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UN SANCTIONS AND RESPECT FOR HUMAN RIGHTS

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

Foreword

The present document deals with recent developments in the Security Council's approach to sanctions with an emphasis on the sanction committee's listing and de-listing procedure of individuals and entities belonging to terrorist groups.

1. Introduction

The Security Council adopts different sanctions regimes for different situations. As far as individuals are concerned, there are 2 types of sanctions: travel bans and the freezing of assets, the latter being imposed on entities as well. Sanctions committees supervise the imposition of these sanctions. In particular, they establish lists, designating individuals and entities on which these sanctions shall be imposed. Currently, such "sanctions lists" are employed in 4 situations/States, namely, Liberia,¹ Sierra Leone,² Iraq³ and al-Qa'idah⁴.

Among these lists, the one established with regard to the al-Qa'idah situation, aiming to publish the names of terrorists in order to guide States' efforts in the fight on terrorism, is certainly the most important one. However, the situation in Iraq, which has given rise to the freezing of assets of numerous senior Iraqi officials, must not be underrated. In contrast, the situations in Liberia and Sierra Leone are of relatively minor importance, having given rise merely to the imposition of travel bans on a very restricted number of persons.

When inscribing certain individuals or entities on their lists, the Committees face the problem of how to reconcile rapid, preventive and pre-emptive action with individual human rights. Recent cases, the most prominent being the case of the Somali Swedes in 2002, in which Sweden asked for 3 individuals and one entity of Swedish nationality to be de-listed from the al-Qa'idah list, have cast doubts on this issue. Therefore, reforms of Committees' procedures are being discussed and the need is felt to clarify criteria regarding listing and de-listing of individuals and entities.⁵

2. The listing process

The Committees' procedure for listing is based on resolutions by the SC and is subject only to such guidelines as these committees have adopted. At present, with the exception of the Committee for Sierra Leone, such guidelines have been adopted by all Sanction Committees.

According to the guidelines adopted by the committee dealing with the situation in Liberia, the list of individuals liable to sanctions is updated quarterly. Requests for addition to or deletion from the list should be received no less than 48 hours prior to the commencement of the review process. Details of the dates of birth, passport numbers and aliases of persons included on the list should be provided when they are available. Once a name has been inscribed on the list, additional information and/or corrections received from Member States will be circulated under the no-objection procedure, and (if no objections are received) immediately incorporated in the list.

¹ Security Council Resolution 1521 (2003); the Committee was established by paragraph 21 of this Resolution.

² Security Council Resolution 1132 (1997) and Security Council Resolution 1171 (1998).

³ Security Council Resolution 1483 (2003); the Committee was established by Security Council Resolution 1518 (2003) whose objective is to identify individuals and entities pursuant to paragraph 19 of Resolution 1483 (2003) and to update the list set up by the Committee established pursuant to Security Council Resolution 661 (1990), which was terminated.

⁴ Security Council Resolution 1267 (1999); the Committee, known as "1267 Committee", was established by paragraph 6 of this Resolution; its functions were subsequently modified and expanded by Security Council Resolution 1390 (2002).

⁵ According to Mr Valdiveso, Chairman of the Committee established pursuant to Security Council Resolution 1267 (1999) in S/2002/1423 (report of the Committee for 2002).

The procedure adopted by the Sanctions Committee for Iraq is quite similar. However, to ensure identification further information on individuals and entities is required, namely, professional or functional title, place of birth and residence and (for entities), name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of business and activity. Moreover, the application of the no-objection procedure is subject to the prior agreement of the Committee.

The procedure adopted by the Committee dealing with al-Qa'idah differs from the other procedures. The Committee considers requests to update its list not only from Member States but from regional organisations as well. Where Member States and regional organisations provide additional information on already listed individuals or entities, they are encouraged to approach the designating State(s) first in order to check the relevance of the information. Proposed additions are to include a narrative description of the information that forms the basis or justification for taking action. Subsequently, the Monitoring Group,⁶ will review any information received and will advise the Committee within 4 weeks whether this information should be included in the list. The decision to do so remains with the Committee and may be subjected to the no-objection procedure if the Committee should agree upon this. Furthermore, the Committee may decide to ask for additional information and may call again upon the expertise of the Monitoring Group, which, according to the Committee's last report, has become indispensable for the effective discharging of its mandate.⁷

3. "Means of appeal?" – de-listing

So far, individuals and entities who consider themselves unfairly listed, cannot rely on a very elaborate system of appeal. However, most Committees provide for some procedural device to this effect.

According to the guidelines of the Committee supervising the sanctions against al-Qa'idah, which were adopted in 2002, individuals and entities, which deem themselves unfairly listed may petition their State of residence and/or citizenship to request review of the case. If, after duly reviewing the case, the petitioned government wishes to pursue such a de-listing request, it should seek to persuade the designating government(s) to submit jointly or separately a request for de-listing. Given that decisions are taken by consensus of the members of the Committee, pursuant to the no-objection procedure, the support of the designating government(s) increases the chances of success of a request for de-listing.

A number of 59 States participated in requesting revisions of the list of the Committee in 2002. 30 individuals and 24 entities were added to the list (ca. 320 individuals and entities are listed) and 4 individuals and 9 entities were removed from it. As far as requests for the removal of individuals from the list are concerned, the government of Sweden was most active.⁸

In 2004, the Committee supervising the sanctions in Liberia established guidelines which provide for regular reviews of the list of persons subject to travel restrictions. In this quarterly review procedure, the Committee examines outstanding requests to remove individuals from the list. These requests are transmitted through the Permanent Mission of the Member State of which the listed individual is a national, or through the nearest UN office. In "exceptional cases", whose nature is not specified in detail, the Committee considers requests received directly from individuals as well.

⁶ The Monitoring Group was established pursuant to Resolution 1363 (2001).

⁷ S/2002/1423.

⁸ S/2002/1423 (report of the Committee established pursuant to Security Council Resolution 1267 (1999), for 2002).

The Committee supervising the sanctions in Iraq affirmed in its guidelines, adopted in May 2003, its intention to establish specific rules on de-listing as soon as possible. However, so far no such rules have been published.

Finally, the Committee supervising the travel bans in Sierra Leone does not refer to any “means of appeal” at all. However, individuals who are listed and therefore subject to a travel ban may request exemptions to it. The Committee has approved several of these requests for exemption. Furthermore, according to the last report of the Committee,⁹ violations of the travel bans seem to be frequent.

4. Alternatives to appeals to the Committee – the challenging of national measures of application in international Courts

International Courts have addressed the question of whether individuals or entities subject to UN sanctions can challenge their application through national measures. In particular the European Court of Justice dealt with this question in connection with the sanctions in Former Yugoslavia in its *Bosphorus* decision.¹⁰ Although the ECJ has emphasised that the public interest of any sanction whose object it is to stop a war is fundamental for the international community and therefore one of the strongest possible forms of public interest,¹¹ it can nevertheless be inferred from this judgment that, according to the ECJ, it is possible that national measures implementing such sanctions are disproportionate. Despite the high threshold for disproportionality to which the ECJ refers, this would be the case if these measures were wholly unreasonably in light of the aims sought to be achieved.

This case is currently being examined by the European Court of Human Rights. Concerning the admissibility of this case, the State in question (the Republic of Ireland) submitted that the applicants’ complaints are incompatible *ratione personae* with the provisions of the Convention: since international organisations have their own separate legal personality and the ECtHR has no jurisdiction to hear complaints directed against such an organisation or its competent organs. In contrast to this statement, however, the applicant submitted that he was not challenging the acts, omissions or legal provision of an international organisation, but rather the application of those legal provisions by the Irish Republic. In its decision of 13.9.2001 on the admissibility of the case,¹² the ECtHR unanimously affirmed that the applicant’s complaint raised complex and serious issues under Article 1 of Protocol No. 1 of the European Convention on Human rights which requires determination on the merits.

From the above, it appears that both the ECJ and the ECtHR affirm their jurisdiction and their will to rule on the legitimacy of national measures implementing decisions of international organisations and to provide redress if these measures were found to be unjustified. Therefore, it can be considered that there exists an indirect possibility to obtain redress against decisions by sanction committees as far as the application measures of Member States of the European Union or of the Council of Europe are concerned.

5. Conclusion

Despite some developments concerning the procedures of sanctions committees, the gulf between the need for rapid, preventive and pre-emptive action and effective protection of individual human rights has not yet been bridged to the satisfaction of all Member States.

⁹ S/2002/1414.

¹⁰ C-84/95.

¹¹ C-84/95, paragraph 26.

¹² Hudoc reference REF00022596; *BOSPHORUS HAVA YOLLARI TURIZM VE TICARET AS v. IRELAND*; Application number 00045036/98; Date 13/09/2001.

According to some States,¹³ some sanctions committees still lack due process and listed individuals and organisations neither have the right nor the possibility to have an independent legal examination of the evidence presented against them in a specific case.

In contrast, others consider a vigilant and proactive approach in listing suspicious individuals and entities necessary, in particular as far as the fight against terrorism is concerned. Moreover, it is argued that committees fighting against terrorism are inherently different from other sanctions committees and cannot be measured by the same yardstick.¹⁴ The listing of individuals and entities suspected of aiding or participating in terrorism remains the best instrument at the committees' disposal to guide the fight against terrorism and its efficiency should not be compromised by stringent procedural requirements.

¹³ See for example document CAHDI (2004) 7 (submitted by Greece) and document CAHDI (2004) 9 (submitted by Sweden).

¹⁴ According to Mr. Valdiveso, Chairman of the Committee established pursuant to Security Council Resolution 1267 (1999) in S/2002/1423 (report of the Committee for 2002, paragraph 21.)