

Behind the curtains at the Security Council

Mr. A.C. Visser¹

As compliance officer you find yourself confronted with long lists of names of sanctioned persons, groups and entities by the Security Council of the United Nations. Often these names are accompanied by several aliases and, in the early years of sanctions, came without any identifying information, like a date of birth. Countries also publish their own sanctions lists, either to prevent terrorism pursuant to Security Council resolution 1373 (2001) or pursuant to their own sanctions regime. Making a 'hit' on any of these lists means freezing the assets of the person or entity concerned or cancelling a transaction.

From the outside it is difficult to understand the differences between the various sanction regimes, their effectiveness and the ways to influence the process. In this article I shed light on the processes behind the closed doors of the Security Council. I will provide a summarized overview of the history of sanctions and explain how the Security Council comes to a decision on whether to designate persons and entities, how to challenge the designation and how the Security Council enforces its sanctions to the Member States. Finally, the article describes the rationale and ways for the private sector to influence the international procedures.

From embargo to targeted sanctions

After years of embargos, during which many innocent people suffered², the Security Council decided to make greater use of a form of sanctions that targeted individuals, regimes and businesses. By cutting off their access to the financial sector (and, on some occasions, to goods and services), the Security Council wanted to guarantee that neither the general population nor legitimate trade activities would suffer.

1 The article is written in a personal capacity and can not be seen as coming from the UN Security Council or CTED.

2 Background paper on Targeted Sanctions, Watson Institute 2004, page 2.

The Security Council (consisting of fifteen countries)³, under the authority of Article 41 of the Charter of the United Nations, is able to give effect to its decisions using enforcement measures that do not involve the use of armed force, which is the other part of its mandate.

The enforcement measures usually take the form of targeted sanctions⁴, the most common being financial sanctions – or asset freezes. Asset freezes aim at suppressing the financial capabilities of suspected terrorists and/or financiers of terrorism or other politically sanctioned, and thus disabling terrorists from carrying out attacks or recruiting fighters. As sanctions are enforced under Chapter VII of the Charter, they are subsequently binding for all Member States, a total of one hundred and ninety-three countries.⁵ All countries, by virtue of being members of the Organization, are committed to executing the decisions of the Security Council.

In particular the sanctions related to terrorism and non-proliferation have received an extra push, since their implementation is also enforced by the Financial Action Task Force (FATF) and its geographical regional bodies. By way of peer reviews, FATF and the regional bodies assess the work of their members and assess the effectiveness of the work of financial supervisors (is the review of sanctions lists incorporated into the administrative procedures of the financial institutions, what are the penalties, have enforcement actions been taken by supervisor?). The different layers of controls (international review from the United Nations to its members, peer review by FATF, monitoring of the supervisory authority to the private sector) trickle down and finally constitute a tremendous pressure on compliance departments to implement the asset freezes and monitor transactions. In addition, infringing sanction implementation constitutes a criminal offence.⁶

What kind of animal?

A list of names from New York, so it must be a sanction from the Security Council of the United Nations? There is actually a large variety of sanction regimes. Some are instigated due to political crisis in countries (country specific sanctions); others are thematically inspired (terrorism, non-proliferation). There are combinations, for example

3 Five permanent members (the United States, the United Kingdom, France, Russia and China), and ten States whose membership reflect a geographical balance. The rotating membership lasts for two years.

4 Even though the enforcement measures are commonly called 'sanctions', the asset freezing measures are not considered sanctions as in a criminal justice procedure. The asset freezing measures are considered preventive measures that will constitute political pressure.

5 www.un.org/sc/committees

6 Infringing Santiewet 1977 is a criminal offence pursuant to the Wet Economisch Delicten, when committed with intent. See art 14c Santiewet 1977 jo. Art. 1 sub 1° jo art 2 sub 1 jo art 6 sub 1 under 1° WED.

those imposed on Iran, that target a specific regime and political decision and a thematic area (prevention of weapons of mass destruction). Sanctions can include freezing assets, prohibiting the provision of financial services and prohibiting the financing of goods.

The imposition of an asset freeze requires Member States to freeze without delay funds, other financial assets and economic resources owned or controlled, directly or indirectly, by designated individuals and entities. The designation makes the measures more direct, more targeted; they are called 'smart sanctions' individualized to the problem instead of a blanket embargo.

Currently, asset freezes have been included in fifteen Security Council resolutions pertaining to designated individuals or entities from Cote d'Ivoire⁷, the Democratic People's Republic of Korea⁸, the Democratic Republic of the Congo⁹, Iran (Islamic Republic of)¹⁰, Iraq¹¹, Lebanon¹², Liberia¹³, Libya¹⁴, Somalia and Eritrea¹⁵, Central African Republic¹⁶, Yemen¹⁷, the Sudan¹⁸ and South Sudan¹⁹, as well as individuals associated with the Taliban²⁰, Al-Qaida and related entities.²¹

The Security Council emphasizes the need to minimize any negative effects that sanctions may have on fundamental human rights; therefore, with the exception of the Iraq sanctions regime, each sanctions regime provides for exemptions to asset freezing. These exemptions may apply where the funds or assets are being used for food, housing, medicine, insurance, taxes and legal fees, for example. The sanctions often also include exemptions to allow for the payment of obligations entered into under contracts that were agreed to before the sanctions came into effect. Innocent third parties and commercial interest are not supposed to encounter negative consequences from sanctions. In other words, designated persons and entities do not have an excuse to infringe payment obligations under existing contracts. These affected individuals or the banks (who

7 See resolution 1572 (2004). The sanctions on Cote d'Ivoire have been extended to 30 April 2016 pursuant to resolution 2219 (2015).

8 Resolution 1718 (2006).

9 Resolution 1533 (2004).

10 Resolution 1737 (2006).

11 Resolution 1518 (2003).

12 Resolution 1636 (2005).

13 Resolution 1521 (2003).

14 Resolution 1970 (2011).

15 Resolutions 751 (1992) and 1907 (2009).

16 Resolution 2127 (2013).

17 Resolution 2140 (2014).

18 Resolution 1591 (2005).

19 Resolution 2206 (2015).

20 Resolution 1988 (2011).

21 Resolutions 1267 (1999) and 1989 (2011).

facilitate payments) can request exemptions of the competent authority to ensure that the payment obligations under existing contracts will be fulfilled.

Functioning of the Security Council

So how does it work? Who decides who gets listed? What kind of information is used?

Sanction committees

Each sanction regime is overseen by a sanctions committee that is responsible for monitoring, reporting and managing exemptions and designation lists. The sanctions committees must include all members²² of the Security Council, with a running term of two years. Moreover, each committee includes a Security Council-appointed Chair, who is assisted by two Vice-Chairs, also appointed by the Council. The United Nations Secretariat also provides secretariat support to the committees.

The objectives of a committee vary. Some are general, as in the case of the sanctions regime on Libya, which is aimed at protecting citizens from human rights violations, while others are more specific. The sanctions regime on Lebanon was instigated by the terrorist attack of 14 February 2005, and the mandate of the committee concerned will terminate once all investigative and judicial proceedings relating to that attack have been completed, unless otherwise decided by the Council.

Decisions on designations are usually made by consensus following a 'no-objection procedure'. In line with this procedure, the Chair of a committee has no additional decision-making powers but, rather, circulates the proposed decision to the members of the committee. If no written objections are made within a specified period of time, the proposed decision is deemed to be adopted. The time frame for the no-objection procedure varies from five days²³ to ten days²⁴ but may be reduced or lengthened in emergency situations.²⁵

The committees are usually assisted by a panel of experts, a team of people with technical expertise, including in missile technology and conventional arms, who provide neutral, fact-based assessments and analyses. The experts are usually appointed by the Secretary-General, in consultation with the committee.²⁶

22 Representatives of the Ministry for Foreign Affairs, sometimes at the ambassador level, in most occasions civil servants.

23 As in the case of Liberia.

24 As in the case of Al-Qaida.

25 See e.g. Guidelines for Liberia Committee www.un.org/sc/committees/1521/pdf/GuidelinesFinal.pdf

26 www.un.org/sc/committees/1737/pdf/Fact_Sheet_en.pdf

Listing of entities and individuals

An entity or individual is usually placed on a sanctions list following a written request by a Member State to the relevant committee. Prior to making a request, Member States are encouraged, if possible, to consult the State of residence of the person or entity concerned, to seek additional information.²⁷

When submitting a request, States should provide a detailed statement in support of the proposed listing. The statement should include information on why the person or entity meets the designating criteria as established in the requisite resolutions and details on the nature of the supporting evidence i.e. whether it is an open, judicial or intelligence source. States should also include details of any connection between the person or entity and currently listed individuals and entities. States should also identify those parts of the statement that may be publicly released, to either the person or entity under consideration, or interested States.

Requests should also contain as much information as possible to ensure the correct identification of an individual or entity. This includes, in the case of an individual, his or her full name, including aliases, date and place of birth, nationality, gender, occupation, passport or national ID number, current and previous addresses and current location. In the case of entities, information such as the name, acronyms, nature of the business activity, tax numbers and website addresses should be provided.

Some committees, such as the one overseeing the implementation of Security Council resolution 1267 on Al-Qaida, have standard forms for listing, which can be found on the committee's website.²⁸

The determination of whether to list is made through the no-objection procedure. Once an entity has been listed, the committee, with the assistance of the panel of experts and the designating Member State is required to publish, on its website, a narrative summary of reasons for the listing— subject to confidentiality restrictions.

Following listing, the United Nations Secretariat must notify the permanent mission of the country in which the listed person is believed to be located. The Secretariat shall provide to the permanent mission that portion of the initial request that may be made public, a description of the effects of designation, the committee's procedures for considering a request for removal from a sanctions list ('delisting'), and the provisions for available exemptions. The Secretariat should also remind States that they are required to

27 www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

28 www.un.org/sc/committees/1267/pdf/sfl_ind_basic.pdf

inform newly listed individuals, in a timely manner and in accordance with their domestic laws, of the measures imposed on them, the reasons provided on the website, and any information that has been provided to the State by the Secretariat.²⁹

The designation criteria, as determined by the Security Council, are essentially mirrored on the objectives of the resolution. So, for example, as regards the Iraq regime, assets subject to freezing measures were those acquired by Saddam Hussein, senior officials of the former regimes, immediate family members and entities owned or controlled, directly or indirectly, by them.

Delisting of entities and individuals

Al-Qaida list

There are two ways to make a request for delisting: through the Member State (usually its Ministry of Foreign Affairs) or, if the requestor is an individual, through the Ombudsperson.

Member States may submit delisting requests to the Al-Qaida Sanctions Committee after having consulted the designating State and the State of nationality of the listed person, if applicable. The committee takes into consideration the opinion of affected States, i.e. the designating State and the State of nationality, in determining a delisting request.³⁰ Should the fifteen members of the committee reach a consensus and decide to approve the delisting request, they must notify the State in which the individual or entity is believed to be located and the State of residence of the delisting, within three working days.

In practice, it means that the Ministries of Foreign Affairs concerned must contact one of the fifteen Member States that are present in the Security Council to sponsor their delisting request. Should a Ministry of Foreign Affairs be in agreement with the designated individual, there should be no problem with the government supporting a delisting request. To ensure and facilitate efficient communication between the designated individual and its government, it is important for the Ministry to make public clear guidance on the matter³¹, and to assign a focal point to facilitate communication with affected individuals and third parties. However, should the Ministry not be in agreement with the affected individual, it will not support the affected individual in requesting that a Council member

29 For example, the regime on the Democratic Republic of the Congo. See [www.un.org/sc/committees/1533/pdf/S%20AC.43%202010%20Guidelines%20FINAL%20\(6%20August%202010\).pdf](http://www.un.org/sc/committees/1533/pdf/S%20AC.43%202010%20Guidelines%20FINAL%20(6%20August%202010).pdf).

30 Resolution 2161 (2014).

31 Often a website: www.rijksoverheid.nl/onderwerpen/internationale-sancties/inhoud/uitvoering-van-sancties-in-nederland

sponsor the delisting request. Affected individuals can attempt to force their Ministry of Foreign Affairs to support their request by initiating legal procedures in court.

Secondly, the Office of the Ombudsperson³² is authorised to receive delisting requests from individuals and entities listed on the Al-Qaida Sanctions List and form recommendations in an independent and impartial manner, and without either seeking or receiving instructions from any government.³³ The Ombudsperson takes into consideration the reasons for initial listing and collects factual information from Member States and United Nations bodies to facilitate the decision. The Ombudsperson provides a recommendation to list or delist to the sanctions committee, along with a comprehensive report containing reasons and all the information gathered. The committee then has fifteen days to review the report. In cases where the Ombudsperson recommends delisting, and after the committee has completed its consideration of the Comprehensive Report, the Chair will circulate the delisting request with a no-objection period of ten working days.³⁴ The delisting will then occur after sixty days, unless one or more members object to the delisting. If all members object, then the name will remain on the list. If, however, not all members object, the Committee Chair, on the request of a committee member can refer the question of delisting to the Security Council. The institute of the Ombudsperson was established to improve access by affected persons to the Security Council Committee, in particular for cases where the Foreign Affairs Ministry did not want to submit a request for delisting through a member of the Council.

The Security Council must also issue a press release once a name has been removed from the Al-Qaida Sanctions List.

Delisting in respect of other regimes

Petitions for delisting may occur by way of one of two mechanisms. A Member State, or the State of nationality of the petitioner, may submit a delisting request to the relevant committee. It is then at the discretion of the sanctions committee to decide whether to remove a name from the list, giving consideration to whether the person still satisfies the criteria by which they were initially designated.

The second way is for a listed person to make a request for delisting to the focal point for delisting. The focal point, established pursuant to resolution 1730 (2006), is a person tasked with receiving delisting requests from petitioners. If this is the petitioner's first request, the focal point (FP) moves to forward the request to the petitioner's State, which is then required to review the request. Once the request has been reviewed, the FP

32 Established by resolution 1904 (2009).

33 See section 41 of resolution 2161 (2014).

34 www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

informs the committee of the opinion of the State. The committee then makes a decision following a no-objections procedure.

Pursuant to paragraph 63 of resolution 2161 (2014), the focal point is able to receive communications from individuals claiming to have been subjected to sanctions as a result of false or mistaken identity or confusion with individuals listed on the Al-Qaida Sanctions List.

Resolution 1373 (2001) compared

Resolution 1373 constitutes a marked shift from the previously mentioned sanction regimes. Whereas the latter resolutions establish a sanctions committee to maintain a centralized list of designated persons, resolution 1373 leaves it to each Member State to maintain its own list of persons for the purposes of implementing resolution 1373.³⁵ The implementation of resolution 1373 at the national level can serve as a basic tool to put forward the national listings to an international level, either in the United Nations or, at the regional level, the European Union. The authority to designate on a national level usually lies either with the Financial Intelligence Units of a State, or the Ministry of Foreign Affairs. Additionally, resolution 1373 provides that next to freezing assets, States must also ensure that no funds are made available, directly or indirectly, to designated persons.

The application of 1373 relies on the general legal principles present in each respective State, and requires the cooperation of financial, intelligence and law enforcement authorities to correctly identify and designate individuals. Requests for listing and delisting are made directly to Member States and can be made by foreign countries. Delisting is usually granted when persons no longer meet the criteria for which they were initially designated.

While the other sanctions provide explicit exceptions to the asset freezing sanction, this is not the case for resolution 1373 (2001). Humanitarian considerations are safeguarded, however, by resolution 1456, which provides that States must ensure that in combatting terrorism, they still comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law.³⁶

Furthermore, resolution 1452 urges Member States, in implementing resolution 1373, to take into full considerations the exemptions as outlined in paragraph 1 of resolution 1452. These exemptions include the exempting of assets which have been determined

35 See FATF Report 'Targeted Financial Sanctions related to terrorism and terrorist financing' (Recommendation 6)

36 Paragraph 6 of resolution 1456.

by the relevant State to be necessary for basic expenses such as food, medicines, medical treatment, etc., or necessary for extraordinary expenses, as so determined by the State.

Whereas, the sanctions regimes are usually limited either to specific persons³⁷, or by time³⁸, resolution 1373 is potentially limitless. Resolution 1373 is applicable to “persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”³⁹ As no definition of ‘terrorist acts’ is provided for in the resolution, countries are afforded with great discretion as to what constitutes terrorism in line with their own political agendas.

Enforcement of sanctions

The enforcement of sanctions remains the responsibility of Member States, however the Security Council, through the respective sanctions committees, monitors the implementation of the resolutions and facilitates capacity-building and assistance to implementation. The expert groups are tasked with gathering, examining and analysing information from States (usually achieved through their permanent missions), relevant United Nations bodies and other interested parties regarding the implementation of the sanctions. The experts also support the committee's outreach efforts to Member States on issues regarding sanctions implementation, monitoring of sanctions implementation and analysis of trends and ‘best practices’ regarding sanctions enforcement. To enhance dialogue and maintain transparency, the Chair is required to hold regular briefing sessions with interested States and to maintain the committee's website.

The committee may also consider visits by the Chair and/or committee members to selected countries to encourage the full and effective implementation of sanctions, with a view to encouraging States to comply fully with the relevant resolutions: The Chair is required to contact countries through the permanent mission in New York and seek prior consent for the visit, after explaining the purposes of the trip. The Chair is then required to prepare a comprehensive report on the findings of the trip and brief the committee orally and in writing.⁴⁰ These assessment visits and reports to the Security Council serve as an enforcement tool. The assessment report highlights the gaps in implementation which is reported to the Security Council. Therefore countries are putting in serious efforts to show that their implementation is correct and up to date.

37 See e.g. Liberia 1521 (2003).

38 See, e.g. Cote D'Ivoire 1572 (2004) regime.

39 Paragraph 1(c) of resolution 1373.

40 www.un.org/sc/committees/1970/pdf/Provisional%20Guidelines.pdf

The Security Council encourages States to respond promptly and thoroughly to any requests for information and to invite the experts to visit and investigate alleged violations of the sanctions regime. In some occasions, when there is a lack of reporting of the Member States and/or a lack of progress made, the relevant Security Council Committees can invite the ambassador of the non-reporting State to explain the status of implementation. This type of measures constitutes a soft political enforcement tool.

As mentioned previously, the technical international organisations, like FATF and its regional bodies, also enforce Security Council resolutions, in particular resolution 1267 (1999) and 1373 (2001) and the resolutions on Iran and DPRK (North Korea). The FATF and the regional bodies do not only conduct peer review assessments, but also warnings are issued if insufficient progress is made. Through the layered system of the FATF recommendations, once a country is included in the list of countries not making sufficient progress, the financial supervisors will monitor the private sector to ensure that enhanced due diligence is used on transactions relating to countries that are on the list.

Similarly to the other resolutions, the efficacy of resolution 1373 is dependent on the implementation by Member States. As such, the Counter-Terrorism Committee (CTC) and its Executive Directorate (CTED) are monitoring the compliance of the Member States with the resolution. Assessments of Member States are conducted and if necessary the CTC facilitates technical assistance. To ensure compliance and provide political pressure the CTC can invite ambassadors to explain a lack of engagement with the CTC or difficulties in implementation. Technical assistance is provided by way of organizing technical capacity-building workshops, or through the adoption of informational material such as the directory of international best practices, codes and standards relevant to the implementation of Security Council resolution 1373 (2001) which recommends practices that countries should adopt, taking into account their own individual circumstances.

Given the incorporation of resolution 1373 into the FATF recommendations, the enforcement on a technical level through peer review equally applies.

Effectiveness of sanctions and the role of the private sector

Some wonder how effective the Security Council resolutions really are. The chain is as strong as the weakest link. Effectiveness improves once all Member States have a legal framework in place that allows for asset freezing. After more than ten years, in most countries the basic legal framework to freeze the assets of listed individuals and entities pursuant to resolution 1267 (1999) and a domestic asset freezing mechanism pursuant to resolution 1373 (2001) is in place.

However on an operational level, implementation is often still lacking behind. In some occasions the financial sector does not have administrative and software procedures in place to monitor the transactions. In some countries the formal financial sector is less developed. Not all financial transactions take place in the formal financial sector. How are these funds frozen if they do not go through the banks?

Despite some obstacles, from an international perspective, effectiveness continues to improve, through the political pressure and assessment of countries, as well as through the technical compliance assessments of FATF. In addition on a national level, countries will enforce implementation of the sanctions by the private sector via criminal law. Often the private sector take measures to strengthen controls in cross-border relationships with other financial institutions in other areas.

At the international level, progress and effectiveness have increased substantially when the Security Council Committees included more identifiers for the listed individuals and entities.

At the same time, challenges remain, since there is a practical difficulty in identifying and tracking funds, due to the sophistication of money-laundering techniques which can similarly be applied to financing of terrorism.⁴¹ Often complex structures to hide the beneficial ownership are set up. Adding to this is the fact that assets gained through terrorism can be derived from both legal and illegal means, making it even more difficult to identify. Identifying suspicious transactions that point to the financing of terrorism remains difficult for the private sector.

Secondly, the asset freezing process requires deliberation and consultation among committee members, Member States, Security Council members etc. in order to determine a designation. The time-consuming nature of investigating means that by the time a person has been designated, it is possible that the majority of the financing of an attack has already been accomplished. Therefore, greater cooperation is needed among law enforcement and other government authorities with the private sector in order to identify and track terrorist assets in a more swift manner.

41 See www1.worldbank.org/finance/assets/images/01-chap01-f.qxd.pdf.

Security Council dialogue

Communication of the Security Council is one way, towards its members. There is very limited information exchange between the Security Council and the private sector.⁴² Research and surveys have found that banks desire more guidance from authorities on how to meet their counter-terrorism financing obligations.⁴³

It is evident that financial institutions have a large array of data that will be useful in identifying terrorist assets. Financial institutions, such as banks or money-transfer institutions, undertake a large amount of monitoring for their own personal protection against money-laundering and terrorist financing. Financial institutions therefore have access to information such as which countries are at a higher risk of suspicious transactions, the types of transactions that are most suspicious, and among whom. Through STR reporting this type of data will be available to governments and has therefore a potential to be shared on an international level, in the end also with the Security Council. This could make the measures of the United Nations bodies, such as asset freezing, more targeted towards certain areas, types of transactions etc.

At a domestic level, initiatives have been undertaken to promote dialogue between regulatory authorities and the private sector⁴⁴, however this has yet to be achieved at the international level. Given that banks and other financial services providers will be at the frontline of giving a practical effect to asset freezing measures, there is a large scope for dialogue between the United Nations and the private sector in order to give greater efficacy to asset freezing which has not yet been tapped into. It will be difficult to achieve an ongoing dialogue with the Security Council and it will often be a 'one way communication' on an ad-hoc basis, but still any type of information exchange by the private sector to the Security Council can potentially influence a political process which normally remains behind closed doors for fifteen members only.

42 In 2005 a first discussion meeting was organised by the Al-Qaida Monitoring Team with the private sector to improve the quality of the sanctions list.

43 See for example, KPMG Global AML survey 2014, and Mutual Evaluation reports of the FATF in relation to effective supervision.

44 E.g. UK's Financial Sector Forum and Joint Money Laundering Intelligence Taskforce (JMLIT) tasked with promoting dialogue and information sharing between regulatory authorities and the private sector.