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THE DEMISE OF THE U.N. ECONOMIC SANCTIONS REGIME TO DEPRIVE TERRORISTS OF FUNDING

Jimmy Gurule

In response to the September 11, 2001 terrorist attacks and the growing prevalence of terrorist activities around the world, the U.N. Security Council devised and implemented a global economic sanctions regime to freeze the funds, financial assets, and economic resources of individuals and entities who finance and support acts of terrorism. Pursuant to Chapter VII of the U.N. Charter, the Security Council adopted Resolutions 1267 (1999) and 1333 (2000), which impose duties on States to prevent and suppress the financing of terrorism. The international economic sanctions regime established by these resolutions has been characterized as “the sole vehicle for truly global action against the twin threats of Al-Qaida and the Taliban.” To date, pursuant to Resolutions 1267 and 1333, approximately 490 individuals and entities have been placed on a list, known as the “Consolidated List,” and their assets are required to be frozen by Member States.

Despite its importance in combating global terrorism, the Security Council’s asset freeze program has reached a critical juncture. Senior counter-terrorism officials are less enthusiastic about the economic sanctions regime than ever before. Increasingly fewer names are being submitted for designation under Resolutions 1267 and 1333, and terrorist-related assets are no longer being frozen. As a result, al Qaeda and the Taliban retain ample funding to sustain their lethal operations and finance deadly terrorist attacks. In short, based on every objective measurement, the U.N. counter-terrorism sanctions program appears to be failing. Unless significant measures are taken to hold States accountable for their failure to comply with their duty to freeze terrorist assets, the anti-terrorist financing sanctions regime will cease to be relevant in the fight against global terrorism.

This article examines the evolution, operation, and implementation of the U.N. sanctions regime to freeze terrorist assets, and makes several important recommendations for enhancing the effectiveness of the counter-terrorism sanctions program.

* Excerpts of this article have been taken from the author’s book, entitled: UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM (2009).
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I. THE INTERNATIONAL LEGAL DUTY TO FREEZE TERRORIST-RELATED ASSETS

In response to the September 11, 2001 terrorist attacks and the growing prevalence of terrorist activities around the world, the United Nations Security Council devised and implemented a global economic sanctions regime to freeze the funds, financial assets, and economic resources of individuals and entities who finance and support acts of terrorism. Pursuant to its Chapter VII authority, the Security Council has adopted numerous resolutions imposing duties on Member States to prevent and suppress the financing of terrorism. Among other things, these resolutions require coun-

1 The U.N. Charter confers on the Security Council the “primary responsibility” for the maintenance of international peace and security. See U.N. Charter art. 24, para. 1. Article 41, Chapter VII, authorizes the Security Council to impose measures not involving the use of armed force to maintain or restore international peace and security. Id. art. 41. Article 25 provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Id. art. 25. Additionally, article 103 provides that “[i]n the event of conflict between the obligations of the Members of the United Nations under the . . . Charter and their obligations under any other international agreement, their obligations under the . . . Charter shall prevail.” Id. art. 103.

tries to “freeze without delay” the funds, financial assets and economic resources of Osama bin Laden, members of al Qaeda, the Taliban and persons and entities associated with them. The international economic sanctions regime established by these resolutions has been characterized as “the sole vehicle for truly global action against the twin threats of Al-Qaida and the Taliban.”

The 1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention), also recognizing the need for the world community to work cooperatively to deprive terrorists of funding, complements the work of the Security Council. On June 25, 2002, the United States ratified the Terrorist Financing Convention. Among other important duties, it requires parties to the Terrorist Financing Convention to enact domestic legislation to criminalize and punish as a grave offense those persons who willfully provide or collect funds with the intention or knowledge that they will be used to carry out acts of terrorism. The Terrorist Financing Convention further requires State Parties to hold legal entities, such as banks, liable for providing financial services to terrorists by the imposition of criminal, civil, or administrative sanctions. Most importantly, the Terrorist Financing Convention imposes a legal obligation on signatories to freeze any funds used or allocated for the purpose of committing a terrorist offense. Article 8(1) provides that “[e]ach State Party shall take appropriate measures . . . for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing [terrorist-related] offences.”

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7 Terrorist Financing Convention, supra note 5, art. 4. See also id. art. 2.
8 Id. art. 5(3).
9 Id. art. 8(1).
The Financial Action Task Force on Money Laundering and Terrorist Financing (FATF), an inter-governmental body responsible for developing and promoting international standards to combat money laundering and terrorist financing, also acknowledges the importance of international action to freeze terrorist assets. The FATF is comprised of thirty-four member countries, associate members, FATF-style regional bodies, and several international organizations. In response to the 9/11 terrorist attacks, FATF adopted Nine Special Recommendations on Terrorist Financing, including a provision on terrorist asset freezing. Special Recommendation III: Freezing and Confiscating Terrorist Assets provides that “[e]ach country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorist organizations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.” Special Recommendation III is intended to implement the obligations imposed on States by Resolution 1267 (1999) and 1373 (2001) to freeze terrorist-related assets. The combination of these three authorities—the U.N. Security Council anti-terrorist financing resolutions, the Terrorist Financing Convention, and the FATF’s Special Recommendation III: Freezing and Confiscating Terrorist Assets—makes a compelling case

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10 In response to growing concerns over money laundering and the threat posed to the banking system and financial institutions, the Financial Action Task Force on Money Laundering (FATF) was established by the G7 countries at a summit held in Paris in 1989. In April 1990, the FATF issued a report containing a set of forty recommendations, which set out a basic legal framework to detect, prevent and suppress money laundering. In October 2001, the FATF expanded its mission to include the prevention of terrorist financing. The FATF has adopted Nine Special Recommendations on Terrorist Financing. See Financial Action Task Force, Special Recommendations on Terrorist Financing (Oct. 22, 2004), http://www.fatf-gafi.org/dataoecd/8/17/34849466.pdf [hereinafter Nine Special Recommendations on Terrorist Financing]; see also Financial Action Task Force, The Forty Recommendations (June 20, 2003), http://www.fatf-gafi.org/dataoecd/7/40/34849567.pdf [hereinafter Forty Recommendations].

11 The FATF is comprised of thirty-four member countries. India and the Republic of Korea are observer countries. The associate members include: the Asia/Pacific Group on Money Laundering (APG); the Grupo de Acción Financiera de Sudamérica (GAFISUD); Middle East and North Africa Financial Action Task Force (MENAFATF); and the Council of Europe Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL). The Caribbean Financial Action Task Force, Eurasian Group, Eastern and Southern Africa Anti-Money Laundering Group, and the Intergovernmental Action Group Against Money Laundering in Africa are FATF-style regional bodies. See Financial Action Task Force (FATF), FATF Members and Observers, http://www.fatf-gafi.org/document/52/0,3343,en_32250379_32237295_34027188_1_1_1_1,00.html (last visited Jan. 17, 2009).

12 Nine Special Recommendations on Terrorist Financing, supra note 10, at 1. Special Recommendation III further provides: “Each country should also adopt and implement measures, including legislative ones, which would enable competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations.” Id.
that every country has a legal duty to freeze the funds and curtail the flow of financial assets to terrorists and their financial supporters.

The successful implementation of an effective terrorist asset freezing regime is critical in combating the financing of terrorism. The U.N. working group of counter-terrorism experts, established by 2004 Security Council Resolution 1566, states that “freezing of financial assets is an indispensable tool in curtailing terrorism.”\(^{13}\) It is estimated that approximately $85 million in terrorist-related funds have been frozen under the international sanctions regime.\(^{14}\) However, the economic sanctions program serves several other valuable purposes. First, asset freeze acts as a deterrent against those who otherwise might be willing to finance terrorist activity.\(^{15}\) Second, persons designated under relevant Security Council resolutions are isolated from the international financial community. Their funds, financial assets and economic resources are subject to being frozen anywhere in the world. Thus, the fear of having their funds and other assets frozen may cause potential donors to reconsider funding terrorist activities. Second, asset freeze reduces the flow of money and other support to terrorists and makes the transfer of funds more difficult to effect.\(^{16}\) The economic sanctions program “terminate[s] terrorist cash flows by shutting down pipelines used to move terrorist-related assets.”\(^{17}\) Third, an effective financial ban may expose terrorist financing “money trails” that may generate leads to previously unknown terrorist cells and financiers.\(^{18}\) Finally, asset freeze may restrict terrorists from operating extensive terrorist networks, training camps and social programs for funding the families of homicide bombers.\(^{19}\)

The U.N. Security Council has been at the forefront of developing and monitoring the implementation of the anti-terrorism asset freeze pro-
gram. In addition to adopting numerous resolutions that impose a legal duty on Member States to freeze terrorist assets, the Security Council has established various committees and expert working groups to monitor the action taken by States to comply with measures imposed by these resolutions.\footnote{S.C. Res. 1267, supra note 2 (creating a committee of members of the Security Council to oversee implementation of measures imposed by Resolution 1267); S.C. Res. 1526, supra note 2 (creating the Analytical Support and Sanctions Monitoring Team).}

Furthermore, the Council has created a list, known as the “Consolidated List” or “Sanctions List,” of individuals and entities associated with bin Laden, al Qaeda, or the Taliban whose assets are required to be frozen by Member States.\footnote{See S.C. Res. 1333, supra note 2, ¶ 8(c).} Each year, however, fewer and fewer names are being submitted by States for inclusion on the Consolidated List for asset freeze.\footnote{See Seventh Report of the Sanctions Monitoring Team, supra note 4, ¶ 25.}

For example, in 2007, only eight names were added to the Sanctions List, the lowest annual rate ever, continuing a downward trend observable since 2001.\footnote{Id. ¶ 25, n. 37 (indicating that, in 2000, “there were seven listings: 2001 – 278 ; 2002 – 54; 2003 – 77; 2004 – 44; 2005 – 32; 2006 – 24). The Consolidated List, however, actually shows that eight, not five, names were added in 2007. See Al-Qaida and Taliban Sanctions Comm., The Consolidated List of the U.N. Security Council’s Al-Qaida and Taliban Sanctions Committee, available at http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf [hereinafter Consolidated List].} Equally disturbing, the amount of terrorist assets frozen over the last several years has stalled. There has been no increase in terrorist assets frozen since 2004.\footnote{See Seventh Report of the Sanctions Monitoring Team, supra note 4, annex III.}

In fact, the trend is moving in the opposite direction. At the end of 2007, approximately $85 million remained frozen under the sanctions regime, down from a previous high of $91.4 million.\footnote{Id. ¶ 57.} The continuing viability of the U.N. anti-terrorist financing sanctions program is further threatened by numerous legal challenges. While the European Court of FirstInstance denied claims that the designation process violates fundamental human rights and due process principles, two cases have been appealed to the Court of Justice of the European Communities.\footnote{See Joined Cases C-403 & C-415/05, Kadi, Al Barakaat Int’l Found. v. Comm’n, 2005 E.C.R. I.} In a January 2008 advisory opinion, an Advocate General for the higher court rejected the lower court’s conclusion that it lacked competence to review actions implementing Security Council resolutions issued under Chapter VII of the U.N. Charter against European Union due process and human rights standards. The Advocate General found that the European Union regulation implementing the economic sanctions, EC 881/2002, infringed on the right to be heard, the right to effective judicial review by an independent tribunal, and the right to
property. If the Advocate General’s position is adopted by the European Court of Justice, the regulation used by the twenty-seven Member States of the European Union to implement the sanctions likely will be held invalid. Furthermore, U.N. counter-terrorism experts fear that a decision that invalidated the sanctions against so many States also might lead to similar legal rulings outside of the European Union.

While the number of U.N. designations is declining and Member States are reluctant to freeze terrorist-related assets, the threats from al Qaeda and the Taliban remain persistent. According to U.N. counter-terrorism experts:

Al-Qaida has continued to show its determination to mount major attacks; it has extended its base of support; its leaders have consolidated their ability to communicate their message and their operational plans, and the Taliban have increased their influence not just in Afghanistan, but in North-Western Pakistan as well.

While much has been written about al Qaeda’s organizational disposition and strength, analysts agree that neither its global influence, nor its intention to attack the U.S., has declined. In 2007, suspected members of al Qaeda were reported arrested or killed in more than forty countries around the world, suggesting a high volume of terrorist planning. Moreover, in 2007 al Qaeda in the Islamic Maghreb (AQIM), the North Africa wing of al Qaeda, claimed responsibility for killing dozens of innocent civilians and wounding hundreds more in Algeria. These attacks included a suicide bombing near the U.N. building in Algiers and another attack the same day against a government office building that killed a total of forty-one people, including seventeen U.N. employees.

The Taliban remains a serious threat to international peace and security. The terrorist group is resurgent and dominates large areas in southern Afghanistan. Furthermore, Tehrik-e-Taliban Pakistan, also known as the Taliban Movement of Pakistan, has emerged as a new terrorist threat. The Taliban Movement of Pakistan, headed by Baitullah Mehsud, operates in

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30 Id. ¶ 11.
31 See id.
the Waziristan region, along the Pakistan border with Afghanistan, where Western intelligence suggests al Qaeda is regrouping.34 According to one U.N. report, the Taliban “have enough money to hire foot soldiers and to buy weapons, including the components for sophisticated improvised explosive devices, and their ability to cross the long and porous border with Pakistan is largely unconstrained.”35 There are currently estimated to be about 3,000 active and as many as 7,000 occasional Taliban fighters in Afghanistan, and the Taliban Movement of Pakistan is estimated to control a fighting force of 40,000.36 Moreover, al Qaeda and the Taliban appear to be closely aligned. In a September 2007 video message delivered by Ayman al-Zawahiri, al Qaeda’s second-in-command, he referred to Mullah Omar, the head of the Taliban, as the supreme leader.37 Further, the Taliban appears to have adopted some of al Qaeda’s terrorist tactics. In January 2008, the Taliban claimed responsibility for a suicide bombing that killed seven people, including an American, at a luxury hotel in Kabul, Afghanistan, where the Norwegian foreign minister was staying.38 Finally, Baitullah Mehsud, the leader of the Taliban Movement in Pakistan, is suspected of involvement in the tragic assassination of former Pakistani Prime Minister Benazir Bhutto in December 2007.39

The Security Council’s international asset freeze program has reached a critical juncture. Senior counter-terrorism officials are less enthusiastic about the economic sanctions regime than ever before and Member States are reluctant to submit names for inclusion on the Consolidated List.40 Terrorist-related assets are no longer being frozen.41 As a result, al Qaeda and the Taliban retain ample funding to sustain their operations and

36 Id.; Gannon, supra note 34.
41 Id., ¶¶ 57–58, n. 55. See also Sixth Report of the Sanctions Monitoring Team, supra note 15, ¶ 3 (“[F]ew names have been added to the Consolidated List of individuals, groups and entities subject to the Al-Qaida/Taliban sanctions measures, and States have not reported much action against those who are already on it.”) (citation omitted).
finance deadly terrorist attacks. Based on every objective measurement, the international economic sanctions program appears to be failing. Unless significant measures are taken to hold Member States accountable for their failures to comply with their duties to freeze terrorist-related assets “without delay,” the anti-terrorist financing sanctions regime will cease to be relevant in the struggle against global terrorism.

II. THE ORIGINS OF THE U.N. SECURITY COUNCIL ECONOMIC SANCTIONS REGIME

A. U.N. Security Council Resolutions 1267 and 1333

The international assets freeze program has its origins in three important U.N. Security Council resolutions: 1267, 1333, and 1373. While the Security Council has adopted a number of successor resolutions intended to strengthen the mandated of these resolutions (as least thirteen in total), these three resolutions constitute the foundation for the international legal framework to freeze terrorist-related assets. In October 1998, the Security Council decided that the threat posed by al Qaeda required an international response. The Taliban had provided al Qaeda a safe haven, where the terror group was able to plan, supervise, and execute terrorist attacks, including those against the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, in August 1998. Accustomed to dealing with State actors, the Council decided to confront al Qaeda by imposing sanctions on the Taliban, who operated as the de facto government in Afghanistan. The Security Council adopted Resolution 1267, which imposed various obligations on Member States, including the duty to freeze funds and other financial resources owned or operated by the Taliban. Paragraph 4(b) requires countries to “[f]reeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban.”

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42 See Sixth Report of the Sanctions Monitoring, supra note 15, ¶ 6 (“[I]t seems clear that the [Taliban] movement has no current shortage of money, either to hire fighters or to provide them with weapons.”) (citation omitted).

43 See supra note 3 and accompanying text (noting that the sanctions regime established by Resolutions 1267 and 1333 has been modified and strengthened by subsequent resolutions, including Resolutions 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006), and 1735 (2006)).

44 See S.C. Res. 1267, supra note 2. Resolution 1267 also imposed a ban on air travel to and from territory controlled by the Taliban, imposed a weapons ban, directed the Taliban to cease providing al Qaeda a safe haven, and ordered that Osama bin Laden be immediately turned over to appropriate authorities for prosecution in connection with the African embassy bombings. Id.

45 Id. ¶ 4(b).
of the Security Council, to monitor actions taken by States to implement the measures imposed by the resolution (Al-Qaida and Taliban Sanctions Committee or 1267 Committee).\footnote{Id. ¶ 6. The Al-Qaida and Taliban Sanctions Committee is responsible for overseeing implementation by States of the sanctions measures (assets freeze, travel and arms embargo) imposed by the Security Council on individuals and entities belonging to or associated with the Taliban, Osama bin Laden, and al Qaeda. See S.C. Res. 1267, supra note 2.}

The Taliban failed to comply with the Security Council’s mandates, and terrorist attacks by al Qaeda members continued. On October 12, 2000, a small boat filled with explosives was detonated against the USS Cole, docked in Aden, Yemen. The blast killed seventeen American sailors and wounded at least forty others. Moreover, members of al Qaeda continued to operate a network of terrorist training camps in Afghanistan, responsible for training as many as 10,000 terrorists. In response to the attack on the USS Cole and other terrorist activities by al Qaeda, in December 2000 the Security Council adopted Resolution 1333, which went beyond imposing sanctions on State actors such as the Taliban. Resolution 1333 imposed measures on individuals and non-State entities, mandating a freeze on the financial assets of Osama bin Laden, al Qaeda, and individuals and entities associated with them.\footnote{S.C. Res. 1333, supra note 2, ¶¶ 5(a), 8(b), 8(c), 11 (noting regulations concerning weapons bans, closures of Arian Afghan Airlines offices in Member States, asset freezes, and travel bans).} In essence, through Resolution 1333, the Security Council sought to isolate bin Laden, al Qaeda, and their associates from the international community, including sympathetic financial donors.

Paragraph 8(c) of Resolution 1333 requires the Sanctions Committee created by Resolution 1267 “to [establish and maintain] an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with Usama bin Laden, including those in the Al-Qaida organization.”\footnote{Id. ¶ 8(c).} Member States are encouraged to submit information to the members of the Al-Qaida and Taliban Sanctions Committee on individuals and entities associated with bin Laden and al Qaeda for designation and placement on the list by the Committee. After inclusion on that list, Member States are obliged to “freeze without delay” the “funds and other financial assets” of those individuals and entities.\footnote{Id.} The list, referred to as the “Consolidated List,” includes persons and entities associated with the Taliban, as well as bin Laden and al Qaeda.\footnote{See Sec. Council Fact Sheet on Listing, http://www.un.org/sc/committees/1267/fact_sh eet_listing.shtml (last visited Oct. 10, 2008) [hereinafter Fact Sheet on Listing]. See also S.C. Res. 1390, supra note 2 (expanding the sanctions imposed under Resolutions 1267 and 1333 beyond the Islamic Emirate of Afghanistan to terrorist groups or individuals generally); see}
and the Taliban achieved less than was expected. Few names were placed on the Consolidated List. However, the Security Council’s determination to deal with international terrorism, including its funding, was strengthened by the tragic events that occurred on September 11, 2001.


In the aftermath of the 9/11 terrorist attacks, the U.N. Security Council unanimously adopted Resolution 1373, which imposes several important duties on Member States to combat the threat of global terrorism. As a result of this resolution, States are required to prevent the movement of terrorists by effective border controls and regulations on the issuance of travel documents (travel ban), to prevent the supply of weapons to terrorists (arms embargo), to deny safe haven to those who plan, support or commit terrorist acts (safe haven ban), and to afford States the greatest measure of assistance in connection with criminal terrorism investigations (mutual assistance). Resolution 1373 further imposes certain obligations on Member States to prevent and suppress the financing of terrorism. First, States are required to criminalize the willful provision or collection of terrorist-related funds. To comply with this provision, States must enact domestic legislation, if necessary, to make it a crime to collect or provide funds to terrorists. Second, States must ensure that any person who participates in financing terrorist acts is prosecuted and brought to justice. Third, States must prohibit persons and entities from making financial assets, economic resources, and financial services available to persons who commit or facilitate the commission of terrorist acts. Finally, Resolution 1373 authorizes


See Seventh Report of the Sanctions Monitoring Team, supra note 4, ¶ 25 n. 37 (noting that there were only seven listings in 2000).

See S.C. Res. 1373, supra note 2.

See id. ¶¶ 2(a), (c), (f), (g). See also Alistair Millar & Eric Rosand, Allied Against Terrorism 16 (2006).

The duty to establish the financing of terrorism as a criminal offense under a State’s domestic legislation is further imposed as a term of the International Convention for the Suppression of the Financing of Terrorism. See Terrorist Financing Convention, supra note 5, art. 4. The U.S. is a signatory to the Terrorist Financing Convention, which was ratified by the U.S. Senate on June 25, 2002. See Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, 116 Stat. 721 (2002).

S.C. Res. 1373, supra note 2, ¶ 2(c).

Id. ¶ 1(d).
States to “[f]reeze without delay funds and other financial assets or economic resources” of terrorists, those who finance terrorism, and terrorist organizations around the world.\textsuperscript{58}

The assets freeze provision is particularly broad in scope and coverage. Paragraph 1(c) of Resolution 1373 requires all countries to “freeze without delay” the funds and other financial assets, or economic resources of: (1) persons who commit, or attempt to commit, participate in, or facilitate the commission of terrorist acts; (2) “entities owned or controlled by such persons;” (3) “persons and entities acting on behalf of, or at the directions of, such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons;” and (4) associated persons and entities.\textsuperscript{59} States are required to freeze not only the “funds and other financial assets” of terrorists and their associates, but also their “economic resources.”\textsuperscript{60} In addition to freezing the financial assets of designated persons and entities, paragraph 1(c) requires States to freeze their non-monetary assets, such as real estate, vehicles, aircraft, ships, equipment, precious stones, and other personal property.\textsuperscript{61} More importantly, Resolution 1373 is not limited to freezing the funds and assets owned or controlled by al Qaeda, bin Laden, the Taliban, and individuals and entities associated with them, but also reaches the financial resources of any person or entity involved in the commission of terrorist acts. For example, Resolution 1373 authorizes States to freeze the assets of Hamas,\textsuperscript{62} Hizballah,\textsuperscript{63} the

\textsuperscript{58} Id. ¶ 1(c).

\textsuperscript{59} Id. Resolution 1617 defines the acts or activities indicating that an individual or entity is “associated with” al Qaeda, Osama bin Laden, or the Taliban to include:

· participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

· supplying, selling or transferring arms and related materiel to;

· recruiting for; or

· otherwise supporting acts or activities of;

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

S.C. Res. 1617, \textit{supra} note 2, ¶ 2.

\textsuperscript{60} S.C. Res. 1373, \textit{supra} note 2, ¶ 1(c).

\textsuperscript{61} See Seventh Report of the Sanction Monitoring Team, \textit{supra} note 4, ¶ 84, annex I, n. 10. It should be noted that Resolution 1735 (2006) expanded the property subject to asset freeze under the Al-Qaida and Taliban Sanctions to include “funds and other financial assets or economic resources.” S.C. Res. 1373, \textit{supra} note 2, ¶ 1(a) (emphasis added).

\textsuperscript{62} See Press Release, U.S. Dep’t of Treasury, Shutting Down the Terrorist Financial Network (Dec. 4, 2001), available at http://www.investigativeproject.org/documents/misc/29.pdf (noting that HAMAS was designated as a terrorist organization in 1995 pursuant to Executive Order 12947 and was added to the list of terrorist organizations subject to the asset freeze in 1996 under Executive Order 13224).
Liberation Tigers of Tamil Elam (LTTE),\textsuperscript{64} the Revolutionary Armed Forces of Colombia (FARC),\textsuperscript{65} and other terrorist groups not controlled by al Qaeda, bin Laden, and the Taliban.

There are two other significant differences between Resolutions 1267 and 1333 and Resolution 1373. Resolution 1373 does not create a list of terrorist organizations, entities, or individuals subject to asset freeze. While States are obliged to freeze the funds, financial assets, and other economic resources of persons involved in the commission of terrorist acts, Resolution 1373 does not require that their names be placed on a U.N.-administered list.\textsuperscript{66} The Consolidated List created by Resolutions 1267 and 1333, targeting al Qaeda, Osama bin Laden, the Taliban, and individuals and entities associated with them, is the only such terrorist financing list.

Additionally, the Counter-Terrorism Committee (CTC) created by Resolution 1373 is not a sanctions body. It is not responsible for designating individuals and entities for asset freeze. Under Resolution 1373, a decision to freeze assets takes place on two levels.\textsuperscript{67} Initially, a competent national authority decides whether certain assets should be frozen because the person or entity falls within the mandate of paragraph 1(c) of the resolution ("freeze without delay").\textsuperscript{68} After the initial evaluation, other States must decide, in the exercise of their discretion, whether to adopt the sanction and impose an asset freeze on the party concerned. Freezing the assets of such person or entity is not mandated by the CTC.


\textsuperscript{66} See S.C. Res. 1373, supra note 2.


\textsuperscript{68} See id.; S.C. Res. 1373, supra note 2, ¶ 1(c).
C. U.N. Security Council Counter-Terrorism Committees

1. Al-Qaida and Taliban Sanctions Committee

The Committee established by Resolution 1267, the Al-Qaida and Taliban Sanctions Committee, is responsible for overseeing States’ implementation of the measures (assets freeze, travel ban and arms embargo) imposed by the Security Council to combat the terrorist threat posed by Osama bin Laden, al Qaeda, the Taliban, and persons and entities associated with them. The Committee’s mandate was originally limited to the Taliban, but was extended to include al Qaeda, bin Laden, and their associates by Resolutions 1333 and 1390.69 The Committee maintains a list of individuals and entities for this purpose, the Consolidated List. To prevent and suppress the financing of terrorism, States are obliged to freeze the assets of individuals and entities on the Consolidated List.70 The mandate of the Committee further includes regularly updating the List, examining reports submitted by Member States documenting their compliance with Resolutions 1267 and 1333 and other related resolutions, considering requests for de-listing or removal from the List, and submitting periodic reports to the Security Council.71

2. Analytical Support and Sanctions Monitoring Team

In 2004, to further strengthen the mandate of the Al-Qaida and Taliban Sanctions Committee, the Security Council established an eight-person Analytical Support and Sanctions Monitoring Team (Monitoring Team).72 The Monitoring Team, which operates under the direction of the Sanctions Committee, was initially mandated to monitor and make recommendations on implementation of the measures imposed by Resolutions 1267, 1333 and 1390. The Monitoring Team further was tasked with submitting three comprehensive reports to the Sanctions Committee on implementation by States of the measures imposed by the relevant Security Council resolutions, including recommendations for improved implementation and possible new measures.73 Resolutions 1617 (2005), 1735 (2006),

69 See S.C. Res. 1333, supra note 2; see also S.C. Res. 1390, supra note 2.
70 S.C. Res. 1333, supra note 2, ¶ 8(c).
72 S.C. Res. 1526, supra note 2, ¶¶ 6–7.
73 Id. ¶ 8.
and 1822 (2008) extended the mandate of the Monitoring Team.\footnote{S.C. Res. 1617, \textit{supra} note 2, ¶ 19; S.C. Res. 1735, \textit{supra} note 2, ¶ 32. On June 20, 2008, the Security Council adopted Resolution 1822, extending the mandate of the Monitoring Team until the end of 2010. S.C. Res. 1822, ¶ 39, U.N. Doc. S/RES/1822 (2008) [hereinafter S.C. Res. 1822].} To date, the Monitoring Team has submitted eight reports to the Al-Qaida and Taliban Sanctions Committee, and has been tasked with submitting two additional reports by the end of July 2009.\footnote{The last report of the Monitoring Team was submitted on May 14, 2008. \textit{See} Eighth Report of the Sanctions Monitoring Team, \textit{supra} note 14. \textit{See also} S.C. Res. 1822, \textit{supra} note 74, annex I(a) (requiring the Monitoring Team to submit two additional reports to the Sanctions Committee, one by February 28, 2009, and the second by July 31, 2009).} The Monitoring Team has been involved in other activities intended to enhance the effectiveness of the anti-terrorism economic sanctions measures, including visiting Member States, participating in national, sub-regional, regional, and international conferences, and meeting with intelligence and security services and representatives of financial institutions.\footnote{\textit{Id.} annex I(p)–(r), (u).} 

3. Resolution 1373 Counter-Terrorism Committee

To monitor implementation of the duties imposed on Member States by Resolution 1373, the Security Council established the CTC, comprised of all fifteen members of the Council, to be assisted by appropriate experts.\footnote{S.C. Res. 1373, \textit{supra} note 2, ¶ 6.} One of the CTC’s most important responsibilities is to help States obtain the technical assistance they need to implement the measures imposed by Resolution 1373.\footnote{\textit{See} U.N. Sec. Council, Counter-Terrorism Comm. Report of the Counter-Terrorism Comm. to the Sec. Council, ¶¶ 12–14, U.N. Doc. S/2007/675 (Nov. 20, 2007).} More specifically, the CTC coordinates and facilitates the delivery of training and technical assistance to States to prevent the financing of terrorism. The CTC’s mandate also includes strengthening contacts and coordination both with the U.N. system of organizations and among international, regional, sub-regional and intergovernmental organizations, and identifying and promoting best practices in all key areas of Resolution 1373.\footnote{\textit{Id.} ¶ 2.} Over time, the CTC’s responsibilities have expanded to include reviewing hundreds of reports submitted by Member States on actions taken to implement Resolution 1373.\footnote{\textit{See} \textsc{Millar} \& \textsc{Rosand}, \textit{supra} note 53, at 16–17; \textit{see also} U.S. Gov’t Accountability Office, Better Strategic Planning Needed to Coordinate U.S. Efforts to Deliver Counter-Terrorism Financing Training and Technical Assistance Abroad 40 (2005), http://www.gao.gov/new.items/d0619.pdf.} Finally, in 2005, Resolution 1624 broadened the CTC’s mandate to include working
with States to implement measures to prohibit and prevent incitement to commit acts of terrorism.  

4. Counter-Terrorism Committee Executive Directorate

Initially, consultants hired by the U.N. Secretariat, hired on short-term contracts, performed the CTC’s work. Realizing the need for a more permanent and professional staff, in March 2004 the Security Council adopted Resolution 1535, creating the Counter-Terrorism Committee Executive Directorate (CTED), comprised of thirty-five counter-terrorism experts and support staff. The Security Council adopted Resolution 1805 extending the CTED’s mandate until the end of 2010. The CTED consists of an Assessment and Technical Assistance Office (ATAO) and the Information and Administrative Office (IAO). The ATAO is composed of twenty counter-terrorism experts and is responsible for evaluating the technical assistance needs of States to assist them in implementing measures imposed by Resolution 1373. The IAO is in charge of handling the administrative needs of the CTC, including overseeing personnel and financial matters.

The CTED’s mandate includes providing the CTC with expert advice on all areas covered by Resolution 1373, reviewing Member States’ reports on their implementation of their obligations, visiting countries to verify their reports, facilitating technical assistance to countries to enhance their asset freeze regime, and coordinating with other U.N. counter-terrorism bodies. The CTED’s mandate also includes monitoring Member States’ implementation of Security Council Resolution 1624, condemning

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81 See S.C. Res. 1624, supra note 2, ¶¶ 5–6.
84 The CTED has been fully staffed since September 2005 and was declared fully operational in December 2005. See MILLAR & ROSAND, supra note 53, at 17; see also Sec. Council: Counter-Terrorism Comm., http://www.un.org/sc/ctc/page1.html (last visited Oct. 10, 2008).
87 See Presentation to John Jay College of Criminal Justice, supra note 82.
incitement to commit acts of terrorism. Finally, the CTED works closely and coordinates its activities with the Monitoring Team created to enhance the work of the Al-Qaida and Taliban Sanctions Committee.

5. Resolution 1566 Working Group

Following the terrorist incident involving the seizure of approximately 1,200 hostages and the deaths of hundreds of children at a school in Beslan, Russia, the Security Council adopted Resolution 1566 in October 2004. In addition to strongly condemning acts of terrorism, especially the killing of innocent children, Resolution 1566 established a working group consisting of all members of the Security Council. The Working Group was tasked with submitting recommendations to the Council on “practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee.” The Working Group further was directed to look into the possibility of establishing an international fund to compensate the victims of terrorist acts. The CTC is now aided by two administrative bodies created by the Security Council, the CTED and the 1566 Working Group, in evaluating the implementation of Resolution 1373.

III. THE ECONOMIC SANCTIONS DESIGNATION PROCESS

A. Consolidated List

The Consolidated List has been characterized as the “cornerstone” of the Al-Qaida and Taliban sanctions regime. Designation pursuant to Resolutions 1267 and 1333 involves a two-step process: (1) Member States submit the names of persons and entities for inclusion on the Consolidated List to the Al-Qaida and Taliban Sanctions Committee; and (2) the Committee reviews the submissions and makes a final determination on whether to add the names to the List. Initially, a competent national authority decides whether the concerned party falls within coverage of the relevant resolutions and therefore should be placed on the Consolidated List. The Sanc-

88 S.C. Res. 1624, supra note 2, ¶ 6.
89 S.C. Res. 1566, supra note 2.
90 Id. ¶ 9.
91 Id. ¶ 10. As of January 2008, the 1566 Working Group has only published one report proposing some general practical measures to prevent terrorist financing. See Report of the Security Council Working Group Established Pursuant to Resolution 1566, supra note 13.
93 The term “competent authority” is not defined under any of the relevant U.N. Security Council Resolutions. In essence, the Security Council has deferred to the States, permitting
tions Committee then must decide whether to include the person on the List, on the basis of evidence submitted by the Member State to justify the proposed designation.\textsuperscript{94}

By the end of 2007, more than four hundred and eighty names had been placed on the Consolidated List, the vast majority of which were submitted by the United States shortly following the September 11, 2001 terrorist attacks.\textsuperscript{95} The list is divided into five sections: the first for individuals belonging to or associated with the Taliban (one hundred and forty-two individuals); the second for entities belonging to or associated with the Taliban (none); the third for individuals belonging to or associated with the al Qaeda organization (two hundred and twenty-five individuals); the fourth for entities belonging to or associated with al Qaeda (one hundred and twelve entities); and the fifth for individuals and entities that have been removed from the list pursuant to a decision by the Al-Qaida and Taliban Sanctions Committee (eleven individuals and twenty-four entities).\textsuperscript{96}

\textbf{B. Submission of Names by Member States}

Member States play a crucial role in the designation process. All names on the Consolidated List have been submitted to the Sanctions Committee by Member States. States are responsible for both the accuracy and sufficiency of the information provided to the Committee. Thus, the accuracy of the List depends on the accuracy of the information included in the State submissions. When proposing names to the Committee for inclusion on the Consolidated List, States are required to use the Cover Sheet for Member States Submission to the Committee, attached as an annex to the Guidelines to the Committee for the Conduct of Its Work (Committee Guidelines). Security Council Resolution 1735 created the cover sheet, which was then attached as an annex to the Resolution, and was intended to simplify the designation process and enhance the quality of the identifier information submitted with State proposals for designation.\textsuperscript{97} The cover sheet details the type of identifier information that should be included in the listing proposal. Specific identifier information is needed to enable the accurate identification of individuals and entities by the competent authorities.

\begin{itemize}
\item \textsuperscript{94} See Guidelines of the Committee, \textit{supra} note 71, ¶ 12(c) (explaining that the proposed designations are submitted to the Committee through the Member States’ Permanent Missions to the United Nations in New York).
\item \textsuperscript{95} See Seventh Report of the Sanctions Monitoring Team, \textit{supra} note 4; Millar & Rosand, \textit{supra} note 53, at 19, 20.
\item \textsuperscript{96} See Consolidated List, \textit{supra} note 23 (noting the most recent numbers on the Consolidated List).
\item \textsuperscript{97} S.C. Res. 1735, \textit{supra} note 2, ¶¶ 7–8.
\end{itemize}
that are required to implement the sanctions measures against such persons and entities. Use of the cover sheet enhances clarity, uniformity and consistency with regard to names submitted by Member States for inclusion on the List.

For individuals, States are required to identify: “family name/surname, given names, other relevant names, date of birth, place of birth, nationality/citizenship, gender, aliases, employment/occupation, residence, passport or travel document and national identification number, current and previous addresses, website addresses, and current location.” States are further encouraged to submit known aliases used by the individual proposed for designation, and whether the alias is considered a “good quality” or “low quality” alias. For groups, the following identified information should be provided, including: “name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business or activity, leadership, tax or other identification number and other names by which it is known or was formerly known, and website addresses.” If the submissions are found to be inadequate, however, the Committee retains the discretion to request additional identifier information or to refuse to approve the designation until additional information is provided. While less than perfect, the quality of the identifier information included in Member State submissions generally has improved over time through enhanced listing procedures adopted by the Committee.

C. Statement of the Case

The Guidelines of the Committee further require States to provide a statement of the case with each submission that establishes the justification for the listing in accordance with the relevant resolutions. The statement of the case should provide as much detail as possible to support a decision for listing, including:

(1) specific findings demonstrating the association or activities alleged;

98 Guidelines of the Committee, supra note 71, ¶ 6(e).
99 See Consolidated List, supra note 23. The term “alias” refers to a name, other than the person’s true birth name, that is used by the person placed on the Consolidated List. The State submitting the name for placement on the Consolidated List determines the quality of the alias. For example, if the State submitting the name has strong evidence that the designee has used a particular false name in the past, such alias would be characterized as a “good quality alias.” However, if the State merely suspects that the designee has used a particular false name, that alias would be characterized as a “low quality alias.” Ultimately, the submission of alias information is merely an attempt to assist States in identifying the correct person for asset freeze.
100 Guidelines of the Committee, supra note 71, ¶ 6(e).
(2) the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.);
(3) supporting evidence or documents that can be supplied . . . [and];
(4) the details of any connection with a currently listed individual or entity.  

Before a State proposes a name for addition to the Consolidated List, it is encouraged to contact the State of residence or citizenship of the individual or entity concerned to obtain any possible additional information to support the designation. States also are required to indicate to the Committee what portions of the statement of the case may be released to the public or other Member States.

D. Standard of Proof

A criminal charge or conviction is not required for an individual’s inclusion on the Consolidated List. According to the Security Council, asset freeze is a preventive measure intended to stop the flow of funds to terrorists, rather than to punish the owner for the commission of a crime. The legal standard for asset freeze is whether there are “reasonable grounds” or a “reasonable basis” to believe that such funds or other assets could be used to finance terrorist activity, not the criminal justice standard of proof beyond a reasonable doubt. In Yusuf v. Council of the E.U, the Court of First Instance stated that “freezing of funds is a precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.” This point was reiterated in the Third Report of the Sanctions Monitoring Team, which stated that although many of those on the List have been convicted of terrorist offences, and others indicted or criminally charged, the List is not a criminal list. The U.N. Report states: “[T]he sanctions do not impose a criminal punishment or procedure such as detention,

101 Id. ¶ 6(d).
102 Id. ¶ 6(c).
103 Id. ¶ 6(d).
105 See Interpretative Note to Special Recommendation III, supra note 104, ¶¶ 2, 6.
arrest or extradition, but instead supply administrative measures such as freezing assets.”

Many of the individuals on the Consolidated List are members of al Qaeda and affiliated terrorist groups. Entities on the List associated with the al Qaeda organization read like a “Who’s Who” of Islamist terrorist organizations. These extremist terror groups include: the Abu Sayyaf Group; Al-Itihadd Al-Islamiya; al Qaeda in the Islamic Maghreb; Al-Jihad/Egyptian Islamic Movement; Ansar Al-Islam; Armed Islamic Group; Eastern Turkistan Islamic Movement; Islamic Army of Aden; Islamic International Brigade; Islamic Jihad Group; Islamic Movement of Uzbekistan; Jaish-i-Mohammed; Jama’at al-Tawid Wa’al-Jihad; Jemaah Islamiyah; Lashkar-e-Tayyiba; Lashkar-i-Jhangvi; Libyan Islamic Fighting Group; Moroccan Islamic Combat Group; and the Tunisian Combatant Group.

Additionally, a number of Islamic charities suspected of funding al Qaeda have been placed on the List, including over fourteen branches of Al-Haramain, a charity based in Saudi Arabia.

E. Joint Designations

In the months following the September 11, 2001 terrorist attacks, Member States submitted joint designations to the Al-Qaida and Taliban Sanctions Committee. For example, in March 2002, the United States “participated in its first joint designation of a terrorist supporter. The United States and Saudi Arabia jointly designated the Somalia and Bosnia-Herzegovina offices of Al-Haramain, a Saudi-based [non-governmental


108 The Sixth Report of the Monitoring Team provides a criminal profile of the individuals on the List:

[A]bout two thirds of the individuals on the Al-Qaida list have been charged with a criminal offence; about 40 percent have been convicted and sentenced; the cases against about 20 percent remain pending; and less than five percent have been acquitted. More than half of the total were facing charges or had been convicted (even if in absentia) before they were put on the List. About half have been arrested at some point, two thirds of who were arrested before their listing. No more than 25 percent of the individuals on the Al-Qaida list can be presumed to be alive, not in custody and never arrested, charged or convicted of a criminal offence.


110 See Consolidated List, supra note 23.
These charities were linked to al Qaeda and their names were forwarded to the Sanctions Committee for inclusion on the Consolidated List. In April 2002, the United States and the other G7 members jointly designated nine individuals and one organization. All of these parties were European-based al Qaeda organizers and terrorist financiers. In August 2002, the United States and Italy jointly designated eleven individuals and fourteen entities linked to the Salafist Group for Call and Combat, and al Qaeda-linked terrorist group operating in Algeria. The group has since changed its name to Al Qaeda in the Islamic Maghreb, and strengthened its affiliation with al Qaeda. In September 2002, the United States and Saudi Arabia jointly referred to the Sanctions Committee Wa’el Hamza Julaidan, an alleged associate of Osama bin Laden and a supporter of al Qaeda. Finally, in October 2002, in the wake of the terrorist attacks in Bali, Indonesia, where a mini-van loaded with explosives was detonated in front of two nightclubs, killing 202 people and injuring 300 more, the United States, Australia, Indonesia, the Philippines, Singapore, and several other countries designated Jemaah Islamiyah, an al Qaeda-affiliated group operating in Southeast Asia. A few days later, the Sanctions Committee added Jemaah Islamiya to its terror list.

F. Review and Final Determination by the Sanctions Committee

The Sanctions Committee is required to expeditiously consider requests to place names on the Consolidated List. Once a submission is received, it is circulated to all fifteen Committee members, who have five working days to raise any objection. If no one objects, the listing is approved. However, a Committee member may request additional time to...
consider the submission, in which case a decision is suspended until the member is ready to proceed. Such a “hold” may occur when a member believes more information is needed to justify the listing, the submission lacks specific identifier information to accurately identify the subject, or more time is needed to evaluate the listing. In practice, the Committee does not reach a decision on submissions within the five-day no-objection period. Since the beginning of 2005, more time has often been required. In fact, it is not uncommon for a decision on a submission to take weeks.

The decision to approve a submission is made by consensus of the Committee’s members. As previously noted, because inclusion on the List is not intended as punishment for a crime, the criminal standard of proof does not apply. Instead, the decision to list is measured against a lower standard of “reasonable grounds” or “reasonable basis” to believe that funds or other assets are terrorist-related.

Once a proposed designation is approved, the Committee issues an announcement on its website and updates the Consolidated List. All U.N. Member States are thereafter required to “freeze without delay” any assets owned or controlled by the designated party. This requires Member States to notify appropriate authorities, agencies and private sector offices within their respective jurisdictions so that action can be taken to implement the freeze order “without delay,” which ideally means with a few hours of a designation by the Committee. Prompt action is necessary “to prevent the flight or dissipation of terrorist-linked funds or other assets, and . . . to interdict and disrupt their flow swiftly.” Any delay between a listing becoming public and measures being taken by Member States affords the listed party an opportunity to move the assets beyond the reach of the sanctions. Additionally, the duty to freeze the assets of persons and groups on

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121 Id. ¶ 44.
122 Guidelines of the Committee, supra note 71, ¶ 4(a).
123 Interpretative Note to Special Recommendation III, supra note 104, ¶¶ 2, 6.
124 Interpretive Note to Special Recommendation III, supra note 104, ¶ 6.

The term freeze means to prohibit the transfer, conversion, disposition or movement of funds or other assets on the basis of, and for the duration of the validity of, an action initiated by a competent authority or a court under a freezing mechanism. The frozen funds or other assets remain the property of the person(s) or entity(ies) that held an interest in the specified funds or other assets at the time of the freezing and may continue to be administered by the financial institution or other arrangements designated by such person(s) or entity(ies) prior to the initiation of an action under a freezing mechanism.

Id. ¶ 7(a).
125 Id. ¶ 7(i).
the List is an ongoing obligation. For example, when opening a new account, banks should check the name of the new customer against the names on the Consolidated List. The Committee is further responsible for updating the List.

A checklist was introduced by Security Council Resolution 1617 to remind Member States of the action that should be taken with regard to new listings. States are required to answer “yes” or “no” on several questions, including whether the Member State has notified financial institutions of the designation and frozen any assets. Member States are encouraged to submit any additional information on listed individuals and entities that would improve the existing information on the Consolidated List.

States were further required by Resolution 1617 to submit a checklist by March 1, 2006, to the Committee on any individuals and entities placed on the Consolidated List prior to the Resolution. Many States, however, have been unwilling to submit a checklist to the Committee. In the Seventh Report of the Monitoring Team submitted to the Sanctions Committee in November 2007, the Team acknowledged the lack of cooperation:

There are . . . 135 States which had not submitted a checklist 19 months after the reporting date (1 March 2006). [T]he checklists have only provided limited information from 57 States on the 24 names added to the List between 29 July 2005 and 31 January 2006, and nothing concerning the 443 names that were already there, or the 23 names added since February 2006.

Needless to say, the unwillingness of Member States to comply with measures taken by the Security Council to enhance implementation of Resolutions 1267 and 1333 seriously undermines the effectiveness of the financial embargo imposed by the Security Council on members of al Qaeda, the Taliban, and affiliated entities, intended to prevent the commission of terrorist attacks.

G. De-Listing Process

A person whose name is added to the Consolidated List is afforded an opportunity to present his case to the Sanctions Committee for review. The Committee’s Guidelines authorize de-listing or removing names from

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128 See S.C. Res. 1617, supra note 2, annex II.
129 See Guidelines of the Committee, supra note 71, ¶ 7.
130 S.C. Res. 1617, supra note 2, ¶ 10.
131 Seventh Report of the Monitoring Team, supra note 4, ¶ 143; see also Fifth Report of the Sanctions Monitoring Team, supra note 92, ¶ 34 (noting States’ reluctance to report by submitting checklists to the Committee).
the Consolidated List. Individuals, groups or entities may submit a petition to consider their cases for de-listing through their States of residence or citizenship. Alternatively, a party can submit a request for de-listing through an administrative “focal point” established within the Security Council Subsidiary Organ Branch to receive de-listing requests. The focal point would forward the de-listing request for information and comment to the designating State and the petitioner’s State of residence or citizenship to determine whether that state or states support or oppose the petition for de-listing. The views of the concerned States are then forwarded to the Sanctions Committee for review and a decision on the petition for de-listing. This process is outlined in paragraph 8 of the Committee’s Guidelines.

If the petitioner submits the de-listing request to the State of residence or citizenship, the State should review all relevant information. If the petitioned State wishes to pursue a de-listing request, it should then seek to persuade the designating State to submit jointly or separately a request for de-listing to the Committee. The petitioned State may, however, without an accompanying request from the designating State, submit a request for de-listing to the Sanctions Committee. The Committee is required to reach a decision by consensus. However, if consensus cannot be reached, the matter may be submitted to the Security Council for final resolution.

A name may be removed from the Consolidated List for two reasons: (1) “the individual or entity was placed on the Consolidated List due to a mistake of identity;” or (2) the “individual or entity no longer meets the criteria set out in the relevant resolutions.” In deciding whether to approve the petition for de-listing, the Committee members may consider whether the individual or entity has severed ties with al Qaeda, the Taliban, and their supporters. While de-listing requests are not liberally granted,
eleven individuals and twenty-four entities have been removed from the Consolidated List.\textsuperscript{143}

\textbf{H. Humanitarian Exception}

Resolution 1452 recognizes a humanitarian exception to assets frozen pursuant to Resolutions 1267 and 1333, creating a broad exception for assets necessary to cover basic living expenses such as food, rent, mortgage, medicines and medical treatment, taxes, public utilities, insurance premiums, and for reasonable professional fees, including legal fees.\textsuperscript{144} In Ayadi \textit{v. Council of the European Union}, the European Court of First Instance interpreted the humanitarian exception to prohibit asset freeze of “any kind of funds or economic resources . . . for the carrying on of employed or self-employed professional activities and the funds received or receivable in connection with such activity.”\textsuperscript{145} More specifically, the Court found that granting the applicant a taxi-driver’s license, permitting him to use his car for business purposes, and allowing him to keep the receipts produced by working as a taxi-driver could be the object of derogation from the freezing of applicant’s funds and economic resources under Resolution 1452.\textsuperscript{146}

The resolution also authorizes access to frozen assets to pay “extraordinary expenses.”\textsuperscript{147} However, what constitutes an “extraordinary expense” is not defined or explained in the resolution and therefore is subject to liberal interpretation. Under the Committee’s Guidelines, Member States are required to notify the Committee of the intention to authorize access to frozen funds or assets needed to cover basic or extraordinary expenses. After receiving notice, the Committee has three working days to inform the submitting State of the Committee’s position.\textsuperscript{148} Once again, the Committee’s decision is by consensus, although notifications pursuant to Resolution 1452 are regularly granted by the Committee.\textsuperscript{149}

Finally, the creation of a humanitarian exception is consistent with the view that asset freeze is a preventative measure, rather than punishment for the commission of a crime. Assuming the process is not abused, the Committee is not concerned with funds being used to cover basic living

\footnotesize{\textsuperscript{143} See Consolidated List, supra note 23.}
\footnotesize{\textsuperscript{144} S.C. Res. 1452, supra note 2, ¶ I(a).}
\footnotesize{\textsuperscript{145} Case T-253/02, Ayadi \textit{v. Council of the E.U.}, 2006 ECR II-2139, ¶ 130.}
\footnotesize{\textsuperscript{146} Id. ¶ 131.}
\footnotesize{\textsuperscript{147} S.C. Res. 1452, supra note 2, ¶ I(b).}
\footnotesize{\textsuperscript{148} See Guidelines of the Committee, supra note 71, ¶ 9(a).}
\footnotesize{\textsuperscript{149} See Sixth Report of the Monitoring Team, supra note 15, ¶ 47 (“Between August and October 2006, the Committee received seven notifications pursuant to resolution 1452 (2002) and approved them all”).}
The purpose of the terrorist financial embargo is to keep money and other financial resources out of the hands of terrorists to prevent the financing of terrorist activities.

IV. THE LEGAL CHALLENGES TO U.N. ECONOMIC SANCTIONS REGIME

Individuals have challenged their designations and placement on the Consolidated List on human rights and due process grounds. The majority of these legal claims have been filed in the United States, United Kingdom, and the European Union. However, in most of these cases, the courts dismissed applicants’ claims and upheld the sanctions imposed. For example, with respect to designations under Resolution 1267, the Court of First Instance of the European Communities regularly has rejected applicants’ human rights and due process arguments, upholding application of the sanctions. The appeals in three cases brought in the United Kingdom were dismissed by the courts. In another contested action, a Turkish court overturned a lower court decision that would have unfrozen petitioner’s assets, thereby ending the lawsuit. Additionally, U.S. courts regularly have dismissed legal challenges to the Treasury Department’s freeze orders, finding that the procedures complied with due process principles.

Two recent legal actions, however, have threatened the continuing viability of the U.N. economic sanctions program. In April 2008, the U.K. High Court of Justice, Queen’s Bench Division, Administrative Court, held that the rules implementing U.N. economic sanctions to freeze the assets of five terror suspects were unlawful because they bypassed Parliament. The expenses.

152 See Ayadi, 2006 E.C.R. II-2139; Case T-306/01; see also Yusuf, 2005 E.C.R. II-3533; see also Kadi, 2005 E.C.R. 3649.
154 Id., Annex I, ¶ 6. However, the case remains pending on appeal before Turkey’s highest reviewing body. Petitioner has asked the court to reconsider its prior decision upholding the freezing of assets. See Eighth Report of the Monitoring Team, supra 14, Annex I, ¶ 6.
U.K. Terrorism Order of 2006 and the 2006 al-Qaeda and Taliban Order implementing U.N. Security Council Resolutions 1267 and 1333 were enacted under section 1 of the 1946 United Nations Act. The 1946 Act allows Orders in Council to be used where it is “necessary and expedient.”\(^{157}\) The High Court ruled that the means used to comply with the Security Council obligations to freeze terrorist-related assets should be subject to the same Parliamentary scrutiny as normal legislation, rather than by Orders in Council.\(^{158}\)

Finally, in January 2008, an Advocate General for the European Court of Justice issued an advisory opinion rejecting the lower court’s conclusion that it lacked jurisdiction and competence to review actions implementing Security Council resolutions issued under Chapter VII of the United Nations Charter.\(^{159}\) The Advocate General opined that the regulations promulgated by the European Union to implement Security Council sanctions to freeze the assets of suspected terrorists infringed on international due process and human rights standards, including the right to be heard, the right to effective judicial review by an independent tribunal, and the right to property.\(^{160}\) According to the U.N. Sanctions Monitoring Team, if the Advocate General’s position is adopted by the European Court of Justice, “there is a real possibility that the regulation used by the 27 member States of the European Union to implement the sanctions will be held invalid.”\(^{161}\) Furthermore, the precedent of such a decision invalidating the sanctions will likely lead to similar outcomes in other States outside the European Union.\(^{162}\)

A. Arbitrary Deprivation of Property

In *Yusuf and Al Barakaat International Foundation v. Council and Commission*, one of the lower court decisions challenged by the Advocate General, the European Court of First Instance rejected the applicants’ claims that the European Union’s (E.U.) sanctions imposed to implement Security Council Resolution 1267 constituted an arbitrary deprivation of property in

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157 Section 1 of the United Nations Act of 1946 authorizes the British government to implement measures taken by the Security Council pursuant to Article 41 of the United Nations Charter (not involving the use of armed force) by Order in Council to the extent “necessary or expedient” for enabling those measures to be effectively applied. *Id.* ¶ 3.

158 *Id.* ¶ 49.


162 *Id.* ¶ 40.
violation of human rights principles. In rejecting the applicants’ claim, the Court of First Instance stressed the “importance of the fight against international terrorism” and the legitimate role played by the Security Council in combating threats to international peace and security caused by terrorist acts. The Court viewed the freezing of funds, which were intended to cut off the flow of funds to terrorists, as “an objective of fundamental public interest for the international community.” The E.U. Court further distinguished between the “freezing” and “confiscation” of assets. The freezing of assets, the Court stated “does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof.” Unlike confiscation of funds, where title vests in the government, the applicants continue to own the property. The asset freeze only affects the use of their property, which constitutes a lesser infringement than those actions which affect the ownership property.

The E.U. Court also found significant the exceptions to asset freeze authorized by the Security Council when it adopted Resolution 1452. The resolution exempts assets necessary to cover basic living expenses, such as food, rent, medicine and medical care, taxes and public utility charges. In addition, funds necessary for any “extraordinary expenses” may be unfrozen under Resolution 1452. Thus, any infringement on applicants’ property interests is alleviated by the exemptions permitted by Resolution 1452. Finally, the E.U. Court noted that applicants could petition the Sanctions Committee for de-listing or removal from the Consolidated List. With regard to the procedures for exceptions and de-listing, and the legitimate objective served by freezing the assets of persons and entities suspected of being linked to Osama bin Laden, al Qaeda, and the Taliban, the Court held that the action taken does not constitute an arbitrary interference with or deprivation of the fundamental right to property.

163 Case T-306/01, Yusuf and Al Barakaat Int’l Found. v. Council and Comm’n 2005 E.C.R. II-3533. The applicants advanced three claims. The first two claims challenged the European Council’s authority to impose sanctions on citizens of the European Union. These claims were rejected by the Court. See id. ¶¶ 171, 189. The third claim raised challenges to the procedures afforded applicants and whether they were denied their fundamental rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. See id. ¶ 190.
164 Id. ¶¶ 296–98.
165 Id. ¶ 298.
166 Id. ¶ 299.
167 Id. ¶ 290.
168 Id.
169 Id. ¶¶ 301, 309.
170 Id. ¶ 302.
The Advocate General rejected the reasoning and arguments of the Court, stating that “the indefinite freezing of someone’s assets constitutes a far-reaching interference with the peaceful enjoyment of property.” Specifically, the Advocate General disagreed with the lower court’s conclusion that the de-listing procedures developed by the Sanctions Committee minimized any infringement on the right to property. The Advocate General stated:

The existence of a de-listing procedure at the level of the United Nations offers no consolation . . . . That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality.

Thus, in the absence of adequate procedural protections, the Advocate General posited that “the freezing of someone’s assets for an indefinite period infringes on the right to property.”

B. The Right to a Hearing and Judicial Review

In Yusuf and Barakaat International Foundation, the Court of First Instance held that lack of notice and a hearing before the applicants’ inclusion on the Consolidated List does not infringe fundamental rights guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court divided the issue into two parts: (1) the right to be heard by the Sanctions Committee before inclusion on the Consolidated List; and (2) the right to be heard by E.U. institutions.

171 Opinion of the Advocate General, supra note 27, ¶ 47.
172 Id. ¶ 51.
before the adoption of regulations implementing the relevant sanctions.\footnote{175} The E.U. Court rejected both claims. The Court stated that affording applicants notice and a hearing before the Sanctions Committee prior to being placed on the List would “jeopardise the effectiveness of the sanctions and would have been incompatible with the public interest objective pursued.”\footnote{176} The Court further remarked: “A Measure freezing funds must, by its very nature, be able to take advantage of a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented.”\footnote{177}

The E.U. Court stated that the applicants’ fair trial rights were adequately protected by the procedures adopted by the Sanctions Committee affording them a process for review and de-listing after their designation.\footnote{178} The Court noted that two of the applicants were in fact heard by the Sanctions Committee through the Swedish government, and their names were removed from the List.\footnote{179} Thus, the Court held that lack of notice and a hearing before the Sanctions Committee prior to one’s inclusion on the Consolidated List did not offend due process.\footnote{180}

The Court also rejected the applicants’ claim that they were entitled to notice and a hearing before the E.U. adopted regulations implementing the sanctions imposed by the Al-Qaida and Taliban Sanctions Committee. The Court of First Instance reasoned that the E.U. had transposed into E.U. legal order, as they were required to do, Security Council resolutions and decisions of the Sanctions Committee. The Court further opined that it did not provide for any mechanism for the examination of individual sanctions, since these matters fell wholly within the competence of the Security Council and the Sanctions Committee.\footnote{181} As a result, the Court stated:

The Community institutions had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants.\footnote{182}
The Court held that the right to be heard cannot apply in such circumstances and therefore the E.U. institution was not required to hear the applicants before the contested regulation was adopted. \(^\text{183}\)

Applicants also requested that the Court review the appropriateness and proportionality of the measures imposed by Security Council Resolution 1267. The Court refused, stating that such a review “entails a political assessment and value judgments which in principle fall within the exclusive competence of the authority to which the international community has entrusted primary responsibility for the maintenance of international peace and security.” \(^\text{184}\) The Court stated that it lacked the authority to review whether the Security Council’s resolutions are compatible with fundamental rights. \(^\text{185}\) In other words, the E.U. courts lack the authority to second-guess designations by the U.N. Sanctions Committee, implementing resolutions adopted under the Security Council’s Chapter VII powers.

The Advocate General reached the opposite conclusion. While the Court of First Instance identified what essentially amounts to a “rule of primacy,” \(^\text{186}\) which provides that Security Council resolutions adopted under Chapter VII of the U.N. Charter prevail over E.U. law, the Advocate General disagreed, posting:

\[
\text{[I]t would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.} \(^\text{187}\)
\]

According to the Advocate General, measures that are necessary for the implementation of resolutions adopted by the Security Council do not retain supra-constitutional status that trump fundamental rights that are part of general principles of Community law. \(^\text{188}\) Thus, in his view, the Court of First Instance erred in holding that it lacked jurisdiction to review the contested regulations designed to implement relevant Security Council resolutions. \(^\text{189}\)

\(^\text{183}\) \textit{Id.} ¶ 329.

\(^\text{184}\) \textit{Id.} ¶ 339.

\(^\text{185}\) \textit{Id.} ¶ 338.

\(^\text{186}\) Opinion of the Advocate General, \textit{supra} note 27, ¶ 18.

\(^\text{187}\) \textit{Id.} ¶ 24.

\(^\text{188}\) \textit{Id.} ¶ 40.

\(^\text{189}\) \textit{Id.} Perhaps the most disturbing aspect of the Advocate General’s advisory opinion is the failure to distinguish Article 103 of the U.N. Charter. Article 103 provides: “In the event of a conflict between the obligations of Members of the United Nations under the present Charter}
Shifting to the issue of whether the procedures for designation and asset freeze violate fundamental rights that form part of general principles of Community law, the Advocate General agreed with appellants. The Advocate General concluded that the procedures at issue breached the right to be heard and right to judicial review because they failed to provide “a genuine and effective mechanism of judicial control by an independent tribunal.”\(^\text{190}\) Instead, the decision whether or not to remove a person from the Consolidated List remained within the full discretion of the Sanctions Committee. In other words, de-listing by the Sanctions Committee does not satisfy the requirement for a hearing and review by an independent and impartial tribunal.

**C. The Right to Notice and a Hearing in Freezing Actions Pursuant to Resolution 1373**

While the European Court of First Instance upheld the designations and orders of asset freeze under Resolutions 1267 and 1333, the Court adopted a different approach on the right to notice and a hearing with respect to freezing actions imposed under Resolution 1373.\(^\text{191}\) In *Sison v. Council of the European Union*, the Court invalidated on due process grounds sanctions imposed on the applicant that were intended to imple-

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\(^{190}\) Opinion of the Advocate General, *supra* note 27, ¶ 54. In September 2008, after the World Conference on Combating Terrorist Financing, and after the submission of my article, the European Court of Justice issued a decision agreeing with the Advocate General’s arguments and overturning the opinion of the European Court of First Instance. See *Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the E.U. and Commission of the E.C.* (E.C.J. Judgment), Sept. 3, 2008, *available at* [http://curia.europa.eu/en/content/juris/index.htm](http://curia.europa.eu/en/content/juris/index.htm). The Court further held that regulations enacted by the E.U. infringed on Kadi and Al Barakaat’s fundamental rights under E.U. Community law. Specifically, the Court held that appellants’ right to be heard and right to effective judicial review had been violated, and the freezing of funds constitutes a violation of the right to property. *Id.*

\(^{191}\) To implement the obligations imposed by Resolution 1373 (2001), the E.U. developed a legal framework which included the creation of an E.U. list of designated persons whose funds were to be frozen in accordance with the resolution. The original list of persons, groups and entities to which the E.U. regulations apply was set out in Council Decision 2001/927/EC, adopted on Dec. 27, 2001. See *Case T-327/03, Stitching Al-Aqsa v. Council of the E.U.*, 2007 E.C.R. 00, ¶¶ 1–10.
The E.U. Court distinguished between sanctions imposed under Resolutions 1267 and 1373. Under Resolution 1373, the Security Council does not identify specific individuals and entities whose assets must be frozen nor does it promulgate specific procedures for freezing funds. Instead, Member States are permitted to exercise broad discretion regarding whose funds are to be frozen under procedures developed by each State. The Court reasoned that the exercise of discretion, coupled with the lack of uniform procedures for determining whose assets should be frozen, mandated that any decision to freeze assets should be subject to more searching judicial review. Furthermore, the Court concluded that the involvement of the courts in the implementation of Resolution 1373 was justified by the absence of a universally accepted definition of “terrorism” and “terrorist act” in international law.

The Court explained that the procedure to impose a measure to freeze funds pursuant to Resolution 1373 takes place at two levels. Initially, a competent national authority must decide whether assets are subject to asset freeze under paragraph 1(c) of the Resolution. Secondly, the E.U. Council must then decide whether the facts and evidence justify adding the person to the E.U. list. While a person designated pursuant to Resolution 1373 has a right to notice and a hearing, such rights should be safeguarded by the national court, applying its domestic laws and procedures. The Court concluded that no right to be heard existed at the E.U. level:

[I]t is not for the Council to decide whether the proceedings instigated against the party concerned and resulting in that decision, as provided for by the national law of the relevant Member States, were correctly conducted, or whether the fundamental rights of the party concerned were respected by the national authorities.

That power, the Court stated, belongs exclusively to the national court or to the European Court of Human Rights. The Council is obligated to defer as far as possible to the assessment conducted by the competent national authority. In short, the E.U. Court was reluctant to second-guess the designation decision by the State submitting the name for asset

193 Id. ¶¶ 147–55.
194 See id. ¶ 151.
195 See id. ¶ 167.
196 Id. ¶ 152.
197 Id. ¶ 164.
198 Id. ¶ 168.
199 Id.
200 Id. ¶ 171.
However, the Court stated that if the European Council decided to include that person’s name on the E.U. list and freeze any funds located within the E.U., the party concerned should be informed by the Council of the specific information and material in its possession which support a decision to impose measures under Resolution 1373. Additionally, the Court would be required to disclose why it decided to exercise its discretion to impose sanctions with respect to the party concerned. The Court added that the party then should be afforded an opportunity to make known its view on the disclosed information and material. Finally, any subsequent decision to continue freezing funds would be preceded by the opportunity for a hearing and notification of the information relied upon to justify the decision, including, if applicable, any new incriminating evidence. In other words, the concerned party would be afforded notice and an opportunity for a hearing prior to the European Council making a decision to continue the sanctions.

Nevertheless, with respect to the European Council’s initial decision to adopt the sanctions imposed by a Member State, the Court agreed with the decision in Yusuf that pre-deprivation notice and hearings “would be liable to jeopardise the effectiveness of the sanctions and would thus be incompatible with the public-interest objective pursued . . . in accordance with Security Council Resolution 1373.” Instead, the Court stated that such persons “should be notified of the evidence against them, insofar as reasonably possible, either concomitantly with or as soon as possible after the adoption of the decision to freeze the funds.” Thus, a party is not entitled to pre-deprivation notice and a hearing before the European Council decides whether to place the person on the E.U. list.

At the same time, the right of disclosure of any evidence relied upon by the Council in deciding to place the party on the E.U. list is not absolute. The Court stated:

201 See id.
202 Id. ¶ 173. Case T-327/03, Stitchting Al-Aqsa v. Council of the E.U., 2007, E.C.R. 00, ¶ 54 (“[A]n initial decision to freeze funds . . . must at least make actual and specific reference to the reasons why the Council considers, having regard to the precise information or material in the relevant file available to it, that a decision satisfying the definition given in Article 1(4) has been taken by a competent authority of a Member State in regard of the person concerned.”).
203 Sison, 2007 E.C.R. ¶ 198. See also Stitchting, 2007 E.C.R. ¶ 54 (“The statement of the reasons for . . . a decision must . . . indicate why the Council takes the view, in the exercise of its discretion, that the person concerned must be the subject of such a measure.”).
205 Id.
206 Id. ¶ 175.
207 Id. ¶ 176.
Exceptions to the general right to be heard in the course of an administrative procedure are permitted . . . on grounds of public interest, public policy or the maintenance of international relations, or when the purpose of the decision to be taken would or could be jeopardized if that right were observed.\textsuperscript{208}

Thus, considerations involving security of E.U. Member States, or the conduct of their international relations, may preclude disclosure to the parties concerned of certain evidence adduced against them.\textsuperscript{209} The Court stated that the case law of the European Court of Human Rights and requirements of Article 6 of the European Convention on Human Rights provide that “certain restrictions on the right to a fair hearing may be envisaged, especially concerning disclosure of evidence adduced or terms of access to the file.”\textsuperscript{210} The Court suggested that restrictions on access might include the particular reasoning for designation and even the identification of the Member State or third country, if disclosure would jeopardize public security.\textsuperscript{211}

Finally, the Court observed that the European Council enjoys broad discretion regarding the matters to be taken into consideration in deciding whether to impose or continue economic sanctions.\textsuperscript{212} Therefore, a court on review may not substitute its assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council.\textsuperscript{213} Instead, the Court opined, the scope of judicial review is limited. The Court stated that the review must be restricted to “checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power.”\textsuperscript{214} In short, the Court adopted a “manifest error” (not \textit{de novo}) deferential standard of judicial review of European Council decisions.\textsuperscript{215}

\textsuperscript{208} Id. ¶ 181.
\textsuperscript{209} Id. ¶ 180.
\textsuperscript{210} Id. ¶ 182.
\textsuperscript{211} Id. ¶ 183.
\textsuperscript{212} Id. ¶ 183.
\textsuperscript{213} Id. ¶ 206.
\textsuperscript{214} Id.
\textsuperscript{215} But see Opinion of the Advocate General, \textit{supra} note 28, at ¶¶ 43–46 (supporting a broader scope of judicial review).
V. HOLDING STATES ACCOUNTABLE FOR BREACHING THEIR DUTY TO FREEZE TERRORIST ASSETS

The international legal framework established by the U.N. Security Council to freeze terrorist-related assets, which is reinforced by the Terrorist Financing Convention and the FATF Special Recommendation III on Terrorist Financing, is failing. The economic sanctions regime suffers from two major problems. First, increasingly fewer names are being added to the Consolidated List each year. In 2007, the number of designations reached an all-time low when only eight names were added to the List. The United States contributed to the decline by submitting only eleven names for inclusion on the List, a low mark for the United States. The terrorist financing designations have been declining since 2001, when, following the terrorist attacks of September 11, 278 names were placed on the Consolidated List. This downward trend is particularly disturbing considering improvements to the listing procedures, such as the use of a cover sheet to enhance the quality, accuracy and consistency of identifier information included in Member State submission to the Al-Qaida and Taliban Sanctions Committee, and the creation of an administrative focal point to coordinate

\[216\] Consolidated List, supra note 23; see Seventh Report of the Monitoring Team, supra note 4, ¶ 25 (stating that only five names were added in 2007). However, the Report was published on November 29, 2007, and the three additional names that appear on the Consolidated List could have been included after the Report was submitted to the Sanctions Committee. See id.


\[218\] See Seventh Report of the Monitoring Team, supra note 4, ¶¶ 24–25, n. 37 (stating that the number of designations under Resolution 1267 declined to fifty-four in 2002; seventy-seven in 2003; forty-four in 2004; thirty-two in 2005; and twenty-four in 2006).
petitions for de-listing.\textsuperscript{219} U.N. counter-terrorism experts maintain that “[t]he inconsistent relevance of the List to the current [terrorism] threat continues to undermine the effectiveness of the sanctions regime.”\textsuperscript{220}

The sanctions regime also suffers from a lack of implementation by Member States. After a name is placed on the Consolidated List, States are required to “freeze without delay” the assets of such persons and entities.\textsuperscript{221} Failure to take swift action creates a risk that funds intended to finance terrorist activities will be transferred or dissipated to circumvent sanctions. However, there has been no significant increase in the amount of funds frozen under the sanctions regime since 2004.\textsuperscript{222} Member States are not freezing terrorist-related assets, despite their obligation to do so pursuant to Security Council resolutions. Furthermore, the U.N. Sanctions Monitoring Team estimates that ninety-five percent of the total value of the assets frozen to date results from the freezing actions of only nine States.\textsuperscript{223} The finding of the Monitoring Team suggests that few States are taking seriously their obligations to freeze al Qaeda-and Taliban-related assets. Even when names are added to the List, States are reluctant or unwilling to freeze the assets of those individuals and entities.

Several reasons have been proffered for the decline in the number of listing submissions to the Committee and the lack of enforcement by Member States, including the: (1) lack of capacity by certain States to implement economic sanctions;\textsuperscript{224} (2) lack of identifier information for names on the List;\textsuperscript{225} and (3) due process and human rights concerns regarding the procedures employed for designation.\textsuperscript{226} While these concerns may have

\textsuperscript{219} The cover sheet was introduced by Annex I of Resolution 1735. See S.C. Res. 1735, supra note 2. Resolution 1730 established a focal point for submitting petitions for de-listing. \textit{Id.}

\textsuperscript{220} Seventh Report of the Monitoring Team, \textit{supra} note 4, ¶ 25.

\textsuperscript{221} S.C. Res. 1333, \textit{supra} note 2, ¶ 8(e).

\textsuperscript{222} \textit{See} Seventh Report of the Monitoring Team, \textit{supra} note 4, annex III.

\textsuperscript{223} \textit{Id.} ¶ 58.

\textsuperscript{224} \textit{Id.} ¶ 60 (stating that some States have no legal basis to freeze assets and therefore do not circulate the Consolidated List to banks).


some merit, and the Al-Qaida and Taliban Sanctions Committee has been responsive to these concerns, they fail to adequately explain the paucity of listing submissions and the lack of rigorous enforcement of sanctions by Member States. Inevitably, this leads to the conclusion that the more likely reason for State non-compliance is lack of political will.227

A. Lack of Administrative Capacity

While some States may lack the administrative capabilities and require training and technical assistance to implement the economic sanctions program, the thirty-four countries that comprise the FATF do not fall within that category.228 These countries are fully or largely in compliance with major international standards to prevent money laundering and terrorist financing and are capable of compliance with relevant anti-terrorist financing resolutions. Furthermore, countries granted “observer status,” such as India and the Republic of Korea, which are striving for FATF membership, also have adequate laws, regulations, procedures and administrative systems in place to detect and prevent terrorist financing.229 At a minimum, these thirty-six countries have the administrative capabilities to implement the mandates of Resolutions 1267 and 1333. Therefore, the lack of administrative capacity argument does not explain why only nine countries are responsible for freezing ninety-five percent of the funds frozen under the international sanctions regime, or why no countries have frozen terrorist assets since 2004.

(1) detail the criteria for listing in the resolutions; (2) establish general standards for statements of the case for listings; (3) extend the time period for review of listing proposals from five to 10 working days; (4) require that targets be notified, to the extent possible, of their listing, the sanctions and procedures for de-listing and exemptions, and receive a redacted statement of the case and basis for listing; (5) designate a focal point within the United Nations Secretariat to handle de-listing and exemption requests and to notify targets of listing; (6) establish a biennial review of listings; (7) set time periods to respond to listing, de-listing and exemption requests and to establish clear standards for de-listing; and (8) improve websites, issue more frequent press statements and broadly circulate procedures of the committees.

227 See Sixth Report of the Monitoring Team, supra note 15, ¶ 24 (“W]hether through lack of capacity, lack of interest or lack of will, States are no longer as ready to devote time and energy to preparing written reports to the Council’s counter-terrorism committees.”).

228 FATF Members and Observers, http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236869_1_1_1_1_1,,00.html (last visited Jan. 17, 2008) (listing the thirty-four countries, territories, and organizations that have FATF membership).

229 The FATF members would not have afforded India and the Republic of Korea observer status unless these countries were viewed as being largely compliant, or soon to be compliant, with important international standards on money laundering and terrorist financing. See FATF, FATF POLICY ON OBSERVERS (June 20, 2008).
B. Lack of Accurate Identifier Information

The lack of accurate identifier information argument likewise does not explain the declining number of new listings and the reluctance of Member States to freeze the assets of individuals and entities on the List. The Sixth Report of the Analytical Support and Sanctions Monitoring Team conservatively estimates that the number of Taliban fighters is between 4,000 and 5,000 men.\textsuperscript{230} The Taliban Movement of Pakistan is reported to have a force totaling as many as 40,000 fighters.\textsuperscript{231} While the revival of the Taliban continues to accelerate, however, only one Taliban name has been added to the Consolidated List since February 2001. This includes the failure to add the names of senior leaders of the Taliban.\textsuperscript{232} For example, neither Mansoor Dadullah, the purported military commander of the Taliban in Afghanistan, nor Baitullah Mehsud, the leader of the Taliban Movement in Pakistan, has been included on the Consolidated List.\textsuperscript{233}

Since 9/11, more than 4,000 people have been arrested or detained in more than one hundred countries based on their connection to al Qaeda.\textsuperscript{234} Several dozen members have been convicted for plotting terrorist attacks, and for providing financial assistance and other material support to al Qaeda. Only a few hundred individuals and even fewer entities associated with al Qaeda, however, have been placed on the Consolidated List.\textsuperscript{235} In some cases, well-known senior leaders of al Qaeda and affiliated terrorist organizations have been omitted from the List. For example, Abu Dujana, the head of the military wing of Jemaah Islamiya, a Southeast Asian terrorist group affiliated with al Qaeda, has not been placed on the List. Indonesian authorities arrested Abu Dujana in the summer of 2007. His arrest is a matter of public record. The Sixth Report of the Analytical Support and Sanctions Monitoring Team highlighted this problem: “The absence of certain well-known names from the List undermines States’ belief that it is a current, relevant, dynamic and will-considered list of the key members of

\textsuperscript{231} Gannon, supra note 34.
\textsuperscript{234} See Michael Chandler & Rohan Gunaratna, Countering Terrorism: Can We Meet the Threat of Global Violence? 85 (Reaktion Books Ltd. 2007).
\textsuperscript{235} See id. at 140. With respect to al Qaeda-related designations, approximately 225 individuals and 112 entities have been added to the Consolidated List. See Consolidated List, supra note 23.
the Taliban, al Qaeda and associated groups. Nor can the lack of action to freeze the assets of individuals and entities on the terror list be explained by the lack of accurate identifier information. A review of the Consolidated List reveals that names added between 2006 and 2008 included the following identifier information: the individual’s full name, date of birth, place of birth, high-quality aliases, and one or more additional identifiers, such as address, nationality or passport number. In short, while not perfect, there is ample identifier information included on the Consolidated List to reassure States that the assets of the right person are being frozen.

C. Due Process Concerns

As previously noted, while several legal actions have been filed challenging the freezing actions taken under Resolutions 1267, 1333, and 1373, the courts have rejected almost all of those due process claims. In upholding the sanctions, the E.U. Court of First Instance found that the burden imposed by the economic sanctions was diminished by possible derogations, allowing exceptions for basic living expenses permitted by procedures adopted by the Sanctions Committee. Such legal claims have been regularly denied by courts in the United States as well. While the European Court of Justice has recently ruled on the Kadi case, deciding the matter in favor of appellants Kadi, this decision cannot account for the declining number of designations that has spanned the last several years.

D. Lack of Political Will

A more reasonable explanation for the current decline of the international legal regime to freeze terrorist assets is the lack of political will by certain Member States. The States that lack interest in compliance with Resolutions 1267 and 1333, whether because they question the relevance or the value of the sanctions, should be reminded that compliance is mandatory. Pursuant to Article 25 of the U.N. Charter, States are required to accept

240 See Fifth Report of the Monitoring Team, supra note 92, ¶¶ 30 (discussing issues of compliance, including lack of political will by certain States).
and carry out the decisions of the Security Council.\textsuperscript{241} The relevant resolutions require Member States to freeze the assets of individuals and entities included on the Consolidated List. Thus, the duty to freeze the assets of suspected terrorists and their financial backers is obligatory, not discretionary.\textsuperscript{242} A State that fails to comply has violated Article 25 of the U.N. Charter. Additionally, with respect to parties to the Terrorist Financing Convention, failure to take appropriate measures to freeze terrorist assets constitutes a breach of Article 8(1) of the Convention.\textsuperscript{243} Finally, such States are further in violation of FATF Special Recommendation III, which requires countries to freeze terrorist-related assets “without delay” in accordance with relevant U.N. resolutions.\textsuperscript{244}

States that demonstrate a consistent disregard of U.N. economic measures should themselves be subject to sanctions for violating their legal obligations under principles of international law. The members of the Sanctions Monitoring Team maintain that some type of sanction may be appropriate for non-compliant States. The problem is diplomatically addressed in the Fifth Report of the Analytical Support and Sanctions Monitoring Team:

Sometimes a State may need a quiet reminder of its obligations in order to tighten its procedures, but at other times, a more public encouragement might be necessary . . . . The Committee may need to decide what action to take in what circumstances . . . . It will want to exhaust every possible avenue before allowing the situation to become confrontational. The intermediate steps should invoke a close and confidential dialogue between the Committee and the State concerned . . . to establish the facts and illuminate the underlying reasons for non-compliance.\textsuperscript{245}

While the Security Council might consider imposing economic measures against non-compliant States pursuant to its Chapter VII powers, the veto authority possessed by the five permanent members of the Security Council could make imposition of such measures extremely difficult, if not impossible.\textsuperscript{246} Another option for holding non-compliant States accountable would be to revive the FATF list of non-cooperative countries and territories (NCCT), this time including those countries not in compliance with the

\textsuperscript{241} U.N. Charter art. 25.
\textsuperscript{242} The advisory opinion of the Advocate General in the \textit{Kadi} case challenged this principle. \textit{See supra} text accompanying note 159.
\textsuperscript{243} \textit{See} Terrorist Financing Convention, \textit{supra} note 5, art. 8(1).
\textsuperscript{244} \textit{See} Nine Special Recommendations on Terrorist Financing, \textit{supra} note 10, at 1.
\textsuperscript{245} Fifth Report of the Monitoring Team, \textit{supra} note 92, ¶¶ 30–31 (emphasis added).
\textsuperscript{246} \textit{See} U.N. Charter art. 41 (stating that the Security Council “may decide what measures not involving the use of armed force are to be employed to give effect to its decisions. . . . These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).
Nine Special Recommendations on Terrorist Financing. Special Recommendation III substantially overlaps with Resolutions 1267 and 1333, requiring States to freeze without delay the funds and other assets and economic resources of persons and entities designated in accordance with relevant Security Council resolutions.247

In 2000, the FATF established a procedure to evaluate countries and territories for compliance with accepted international standards to prevent money laundering.248 A total of forty-seven countries were examined by members of FATF in 2000 and 2001, and twenty-three countries were placed on the FATF NCCT list.249 According to FATF, “[t]he goal of the initiative [was] to secure the adoption by all financial centres of international standards to prevent, detect and punish money laundering, and thereby effectively co-operate internationally in the global fight against money laundering.”250 Being placed on the NCCT list had a sobering yet positive effect. States realized that being identified by the FATF as an NCCT was harmful to their reputation in the international community.251 Also, countries appreciated that adopting current anti-money laundering standards was important for the protection and soundness of their financial systems.252 Most NCCT countries immediately began to improve their anti-money laundering regimes after being listed.253 All twenty-three countries were eventually removed from the NCCT list for implementing effective measures to prevent money laundering and no additional jurisdictions are currently being reviewed under this process.254

A similar process could be implemented to ensure State compliance with international standards on terrorist financing. The U.N. Sanctions Committee or Monitoring Team could identify States for evaluation by the FATF. The members of the Monitoring Team would work closely with the FATF, sharing its expertise, experience and knowledge on lack of State compliance with Resolutions 1267 and 1333, and jointly they could prepare a report outlining areas of deficiency. The States concerned would be afforded an opportunity to comment on the report and provided a time line for implementing needed changes to ensure compliance with the duty to freeze

247 See Nine Special Recommendations on Terrorist Financing, supra note 10, at 1.
248 See FATF, Report on Non-Cooperative Countries and Territories, § 1 (Feb. 14, 2007) (explaining the NCCT review process and criteria defining non-cooperative countries or territories).
250 Id. ¶ 5.
251 Id. ¶ 7.
252 Id.
253 Id.
254 See id. at annex 3 (stating that, as of October 13, 2006, there were no NCCTs).
terrorist assets. Failure to implement needed changes could result in the States being placed on the terrorist financing NCCT list. The threat of being placed on the list would have a deterrent effect and cause States to enhance their anti-terrorist financing regimes to avoid being included on the terrorist financing list.

VI. CONCLUSION

The U.N. economic sanctions program to prevent the financing of terrorism has reached a critical juncture. Legal challenges threaten the continued viability of the U.N. asset freeze program. As stated in the Eighth Report of the Analytical Support and Sanctions Monitoring Team: “It is difficult to imagine that the Security Council could accept any review panel that appeared to erode its absolute authority to take action on matters affecting international peace and security, as enshrined in the Charter.”255 Member States will be emboldened to second-guess Sanctions Committee decisions or simply ignore those designations with which they disagree.

At the same time, the current U.N. legal framework to prevent the financing of terrorism suffers from lack of enforcement. Member States are reluctant or unwilling to submit names for inclusion on the Consolidated List. Equally disturbing, countries are not freezing the assets of persons and entities whose names appear on the List. States must be held accountable for lack of cooperation and breach of their legal duties imposed by Security Council resolutions, the Terrorist Financing Convention, and international standards on terrorist financing developed by the FATF. Member States that willfully fail to comply with their international obligations to freeze terrorist-related funds should be placed on a list of non-cooperative countries or subject to other U.N.-tailored sanctions.

Moreover, the United States needs to assume a greater leadership role in the implementation of Resolutions 1267 and 1333. The submission of twenty-five names for listing in 2007 by the Treasury Department, when al Qaeda and the Taliban retain ample funding and remain a serious threat to international security, is unacceptable.256 The United States must lead by example. At the very least, the Treasury Department needs to ensure that the names of the senior leaders of al Qaeda, the Taliban and affiliated terrorist organizations are included on the Consolidated List. In short, the failure to enforce legal duties and obligations imposed by Security Council Resolu-


tions 1267 and 1333 against non-compliant States runs the risk of rendering the U.N. sanctions regime to freeze terrorist assets irrelevant in the fight against global terrorism.