no judicial review.[22] Consequently, the regulation violated the appellants' rights to defense;[23] to an effective legal remedy;[24] to effective judicial protection;[25] and to property.[26] The Court annulled the regulation as it related to Kadi and Barakaat, but fearing that its decision would "seriously and irreversibly" harm the freezes, which "may be justified," stayed enforcement for 90 days, allowing the EC time to cure its defects.[27]

Thereafter the Commission conveyed to Kadi and Barakaat general narrative summaries of the reasons for their listing, "carefully considered" the parties' responses, finally re-listing both.[28] The *Kadi* plaintiffs re-instituted proceedings in the Court of First Instance arguing that the Commission's actions failed to correct the defects identified by the judgment.[29]

While the *Kadi* litigation appears far from over, it may spark a race to court by similarly situated persons. Indeed, the majority of the approximately 500 parties on the UN consolidated list may be able to raise due process objections roughly equivalent to those asserted by Kadi, and similar challenges may therefore produce similar results.[30] For example, in the June 2009 case of a Jordanian national, Mohammed Othman (aka Abu Qatada), the CFI found that the EU Council "at no time informed the applicant of the evidence adduced against him,"[31] denying him a chance to defend himself and obtain a legal remedy.[32] In annulling the EU regulation as it related to Mr. Othman, the CFI declared him to be "in a factual and legal situation in every way comparable to that of Mr. Kadi."[33] And like the ECJ in *Kadi*, the *Othman* court noted that because the grounds for applying the regulation were not disclosed to the court, no review of its lawfulness was possible, a violation of "the fundamental right to an effective legal remedy."[34]

Similar due process challenges have arisen in U.S. cases. One of these involves a suit against the U.S. Treasury by the Oregon branch of the Al Haramain Islamic Foundation (AHIF), an international network of charities.[35] The court upheld the Treasury's designation of the Ashland, Oregon chapter of AHIF as a Specially Designated Global Terrorist (SDGT) entity in 2004 and again in 2008.[36] However, in an echo of the *Kadi* and *Othman* judgments, it found the Treasury Department's notice to AHIF of its intent to designate and re-designate was insufficiently timely or specific to give the organization a basis to defend itself.[37] It also found that the order blocking AHIF's assets was a "seizure" for purposes of the Fourth Amendment of the U.S. Constitution and ordered further argument as to whether the seizure was reasonable and constitutional.[38] The court voiced significant reservations about the designation methodology followed by Treasury in the case. Since the Treasury Department applies the same framework to asset freezes pursuant to UN designations, a final decision in the case may carry implications similar to the judgments in *Kadi* and *Othman*.

V. Fixing the System

The UN's key contribution to anti-terrorism cooperation is to act as the legal trigger for international enforcement action. If UN designations fail to sustain judicial scrutiny, the UN trigger will also prove unsuccessful. Indeed, while *Kadi* is the most far-reaching blow to the UN sanctions regime, along with

Othman and *AHIF*, it is one among dozens of recent challenges,[39] including similar cases before U.S. and other national courts.[40] And while the Security Council has added procedural protections over the years, the 1267 regime's reliance on intelligence limits the degree of procedural standards major powers are willing to accept.[41]

A proposal by the European Commission currently before the EU Parliament offers one potential solution.[42] Under the Commission's proposal, upon notification by the UN Sanctions Committee of a new listing decision and receipt of the statement of reasons, the Commission would provisionally freeze the economic resources of the party concerned, while at the same time sending the party a statement of reasons and inviting its views. Finally, aided by an advisory committee, the Commission would examine the views and adopt a final decision confirming or rescinding the provisional freeze.

A drawback of the EC proposal is that it demotes UN Sanctions Committee decisions to the status of proposals. Yet as an agent of the Security Council, the Committee's authority to make terrorist designations derives from resolutions with which compliance is compulsory.[43] Thus, any decision to rescind a freezing order would violate the rescinding state's UN Charter obligations. Once European states treat terrorist designations as mere proposals, others would do the same.

No single path leads from this quandary, but a few considerations may suggest a direction. First, *Kadi* means the inevitable erosion of the 1267 status quo. The task lies with the international community to construct improved UN listing and de-listing procedures capable of attracting more support and judicial deference. Otherwise, there is a possibility that the regime will continue to be fragmented as courts in different jurisdictions impose different due process standards, resulting in the blocking of assets in some countries and un-blocking in others. Such a result would enable listed parties to shop, as before, for a safe harbor.

Second, in *Kadi*, the court, hinting at flexibility, noted that procedural modifications to the 1267 regime occurring after the "contested regulation" "cannot be taken into consideration," implying that subsequent changes may overcome judicial scrutiny.[44] The Court also stressed that the de-listing procedure was defective because it was essentially political, conducted by diplomats acting on instructions from their capitals, not because it was not conducted by an EU court.[45] And, finally, the ECJ emphasized that "overriding considerations," such as public safety or the conduct of international relations, may limit procedural protections, including the right to be informed and/or the right to be heard before being listed.[46]

Third, given the grave risks associated with an unraveling sanctions regime and the ECJ's stance toward the Security Council, it would be prudent for the United States and its partners to think creatively about ways to protect, or in some cases reduce the need for confidentiality. For example, one commentator suggests empowering an independent party, INTERPOL for example, to propose designations on behalf of states wishing to protect intelligence sensitivities.[47] Similarly, designations might be made on a provisional basis, pending in-camera review by a panel of jurists with security clearances from designating and enforcing states (i.e. where assets are

located).

VI. Conclusion

A better balance between the UN counter-terrorism sanctions regime and the rights of those it targets must be found. If UN member states fail to address this conflict, domestic courts will surely get involved. Such a result would leave a legal patchwork that frustrates the purpose of multilateral sanctions and casts a shadow over Security Council authority.

About the Author

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Endnotes

[1] The term “targeted sanction” refers to government measures adopted to direct coercive pressure on individuals or entities (including governments) to alter behavior, or prevent actions that could threaten international peace or security. They are applied in such a way as to minimize or eliminate adverse impact on innocent persons typical of comprehensive sanctions, such as those used against the Iraqi or Haitian governments and other regimes during the 1990s. See DAVID CORTRIGHT, GEORGE A. LÓPEZ & LINDA GERBER, SANCTIONS AND THE SEARCH FOR SECURITY: CHALLENGES TO UN ACTION (2002).

[2] Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union and EC Commission, 3 C.M.L.R. 41 (2008) [hereinafter Kadi].

[3] S.C. Res. 1267, ¶¶ 4, 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

[4] The sanctions were strengthened in numerous other ways. UN Security Council resolutions 1333 and 1390 added Osama bin Laden and his associates. *See* S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) and S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002). For a complete current list of relevant UN Security Council measures, refer to the UN Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities official website, *at* http://www.un.org/sc/committees/1267/resolutions.shtml.

[5] Measures adopted by the UN Security Council when acting under Chapter VII are binding upon all UN members; sanctions fall within the terms of Article 41 of that Chapter.

[6] *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, STAFF REPORT TO THE NAT’L COMM’N: MONOGRAPH ON TERRORIST FINANCING 45 (2004), *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf [hereinafter NAT’L COMM’N ON TERRORIST ATTACKS STAFF REPORT]. *See also* Victor D. Comras, *UN Terrorist Designation System Needs Reform*, PERSPECTIVES ON TERRORISM, at http://www.terrorismanalysts.com/pt/index.php.

[7] Note that even those persons who have been the object of Security Council action are usually state actors (such as former Liberian President Charles Taylor currently tried before the Special Court for Sierra Leone). *See, .e.g.*, Noah Birkhäuser, *Sanctions of the Security Council Against Individuals – Some Human Rights Problems, available at* http://www.statewatch.org/terrorlists/docs/Birkhauser.PDF.

[8] *See, e.g.*, Rome Statute of the International Criminal Court art. 67, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 (1998), *available at* http://www2.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

[9] For a detailed description of procedures followed by the 1267 Sanctions Committee through March 2006, *see* THOMAS J. BIERSTEKER & SUE E. ECKERT, STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES (Watson Institute Targeted Sanctions Project, 2006), *available at* http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf. The major subsequent reforms are detailed in UN Security Council Resolution 1822, S.C. Res. 1822, U.N. Doc. S/RES/1822 (June 30, 2008).

[10] Directing their ire toward member governments of the Security Council, three members of the UN Human Rights Committee recently observed: "It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States' constitutional traditions of providing bulwarks against exorbitant and oppressive executive action." UN Human Rights Committee's views in *Nabil Sayadi and Patricia Vinck v. Belgium*, Communication [Comm.] No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008), 48 I.L.M. 570 (2009) (individual opinion (partly dissenting) by Committee members Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Antoanella Motoc).

[11] A few examples follow: The Third and Fourth Reports of the 1267 Monitoring Team recorded concerns from 50 Member States about lack of due process or transparency in the listing and de-listing procedures followed by the Sanctions Committee. UN Sec'y Council Comm. Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, Monitoring Group, *Reports of the Monitoring Group/Monitoring Team, available at* http://www.un.org/Docs/sc/committees/1267/1267mg.htm. The Parliamentary Assembly of the Council of Europe described the procedural and substantive standards and the remedies available under the 1267 regime as "practices unworthy of international bodies such as the United Nations and the European Union." Resolution on the United Nations Security Council and European Union Blacklists, Council of Europe Parliamentary Assembly Res. 1597 (2008), *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1597.htm#1. The report of the *High-Level Panel on Threats, Challenges, and Change* complained that "[t]he way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions." U.N. Sec'y Gen., Report of the High-level Panel on Threats, *Challenges and*

Change, A More Secure World: Our Shared Responsibility, ¶ 152, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/.

[12] Telephone interview with Victor Comras, Int'l Trade Regulation Attorney (former Senior State Dep't Advisor on Sanctions Policy from 1999 to 2001 and UN Security Council appointed Monitor for the Implementation of Chapter VII Measures against Al Qaeda and the Taliban from 2002 to 2004, currently serving on the Security Council's Democratic People's Republic of Korea Sanctions Panel of Experts) (June 1, 2009).

[13] *See* NAT'L COMM'N ON TERRORIST ATTACKS STAFF REPORT, *supra* note 6, at 50-51.

[14] Kadi, *supra* note 2.

[15] Sanctions Committee amendments of October 19 and November 9, 2001.

[16] Council Regulation (EC) 881/2002, Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan, 2002 O.J. (L 139/9).

[17] Case T-306/01, Yusuf and Al Barakaat Int'l Found. v. Council of the EU and Commission of the EC, 2005 E.C.R. II-3533; and Case T-315/01, Kadi v. Council of the EU and the Commission of the EC, 2005 O.J. (C 281).

[18] Kadi, *supra* note 2.

[19] *Id.* ¶¶ 334, 348.

[20] *Id.* ¶ 346.

[21] *Id.* ¶ 323.

[22] *Id.* ¶ 349.

[23] *Id.* ¶ 348.

[24] *Id.* ¶ 349.

[25] *Id.* ¶ 352.

[26] *Id.* ¶¶ 369-371.

[27] *Id.* ¶¶ 373, 376.

[28] Commission Regulation (EC) 1190/2008, Amending for the 101st time Council Regulation (EC) No 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Osama bin Laden, the Al-Qaida Network and the Taliban, 2008 O.J. (L 322/25).

[29] The action was instituted on February 26, 2009; *see* Case T-85/09, Kadi v. Commission, 2009 O.J. (C 90/37).

[30] As of February 28, 2009, a total of 508 individuals and entities were on the Consolidated List according to the Security Council Committee, *Ninth Report of the Analytical Support and Sanctions Monitoring Team*, U.N. Doc. S/2009/245 (May 13, 2009), *available at* http://www.un.org/sc/committees/1267/monitoringteam.shtml.

[31] Case T-318/01, Othman v. Council and Comm'n, ¶ 83 (June 11, 2009), *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-318/01 [hereinafter Othman].

[32] *Id.* ¶ 86.

[33] *Id.* ¶ 82.

[34] Othman, *supra* note 31, ¶ 88.

[35] Al Haramain Islamic Found., Inc. & Multicultural Ass'n of S. Or. v. U.S. Dep't of Treasury, 2008 U.S. Dist. LEXIS 90493 [hereinafter Al Haramain].

[36] *Id.* at 98.

[37] *Id.* at 51-53.

[38] *Id.* at 72.

[39] *Ninth Report of the Monitoring Team*, *supra* note 30, ¶¶ 10, 36-38.

[40] Several cases have challenged the U.S. blacklist procedures. Most notably, in *Al Haramain*, *supra* note 35, Judge Garr King, in an opinion on motions for summary judgment, held that the Treasury Department (OFAC) had sufficient ground to support its designation of the Oregon branch of Al Haramain (AHIF-Oregon). Yet, despite 260 pages of news items and other documents provided to AHIF, it failed to include a specific explanation of the legal and factual rationale for its decision, thus failing to meet constitutional due process standards for agency decisions as required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Because of the open-ended nature of the asset freeze, Judge King reasoned that it may well be a "meaningful interference" with AHIF's property interest and thus a "seizure" under the Fourth Amendment. He directed the parties to brief the court on whether such a seizure would be reasonable under the circumstances and therefore "harmless error," noting in that context that AHIF's interests in receiving notice describing reasons for the continued post-designation freeze were "substantial." Because Judge King expressed significant reservations about the designation methodology followed by OFAC in the AHIF-Oregon case, a framework it applies to asset freezes pursuant to UN designations also, a final AHIF decision may well require additional due process protections similar to those demanded by the ECJ in *Kadi*.

[41] For a concise summary of the incremental reforms undertaken by the Security Council, *see* GEORGE A. LOPEZ ET AL., OVERDUE PROCESS: PROTECTING HUMAN RIGHTS WHILE SANCTIONING ALLEGED

TERRORISTS 11-13 (2009), *available at* http://www.fourthfreedom.org/pdf/Overdue_process.pdf.

[42] Before the new procedures are adopted, the newly elected European Parliament must be formally consulted. If adopted, as observers currently expect, the procedures would effectively demote UN Sanctions Committee decisions to the status of proposals, whose implementation within the 27 countries of the European Union would require EU ratification. *See* Proposal for a Council Regulation Amending Regulation (EC) 881/2002 Imposing Certain Specific Restrictive Measures Directed Against Persons and Entities Associated with Osama bin Laden, the Al-Qaida network and the Taliban., COM(2009) 187 final. 2009/0055 (CNS) (Apr. 22, 2009), *available at* http://www.statewatch.org/news/2009/apr/eu-com-restrictive-measures-187-09.pdf.

[43] *See* Resolution 1267, *supra* note 3.

[44] Kadi, *supra* note 2, ¶ 320.

[45] *Id.*

[46] *Id.* ¶¶ 338-342.

[47] See Comras, *supra* note 6.