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**A critical assessment of the nature, scope and adequacy  
of the Taliban and Al Qaeda sanctions regime(s)  
established by the United Nations Security Council**

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## INTRODUCTION

The term “terrorism” is widely used by the current media. Every day, television broadcasts, newspaper and other information channels all around the world inform about violence, civilian casualties and destruction caused by terrorists. Our society, however, has encountered many forms of this phenomenon practically in all periods of history. Consider, for instance, the Sicarii (first century), the Al-Hashshashin (eleventh century), or Narodnaya Volya (nineteenth century).<sup>1</sup> In all these examples terrorism represented an instrument for achieving various political goals. The concept of terrorism has persisted and still poses a considerable threat not only to the safety and security of individuals, but also to the fundamental elements of states.

Alongside the development of methods of terrorism, society has developed ways of fighting it. This dissertation addresses modern forms of countering terrorism in the sense of sanctions regime(s) established by the United Nations Security Council. It is therefore primarily intended for people who already have some knowledge in this area and wish to explore this field further.

This work is divided into three main sections. While relying largely, but not exclusively, on the Report of the National Commission on Terrorist Attacks Upon the United States<sup>2</sup> and Steve Coll’s *Ghost Wars*,<sup>3</sup> the first section describes the circumstances under which the Taliban and al Qaeda formed and evolved. It also focuses on the motivations of the United Nations Security Council to impose targeted sanctions under Resolution 1267 (1999). Grasping the historical background is necessary for understanding the next section, which examines the core of the sanctions regime, particularly its general idea, structure and processes that allow it to achieve its designated goals. Based on research findings and a wide range of relevant materials, the concluding section assesses the effectiveness of the sanctions regime as well as providing a view towards future challenges and prospects.

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<sup>1</sup> Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1988), 17.

<sup>2</sup> “9/11 Commission Report,” National Commission on Terrorist Attacks Upon the United States, accessed March 6, 2011, <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

<sup>3</sup> Steve Coll, *Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, from the Soviet Invasion to September 10, 2001* (London: Penguin Books, 2005).

## 1. HISTORICAL AND FACTUAL BACKGROUND

In our times, the international community is struggling particularly with two groups called the Taliban and al Qaeda. Cooperating extensively, these two groups have managed to take advantage of the political and social turmoil in several countries and create a worldwide network for promoting their demagogic ideology. In this effort they have used and still use deadly methods, which is the reason why they are considered so exceptionally dangerous.

Although these two groups work closely together, it is necessary to make a distinction between them. While the Taliban is rather an insurgent movement and operates almost exclusively in Afghanistan, al Qaeda is a typical terrorist organization with global reach. As indicated earlier, the establishment of the Taliban and al Qaeda was driven by instability in Afghanistan during and after Soviet occupation. The country was practically in permanent chaos since 1979. The end of one war meant only the beginning of another. Those who were once seen as heroes fighting the Soviets had turned into merciless warlords taking whatever they wanted without repercussions. The absence of any rule of law encouraged the development of bribery, a black market with weapons, and drug production. The civil war put Afghanistan into one of the most serious humanitarian crises the world has ever witnessed. Hope for change came with a group of people that formed around Mohammed Omar. They called themselves the “Taliban,” which literally means “the students of religion.”<sup>4</sup> Afghans welcomed the Taliban at first because they stood up to the cruel warlords and wanted to establish peace once and for all. However, soon after they gained power, the Taliban revealed its dark side.

Meanwhile, another group called al Qaeda appeared on the scene. It was established during the Afghan jihad by Osama bin Laden, who had at that time volunteered to oust the Soviets. Al Qaeda drew on the successes of Maktab al-Khidmat (or “Bureau of Services”), a recruiting network that channelled young Muslim volunteers from all over the world to Afghanistan. However, Bin Laden was aware more than others about the extent of the conflict. He knew that “the continuation and eventual success of the jihad in Afghanistan depended on an increasingly complex, almost worldwide organization.”<sup>5</sup> For this reason he created al Qaeda, which can be translated as “the foundation,” or “the base.” As its name suggests, it was designed to serve as a central organization for potential global jihad.

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<sup>4</sup> “Max Planck Encyclopedia of Public International Law: Taliban,” Christiane Philipp, para. 1, accessed July 17, 2012, [http://www.mpepil.com/subscriber\\_article?id=/epil/entries/law-9780199231690-e1479](http://www.mpepil.com/subscriber_article?id=/epil/entries/law-9780199231690-e1479).

<sup>5</sup> Ibid. 2, at 55.

The two groups evolved separately for several years up until the mid-1990s. By 1996 the Taliban controlled most of the Afghan territory, including the capital, and were strictly enforcing Islamic law. Bin Laden by that time had located in Sudan and was spreading a network of his own but was forced to leave the country because the new political leadership under international pressure lost enthusiasm to assist him. He moved to Afghanistan where the Taliban regime provided him sanctuary. Osama bin Laden was welcomed in Afghanistan because of his access to large financial resources as well as sharing the same religious and political opinions with Mohammed Omar.

Comparing the activities of both groups on a global scale, the Taliban played a rather passive, but very important role as al Qaeda's ally. Before the Taliban ascended to power in Afghanistan, al Qaeda was slowly building a sophisticated network of cells worldwide which it still operates through even now. In the sense of what he called "cutting the head off a snake,"<sup>6</sup> Osama bin Laden planned and perpetrated a number of smaller regional attacks in early 1990s. In 1998, two years after the declaration of war against the United States and their allies,<sup>7</sup> Bin Laden executed an attack on two US embassies in Kenya and Tanzania. Massive explosions claimed the lives of almost 300 people and left behind another 5000 injured.<sup>8</sup> The United States, which did not view Osama bin Laden as a threat at first, had to reconsider his danger.

The world's attention turned to Afghanistan again. The country was at that time ruled *de facto* by the Taliban and was providing safe haven to Osama bin Laden and his associates. Regardless of the 1998 incident, the United Nations Security Council (UNSC) called upon the Taliban regime on several occasions to "stop fighting, conclude a ceasefire and resume negotiations without delay,"<sup>9</sup> to put end to the "violations of human rights, as well as violations of international humanitarian law,"<sup>10</sup> to stop providing "sanctuary and training for international terrorists and their organizations,"<sup>11</sup> and to "halt the cultivation, production and trafficking of illegal drugs."<sup>12</sup> The Taliban did not comply with any of these resolutions. Instead, the regime attempted to gain international recognition. As soon as it was discovered that Bin

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<sup>6</sup> "Overview of the Enemy," National Commission on Terrorist Attacks Upon the United States, accessed July 30, 2012, [http://govinfo.library.unt.edu/911/staff\\_statements/staff\\_statement\\_15.pdf](http://govinfo.library.unt.edu/911/staff_statements/staff_statement_15.pdf).

<sup>7</sup> Osama bin Laden, "Declaration of War Against the United States," August 23, 1996.

<sup>8</sup> "Database of Worldwide Terrorism Incidents," RAND Corporation, accessed July 30, 2012 <http://smapp.rand.org/rwtid/search.php>.

<sup>9</sup> UN Doc. S/RES/1214(1998), para. 1.

<sup>10</sup> UN Doc. S/RES/1214(1998), para. 12.

<sup>11</sup> UN Doc. S/RES/1214(1998), para. 13.

<sup>12</sup> UN Doc. S/RES/1214(1998), para. 14.

Laden was behind the bombings of the US embassies and was being harboured in Afghanistan, effective action was necessary. The UNSC therefore demanded the Taliban to surrender Osama bin Laden so he could be brought to justice. In Resolution 1267 (1999) the UNSC gave the Taliban regime a final chance to comply with its demands or else it would impose sanctions. As it is now known, the Taliban ignored the resolution and as of November 14, 1999, the sanctions regime came into force.

## **2. SANCTIONS UNDER CHAPTER VII OF THE UN CHARTER**

### **2.1. Evolution of the practice of sanctions**

White and Abass define sanctions as “[p]unitive measures and deeper coercion than necessary to force the responsible State to stop its illegal act.”<sup>13</sup> Naturally, they continue, “in a general sense all measures designed to enforce the law can be seen as sanctions.”<sup>14</sup> Before proceeding to the examination of the sanctions regime(s) established pursuant to the Security Council Resolution 1267 (1999) (and 1373 (2001)), it is essential to understand the role of the United Nations, and in particular the UN Security Council, as a world problem solver.

Of the current five principal organs of the United Nations, the Security Council is the most powerful. It was designed to take effective action whenever international peace and security was threatened or breached. While doing so, the UNSC has a variety of measures at its disposal, ranging from imposing sanctions to the use of force. Similarly to the General Assembly (UNGA), the Security Council is entitled to make recommendations and adopt resolutions. Unlike the UNGA, the UNSC resolutions adopted under Chapter VII are binding for all Member States. Furthermore, in relation to these provisions, it is important to mention Article 103, which puts the UN Charter (and therefore the decisions of the UNSC) above any international agreement that conflicts with the Member States’ obligations arising from the Charter.

All these provisions combined constitute a very strong instrument of the international community to respond to any crisis in a quick and effective manner. However, the creators of the Charter did not count on the important fact that the UNSC would be a political body. Hence, for certain period, the variety of interests lowered the efficiency promised by Article 24. Although the provisions of the Charter were very clear, the UNSC could not fully exercise its

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<sup>13</sup> Malcolm D. Evans, *International Law*, 3<sup>rd</sup> ed. (Oxford: Oxford University Press, 2010), 548.

<sup>14</sup> *Ibid.*

functions until the end of the Cold War. The strong bipolar tensions between the United States and the Soviet Union were reflected in ambiguous UNSC decisions that subsequently undermined its legitimacy. Consider, for example, the dispute between Iran and the USSR in 1946, when after these two countries had reached peaceful agreement and the UNSC insisted on keeping the case on the agenda, the USSR stated that it would not take part in any sessions where this specific question was discussed.<sup>15</sup> In 1950, the USSR, this time dissatisfied with the failure to substitute Communist China with Nationalist China, abandoned the UNSC and made it clear that all the resolutions adopted during their absence would not be recognized.<sup>16</sup> These and many other events raised several issues about the legitimacy and effectiveness of the UNSC. When the Cold War ended, the UNSC finally started delivering according to the promise of the UN Charter. Duijzentkunst pointedly comments that “the end of the diplomatic freeze between East and West enabled the organs of the UN to finally explore the full potential of their powers.”<sup>17</sup>

A relevant example of this exploration represents the Lockerbie case. In 1988 an aerial incident in Scottish airspace over the small town of Lockerbie occurred. An explosion in the aircraft’s cargo compartment caused it to fall and subsequently crash into a residential area. It was not an accident, but an intentional terrorist attack resulting in 270 deaths. The United States, the United Kingdom and France requested Libya, *inter alia*, to extradite two of its nationals who were responsible for the attack.<sup>18</sup> The Libyan government refused and the UNSC therefore adopted Resolution 731 (1992), urging Libya to respond to the request. Since Resolution 731 was not adopted under Chapter VII of the UN Charter, the US, UK, and France could not rely on the binding effect of its decision. Two months later, Libya instituted proceedings against the United States<sup>19</sup> and the United Kingdom<sup>20</sup> before the International Court of Justice under Article 14 of the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (or Montreal Convention) of 1971.<sup>21</sup> Libya argued that it acted fully in accordance with the provisions of the Montreal Convention. Furthermore, the United States

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<sup>15</sup> Benedetto Conforti, *The Law and Practice of the United Nations*, 3<sup>rd</sup> ed. (Leiden: Martinus Nijhoff Publishers, 2005), 68-69.

<sup>16</sup> *Ibid.*

<sup>17</sup> Bart S. Duijzentkunst, “Interpretation of legislative Security Council resolutions,” *Utrecht Law Review* 4 (2008): 188.

<sup>18</sup> UN Doc. S/23308.

<sup>19</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Application instituting proceedings, 1992.

<sup>20</sup> Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Application instituting proceedings, 1992.

<sup>21</sup> David J. Harris, *Cases and Materials on International Law*, 6<sup>th</sup> ed. (London: Sweet & Maxwell, 2004), 1082.



and the United Kingdom breached the Montreal Convention by requesting Libya surrender two of its nationals. In March 1992 at the request of the US, UK, and France, the UNSC “adopted Resolution 748 under Chapter VII of the UN Charter, requiring Libya to return the alleged offenders and imposing sanctions against it for not doing so.”<sup>22</sup> The UNSC determined that supporting terrorist activities constituted a threat to international peace and security and therefore invoked its special powers under Chapter VII of the UN Charter to adopt a binding resolution.<sup>23</sup>

Returning to the original issue, an innovation is evident in Resolution 1267 (1999) in the field of sanctions. Libya was sanctioned for not extraditing two of its nationals accused of direct involvement in the Lockerbie incident and therefore deemed a state sponsor of terrorism. By this logic, the UNSC should have sanctioned Afghanistan, yet it sanctioned the Taliban group instead. Why? The newly established state of Afghanistan did not have the necessary recognition from the international community. Although the Taliban controlled the majority of Afghan territory, it was not clear whether they would maintain it and most importantly, whether they would ever adhere to basic international norms and standards as demanded by the UNSC. Accordingly, the UNSC had no other option than to impose sanctions on the Taliban only.

Understanding the shift in what constitutes a targeted sanctions regime is fundamentally important. Al Qaeda was designed as a stateless entity and to this day this is considered as one of its biggest strengths. It is essentially a terrorist version of a franchise, with a large number of independent cells located all around the world operating under a common name. This statelessness precludes any country from waging conventional warfare against al Qaeda. Furthermore and contrary to general belief, it does not have a hierarchical structure or chain of command. The leader rather asserts a formal or, if preferred, spiritual function, and therefore if anything happened to him, the organization as a whole would not be paralyzed. This fragmentation makes al Qaeda an extremely dangerous group that is difficult to counter. The UNSC realized that the only way to fight these people was to target each individual and associate and bring them to justice. If, for whatever reason, this couldn't be done, the sanctions regime would at least decrease their operability.

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<sup>22</sup> Ibid. 21.

<sup>23</sup> Ibid. 21.

However, it is worth noting that the name “al Qaeda” did not appear in the UNSC resolution until 2000.<sup>24</sup> The international community was simply focusing so much on apprehension of Osama bin Laden that his organization was left free to develop. This mistake eventually allowed al Qaeda to plan and then execute the greatest terrorist attack of all time on September 11, 2001. Who knows what the course of history would have been if Osama bin Laden had been removed from the scene back in the late 1990s? Nonetheless, in a clear sign of the Taliban’s support, he was given Afghan citizenship. In 1999, one year after the bombings of the US embassies in Kenya and Tanzania, the UNSC faced a ground-breaking decision. For the reasons explained above, it could not impose sanctions on Afghanistan as a state, only against the entity that controlled it. The UNSC *inter alia* determined that the Taliban regime provided active support to terrorists, especially Osama bin Laden and his associates. Such activities clearly threatened international peace and security and therefore fulfilled the condition to enable the UNSC to take prompt and effective action in response to the situation.

## **2.2. Sanctions regime pursuant to UNSC Resolution 1267**

### **2.2.1. Three elements of the regime**

As already mentioned, the Taliban failed to comply with any of the UNSC decisions. They did not take the final opportunity to surrender to the will of the international community, and therefore in accordance with Chapter VII of the Charter of the United Nations the UNSC decided to impose sanctions on them.<sup>25</sup> These sanctions initially comprised two elements. Firstly, any aircraft “owned, leased or operated by or on behalf of the Taliban,”<sup>26</sup> would be prevented from taking off or landing in their territory, and secondly, any financial resources “owned or controlled directly or indirectly by the Taliban,”<sup>27</sup> would be frozen. In 2000, these measures were strengthened by a third element preventing the Taliban from “direct or indirect supply, sale and transfer ... of arms and related material of all types including weapons and ammunition, military vehicles and equipment.”<sup>28</sup> Although the sanctions regime was optimized and modified by many subsequent resolutions,<sup>29</sup> the basic concept remained the same.

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<sup>24</sup> UN Doc. S/RES/1333(2000).

<sup>25</sup> UN Doc. S/RES/1267(1999), para. 3.

<sup>26</sup> UN Doc. S/RES/1267(1999), para. 4(a).

<sup>27</sup> UN Doc. S/RES/1267(1999), para. 4(b).

<sup>28</sup> UN Doc. S/RES/1333(2000), para. 5(a).

<sup>29</sup> UN Doc. S/RES/1390(2002); UN Doc. S/RES/1455(2003); UN Doc. 1526(2004); UN Doc. 1617(2005); UN Doc. 1735(2006); UN Doc. 1822(2008); UN Doc. 1904(2009); UN Doc. 1989(2011).

Along with the introduction of the sanctions regime, the UNSC established the Al Qaeda and Taliban Sanctions Committee (or 1267 Committee) to oversee implementation of the measures by States. It included all UNSC members and its tasks were listed in paragraph 6 of the same resolution.<sup>30</sup> In general, the 1267 Committee is responsible for monitoring and reporting compliance with the provisions of the resolution and may make recommendations to the UNSC to improve the overall effectiveness of sanctions. Its importance increased over the years, especially with the creation of the so-called “Consolidated list.”

### **2.2.2. Consolidated list in the pre-2009 era**

UNSC Resolution 1333 (2000) gave the 1267 Committee a mandate to maintain a list of individuals and entities that were somehow associated with al Qaeda or the Taliban. Currently, a separate list exists for each group,<sup>31</sup> but originally only one list included both. Nevertheless, the purpose remained the same. Any person or organization whose name appeared on the list would be subject to sanctions in the form of assets freezing, travel bans and arms embargoes.

At the time of its introduction, it was a quite rigorous system that depended almost exclusively on the decisions of the 1267 Committee. The more importance it gained, the more controversy it raised. Boulden pointedly notes that this contributed to putting the 1267 Committee’s “activity and the sanctions regime at the forefront of the increasing awareness of the impact of counter terrorist measures on questions of human rights.”<sup>32</sup>

Inclusion in the list was carried out by the 1267 Committee. Member States put forward a list of candidates that were not necessarily convicted criminals, but had provable connections to al Qaeda or the Taliban. In 2002, the UNSC introduced exceptions into the sanctions regime that slightly decreased the strictness of assets freezing to allow the affected person to survive in society. In Resolution 1452 (2002), the UNSC decided that measures concerning assets freezing did not apply to “necessary basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or ... expenses associated with the provision of legal services.”<sup>33</sup> Evidently, the UNSC

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<sup>30</sup> UN Doc. S/RES/1267(1999), para. 6.

<sup>31</sup> UN Doc. S/RES/1988(2011).

<sup>32</sup> Vaughan Lowe et al., *The United Nations Security Council and war: the evolution of thought and practice since 1945* (Oxford: Oxford University Press, 2008), 614.

<sup>33</sup> UN Doc. S/RES/1452(2002), para. 1(a).

by this action yielded to human rights advocates and proponents, who claimed that the effectiveness of the sanctions regime was detrimental to human rights and thus unacceptable.

Removal from the list, or delisting, was at first practically impossible, as no legal mechanism enabled the 1267 Committee to remove a person or entity. The inevitable question must be asked, whether it was considered an issue of human rights at all in this regard. Over time, this mechanism was created so the affected person or entity (usually referred to as “the petitioner”) could be removed from the list if all fifteen members of the 1267 Committee consensually agreed to do so.<sup>34</sup> It was vastly complicated and not an ideal solution, but things slowly began to change for the better.

To be perfectly clear about how the system worked, consider the following imaginary scenario. Mr. XY is a hardworking and tax-paying citizen whose name mistakenly appears on the Consolidated list in 2001. From that moment on, he is subject to restrictions which essentially exclude him from all ordinary life. His confusion does not end when he finds out about the list. He does not know who put him there or for what reason, or which authority governs the issue. Anyone who provides him with assistance is also put on the list. Because Mr. XY is denied access to financial resources, it is extremely difficult for him to survive in society. What he probably also does not know is that seeking removal from the list is futile as no mechanism is in place to facilitate it. Either way, Mr. XY is desperate and probably will not stop until his name is removed from the list. The whole story could be compared to Don Quixote tilting at windmills, yet as we will learn in the following subsection, thanks to people like Mr. XY, the system was about to change significantly.

### **2.2.3. The case of Yassin Abdullah Kadi and Al Barakaat International Foundation**

Let us move from an imaginary to a real-life scenario that resulted in a major case in this field. When the UNSC adopted Resolution 1267 (1999), the Council of the European Union (EC) under the provisions of the United Nations Charter (Articles 1, 24, 25, 39, 41, 48, and 103, in particular) took necessary steps to implement the resolution. As the 1267 sanctions regime developed, the EC kept up by adopting a series of Common positions and Regulations. These basically transposed the UNSC resolutions. After the UNSC mandated the 1267 Committee

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<sup>34</sup> UN Doc. S/RES/1730(2006).

through Resolution 1333 (2000) to maintain and update a list of individuals and entities connected to the Taliban or al Qaeda, the EC implemented these new measures accordingly.

Among the relevant EC regulations we can name Regulation 337/2000 “concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan;”<sup>35</sup> Regulation 467/2001 “prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation 337/2000;”<sup>36</sup> and most importantly, Regulation 881/2002 defining what is meant by “funds” and “freezing of funds”.<sup>37</sup>

Regulation 881/2002 provided, *inter alia*, that “[a]ll funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the [1267] Sanctions Committee and listed in Annex I shall be frozen.”<sup>38</sup> The amended Annex I included the names of Yassin Abdullah Kadi<sup>39</sup> (natural person) and the Al Barakaat International Foundation<sup>40</sup> (legal person). The appearance of the two names initiated one of the most important cases in this area of study.

The proceedings in this case were lengthy and complicated, but its result was significant. In 2001, Mr. Kadi and the Al Barakaat International Foundation both instituted proceedings against the Council of the European Union and the Commission of the European Communities seeking the annulment of several regulations, specifically 467/2001, 2062/2001, and 2199/2001, “in so far as those measures concern them.”<sup>41</sup>

The first appellant, Mr. Kadi, argued that (a) the right to be heard, (b) the right to respect for property and of the principle of proportionality, and (c) the right to effective judicial review were breached.<sup>42</sup> The second appellant, the Al Barakaat International Foundation, claimed that (a) the Council of the European Union was not competent to adopt the contested regulation, (b)

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<sup>35</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 P and C-415/05 P, Judgement of the European Court of Justice, September 3, 2008, para. 18.

<sup>36</sup> *Ibid.*, para. 25.

<sup>37</sup> *Ibid.*, para. 38.

<sup>38</sup> Council of the European Union Regulation 881/2002, Article 2(1).

<sup>39</sup> European Commission Regulation 2062/2001.

<sup>40</sup> European Commission Regulation 2199/2001.

<sup>41</sup> *Ibid.* 35, para. 46.

<sup>42</sup> *Ibid.* 35, para. 49.

Article 249 of the Treaty Establishing the European Community (or EC treaty) was infringed, and (c) its fundamental rights were breached.<sup>43</sup>

These were very cogent and reasonable arguments. However, the Court of First Instance of European Communities (CFI) dismissed the actions in two judgements claiming that it has no jurisdiction to review the lawfulness of decisions of the Security Council. In this regard the CFI stated that the “resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law.”<sup>44</sup> On the contrary, the CFI continued, “the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.”<sup>45</sup> Considering the legal obligations of the Member States towards the UN Charter, this was a logical explanation.

The CFI also examined whether the UN had breached *jus cogens*. It referred to Article 53 of the Vienna Convention on the Law of Treaties (1969) in which *jus cogens* is defined “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Article 64 of the same convention further provides, that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” In this regard, the CFI simply followed the thought of international relations recognizing some sort of structure or hierarchy. Obviously, such hierarchy does not really exist. On the other hand, the United Nations undoubtedly asserts a central role in an anarchic international system. The CFI confirmed that the European Community is primarily bound by the Charter of the United Nations, which in Article 1(1) provides that while delivering to one of its main purposes, maintaining international peace and security, the UN must act “in conformity with the principles of justice and international law.” In addition, the UN reaffirms the respect for fundamental human rights already in the preamble of the Charter. It is therefore expected that any decision made within the framework of the

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<sup>43</sup> Ibid. 35, para. 50.

<sup>44</sup> *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Case T-315/01, Judgement of the Court of First Instance, September 21, 2005, para. 225; *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Case T-306/01, Judgement of the Court of First Instance, September 21, 2005, para. 276.

<sup>45</sup> Ibid.

United Nations, including resolutions of the UNSC adopted under Chapter VII of the UN Charter, will be properly negotiated and adopted in accordance with these principles.

The European Court of Justice (ECJ) was not of the same opinion as the CFI. In 2008, the ECJ overruled the CFI judgements stating that the “Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.”<sup>46</sup> The 2008 judgement held that neither the ECJ nor the CFI is empowered to review the lawfulness of UNSC resolutions, “even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*.”<sup>47</sup> Furthermore, the ECJ stated that the freezing of assets constituted a breach of fundamental rights.<sup>48</sup> Accordingly, in its ruling the ECJ set aside the judgements of the CFI of 2005 concerning Mr. Kadi and the Al Barakaat International Foundation. The ECJ also annulled EC Regulation 881/2002 in so far as it concerned the two appellants.

It was an interesting development in the case. Posch notes that the ECJ “did not challenge the existing hierarchy of norms within the international legal order”, but at the same time, he continues “by emphasizing the rule of law the Court stated that the judicial review also covers all Community acts, even if they are designed merely to give effect to resolutions adopted by the UN Security Council.”<sup>49</sup> There is an evident uncertainty in this respect, however, careful wording of the ECJ judgement covered the area quite well.

Even though the hierarchy of the international legal system remained unchallenged, this case contributed to triggering the changes made to sanctions regimes, especially concerning the Consolidated list. This issue is examined in the following subsection.

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<sup>46</sup> Ibid. 35, para. 326.

<sup>47</sup> Ibid. 35, para. 287.

<sup>48</sup> Ibid. 35. Para. 370.

<sup>49</sup> Albert Posch, “The Kadi Case: Rethinking the relationship between EU law and international law,” *Columbia Journal of European Law* 15 (2009): 4.

#### **2.2.4. Consolidated list in the post-2009 era**

After more than a decade and in reaction to the persisting controversy concerning the Consolidated list, the UNSC adopted Resolution 1904 (2009) creating the Office of the Ombudsperson (its mandate was extended by Resolution 1989 (2011)). It is an entirely independent and impartial body which reviews and investigates requests for removal from the list on case by case basis. It is important to mention that it deals only with requests concerning the al Qaeda sanctions list.

The establishment of the Office of the Ombudsperson brought a major improvement to the delisting procedure. The whole process, which should not take more than six months, consists of two steps described in Annex II of Resolution 1989 (2011). In the first step, the Ombudsperson gathers and verifies all relevant information about “the petitioner” and further engages in dialogue to obtain more data. In the second step, the Ombudsperson presents a Comprehensive Report to the 1267 Committee with the findings of the investigation conducted in the previous step and a recommendation whether to remove the petitioner from the list. The 1267 Committee reviews the Comprehensive Report within 15 days and in another 15 days considers the recommendation. In the 60 days after consideration, the 1267 Committee may reject the delisting request by consensual vote.

Compared to the pre-2009 era, the new system not only simplifies the procedure of delisting, but also promotes respect for fundamental human rights. With the introduction of the Office of the Ombudsperson, the UNSC reversed the process of delisting. Initially, the petitioner had to convince the 15 members of the 1267 Committee to remove their name from the Consolidated List. As of 2009, the petitioner has only to convince the Ombudsperson. The recommendation has a special status since it does not require the approval of the 1267 Committee, but if some of its members disagree that the petitioner should be removed from the list, the 1267 Committee must agree consensually on it.

To be clear how the new system works, consider again the imaginary scenario of Mr. XY, whose name was mistakenly put on the list. Undoubtedly, he would have a much better chance of having his name removed from the Consolidated list. Following proper investigation, the Office of the Ombudsperson would recommend the 1267 Committee that Mr. X’s name be removed from the list. If the 1267 Committee did not within the next 15 days decide otherwise, the Ombudsperson’s recommendation would prevail and Mr. XY would be removed from the list.



### **2.3. Sanctions regime pursuant to UNSC Resolution 1373**

In December 1999, the UNGA adopted the International Convention for the Suppression of the Financing of Terrorism (or Terrorism Financing Convention).<sup>50</sup> It is important to realize that until the late 1990s and early 2000s no measures existed for countering this vulnerable area of terrorism. For instance, if we went through all the international legal instruments to counter terrorism, we would not find any references to measures against the financing of terrorism. However surprising this might seem, it is a fact.

The Terrorism Financing Convention built on the assumption that terrorists need money to terrorize. A terrorist group, similarly to any other organization, whether legal or illegal, needs financial resources in order to function. Therefore, deprivation of assets would not only cause them difficulties to operate, but ideally it would avert the threat of an attack.

The issue of terrorist financing can be divided into two parts. Firstly, they have to acquire and cumulate resources. This usually involves, but is not restricted to, organized crime. Remember that Osama bin Laden's various companies, as well as MAK, were legal businesses before they were outlawed. The main difference between terrorists and organized criminals is that the money they make serves a different purpose. Unlike organized criminals, whose aim is to make profit from money purposed to further increase profit, terrorists use the resources to fund other activities with the intention of achieving their (political) goals. Secondly, terrorists need to be able to move the resources quickly and discretely around the world. The key issue in this respect is above all assessing the risk of detection. Over the years, they discovered several gaps in the international legal and financial system and did not hesitate to take advantage of them. Among the techniques are wire transfers, alternative remittance systems (especially "hawala"),<sup>51</sup> charities and non-profit organizations, and cash couriers. All these methods have their advantages and disadvantages, whether viewed from the terrorist's or the counter-terrorist's angle.

According to the Terrorism Financing Convention, "[e]ach State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences

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<sup>50</sup> UN Doc. A/RES/54/109(1999).

<sup>51</sup> The US Department of the Treasury describes "hawala" as an "alternative or parallel remittance system, which exists and operates outside of, or parallel to "traditional" banking or financial channels." For more information see <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FinCEN-Hawala-rpt.pdf>.

set forth in Article 2,” which provides that “[a]ny person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out” terrorist activity. This activity is defined as “[a]ny act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” These provisions govern early definition of terrorism and provide a basis for the international fight against the financing of terrorism.

Despite these efforts, humanity experienced a tragedy of colossal proportions at the turn of the century. On September 11, 2001, nineteen hijackers took control of four aircraft with the aim of crashing them into selected targets on US soil. Two planes crashed into the Twin Towers of the World Trade Centre in New York, one plane hit the Pentagon building in Arlington, and the last plane, although it was supposed to hit the US Capitol building, crashed into the Pennsylvanian woods instead. The 9/11 attacks resulted in almost 3000 deaths and enormous material damage.<sup>52</sup>

Society and grieving families of victims demanded who could be responsible for such a malicious attack. Investigations pointed to Osama bin Laden and al Qaeda. Everyone was shocked that a group of people about whom they had barely heard anything previously was able to plan and execute an attack of such magnitude. For that matter, they were also confused as to why the United States and the West were hated so much. Despite the mixed feelings, all people shared the desire to bring the responsible terrorists to justice.

With the assumption that al Qaeda leadership and Osama bin Laden were hiding in Afghanistan, the United States demanded the Taliban to surrender them without delay.<sup>53</sup> This request was ignored and the United States invoked its rights under Article 5 of the North Atlantic Treaty of 1949, which can be simply explained as “an attack on one is an attack on

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<sup>52</sup> “Database of Worldwide Terrorism Incidents,” RAND Corporation, accessed July 30, 2012 <http://smapp.rand.org/rwtid/search.php>.

<sup>53</sup> George W. Bush, “Address to the Nation” (address before a Joint Session of the Congress of the United States – Response to the Terrorist Attacks of September 11, Washington DC, September 20, 2001).

all” and launched military intervention in Afghanistan commonly known as Operation Enduring Freedom.

The tragic events of 9/11 triggered the global “war on terrorism.”<sup>54</sup> The then US President George W. Bush stressed that this war “will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>55</sup> Although it might sound promising, it was obvious from the very beginning that such war would be long and complicated. The international community, while aware of the imminent dangers, was toothless against terrorists other than al Qaeda or the Taliban. From the point of view of various terrorist groups, the 9/11 attacks could be seen as a great achievement. Al Qaeda’s glory attracted many sympathizers. Those who did not sympathize with their goals saw however an opportunity to learn. There is no doubt that the 9/11 attacks were utterly unprecedented. The world realized that previous efforts had not been effective enough. Terrorism seemed to be suddenly spreading like a plague. It was a time of emergency, and as it is said, desperate times call for desperate measures. In view of this saying, the UNSC decided to temporarily assert a role as international legislator.

According to general practice, when an area of international law exists that is not covered, the international community initiates negotiations. The outcome of these negotiations is usually a treaty. In 2001, this was a less likely option seeing that these discussions usually take considerable time, and that even after the creation of such treaty, the process is further prolonged by necessary formalities (see Article 2 of the Vienna Convention on the Law of Treaties of 1969). Nevertheless, no new treaty needed to be created because the Terrorism Financing Convention already existed. The only problem with the Terrorism Financing Convention was that it had not yet been ratified and implemented by all its signatory states. Having considered all the options, the UNSC proceeded with adopting Resolution 1373 (2001). In addition to the decision on new counter terrorism measures (mostly derived from Resolution 1267), the UNSC called upon all States to “[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999.”<sup>56</sup> From that moment on, the aforementioned global “war on terrorism” started becoming reality.

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> UN Doc. S/RES/1373(2001), at para. 3(d).

Despite the unprecedented strength the resolution embodied, note how carefully worded it is. For instance, rather than ordering all States to implement the Terrorism Financing Convention, the UNSC encouraged them to do so. Although the UNSC bears the burden of responding to any threat to peace or security with the power at its disposal, it cannot take the risk to exceed its competence. Of course, it is desirable that the UNSC is efficient, but it must not act to the exclusion of its legitimacy.

UNSC Resolutions 1267 (1999) and 1373 (2001) “differ in the persons and entities whose funds or other assets are to be frozen, the authorities responsible for making these designations, and the effect of these designations.”<sup>57</sup> Boulden argues that the UNSC began to “shift from a case-specific approach ... to one that is more broadly based.”<sup>58</sup> While the 1999 resolution targeted selected individuals and entities, the 2001 resolution targeted terrorism generally. This is another ground-breaking innovation on the part of the UNSC. Even though the two resolutions represent different regimes, their purpose is the same.

Just as with Resolution 1267 (1999), the UNSC established a committee under Resolution 1373 tasked with overseeing its implementation by Member States. It is called the Counter-Terrorism Committee (CTC) and as of 2004 was complemented<sup>59</sup> by the Counter-Terrorism Committee Executive Directorate (CTED), a group of experts from outside its framework. The CTC, or CTED for that matter, is by no means as powerful as the 1267 Committee. Boulden noted that “[w]hile the CTC and CTED represent a new role for the Security Council, it remains the case that the CTC and other anti-terrorism measures do not as yet contain any kind of enforcement mechanism or threat of enforcement.”<sup>60</sup> Neither the CTC nor CTED have the mandate to maintain a list of individuals and entities as with the 1267 Committee. If the UNSC decided to do so, it would be an enormous enterprise facing similar, if not the same, problems as the 1267 Committee. Instead, the UNSC promotes and enhances the cooperation of Member States in the field of global countering of the financing of terrorism.

To sum up the evolution of the sanctions – as non-forcible measures to enforce law, they have developed into a strong instrument of the international community. The success in the “war on

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<sup>57</sup> “FATF IX Special Recommendations,” Financial Action Task Force, page 8, accessed August 3, 2012, <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

<sup>58</sup> Vaughan Lowe et al., *The United Nations Security Council and war: the evolution of thought and practice since 1945* (Oxford: Oxford University Press, 2008), 611.

<sup>59</sup> UN Doc. S/RES/1535(2004).

<sup>60</sup> *Ibid.* 58, at 620.

terrorism” depends on the coordinated approach offered primarily by the United Nations. White and Abass argue that States, while taking punitive or coercive measures, “should seek the authority of a regional organization and preferably, though not necessarily, the United Nations.”<sup>61</sup> Over decades, the United Nations has gradually asserted a role as a major, or central, international organization. Boyle and Chinkin identify various reasons why this is so, arguing that it is due to the UN being seen as a legitimate body.<sup>62</sup> It has earned this status through universal membership as well as universal competence. Essentially, the UN constitutes a type of global forum open to any State where any issue or topic may be addressed. These characteristics enable the United Nations, and therefore the international community, to defend itself against a perfidious phenomenon such as terrorism. However, as we will find out in the following chapter, insufficient action from Member States causes the sanctions regime(s) to not fully explore their potential and consequently not be fully effective.

### **3. ASSESSMENT**

#### **3.1. Analytical Sanctions and the Monitoring Team**

One does not need to go far to find a source of information on the performance of the sanctions regime. In 2004, the UNSC decided to create the Analytical Support and Monitoring Team (Monitoring Team) with the objective “to assist the (1267) Committee in the fulfilment of its mandate.”<sup>63</sup> Despite the fact that it was initially established for a period of 18 months, the mandate of the Monitoring Team was progressively extended. One of its main responsibilities is to periodically report on the implementation of measures and make recommendations for improved implementation. The latest report providing an overall assessment of each of the three sanctions regime elements was published on April 13, 2011.<sup>64</sup>

Concerning the first element, assets freezing, the Monitoring Team informed that al Qaeda and the Taliban “continue to raise money through legal means, such as donations and legitimate business enterprises, and illegally, such as through kidnapping for ransom, extortion, drug trafficking and illegal taxation.”<sup>65</sup> As these methods have been in use for some time, it is an acknowledgement of the danger that arises from them. More importantly, the Monitoring Team

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<sup>61</sup> Ibid 13, at 555.

<sup>62</sup> Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 108.

<sup>63</sup> UN Doc. S/RES/1524(2004), para. 6.

<sup>64</sup> UN Doc. S/2011/245.

<sup>65</sup> Ibid., para. 47.

focused in the latter text on different techniques of moving money around the world. In this regard, it recognized the risks posed by the hawala alternative remittance system, and so they recommended regulating it following the example of Saudi Arabia.<sup>66</sup> In relation to non-profit organizations, the Monitoring Team stated that they “manage large budgets and move sums of money across jurisdictions legally and with great ease; thus they can provide a relatively safe global platform from which to move funds with minimum risk of detection.”<sup>67</sup> For these reasons, the Monitoring Team encouraged all Member States to intensively monitor the activity of these organizations.<sup>68</sup> Finally, the Monitoring Team addressed the problem of cash couriers. It advised that illegal movements of cash by cross-border couriers pose a problem that needs to be tackled in more sophisticated ways.<sup>69</sup> The Monitoring Team often referred to the Financial Action Task Force nine special recommendations. These are examined in the following subsection.

Concerning the second element of travel bans, the Monitoring Team stated that “[t]here will always be parts of the world where border controls are difficult to impose and all sorts of illegal groups, not just terrorists, will continue to take advantage of the situation.”<sup>70</sup> The porous border between Afghanistan and Pakistan is probably the most relevant example of this struggle. The report, however, emphasized the achievements of Member States in this area. Not only is an increase of cooperation with the International Criminal Police Organization (INTERPOL) evident, but identification and travel documents have improved, biometric passports have been introduced, and visa requirements have been tightened.<sup>71</sup> Constant diligence, though, is required.

According to the latest report, the international community achieved partial success in the arms embargo as the last element of the regime.<sup>72</sup> It explicitly provides that the “continuation of the Taliban activity in Afghanistan suggests insufficient implementation of the arms embargo.”<sup>73</sup> In addition, the Monitoring Team warns against Somalia. Local Transitional Federal Government depends entirely on foreign aid which is barely sufficient to maintain order in Mogadishu. This lawless environment represents a fertile ground for groups like al Qaeda.

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<sup>66</sup> Ibid., para. 51.

<sup>67</sup> Ibid., para. 52.

<sup>68</sup> Ibid., para. 53.

<sup>69</sup> Ibid., para. 54.

<sup>70</sup> Ibid., para. 60.

<sup>71</sup> Ibid. 64, para. 58.

<sup>72</sup> Ibid. 64, para. 64.

<sup>73</sup> Ibid. 64, para. 65.

However, the position of al Qaeda is, thanks to the arms embargo, weaker than it used to be and contrary to the Taliban, lacks “the necessary logistical, recruitment and training networks to mount a sustained challenge to State authority.”<sup>74</sup> At the same time, the Monitoring Team admits that this particular element would be more effective if Member States participated more in cooperation in this matter.

Although the reports of the Analytical Sanctions and Monitoring Team represent an important piece of relevant material, its informative value would be greater if some of its parts were not as general as they are now. In other words, clarity is at the expense of quality. The Monitoring Team should realize that their readership comprises scholars and experts in the field, and therefore their reports should conform to this fact. In this respect, in evaluating the effectiveness of the sanctions regime, this source must not be solely relied on.

### **3.2. Financial Action Task Force**

Another source of valuable information is an international organization called the Financial Action Task Force (FATF). It is a “global standard setting body” established in 1989 aiming to “promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing.”<sup>75</sup> More precisely, the FATF “monitors the progress of its members in implementing necessary measures, reviews money laundering and terrorist financing techniques and counter-measures, and promotes the adoption and implementation of appropriate measures globally.”<sup>76</sup>

The UNSC recognizes the importance of the FATF. In Resolution 1617 (2005) it “strongly urges all Member States to implement the comprehensive international standards embodied in the Financial Action Task Force’s (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing.”<sup>77</sup> In 2011, the UNSC further encouraged Member States to “utilize the guidance provided by Special Recommendation III for effective implementation of targeted counter-terrorism sanctions.”<sup>78</sup> These UNSC resolutions suggest that the FATF enjoy a special status in this particular field.

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<sup>74</sup> Ibid. 64, para. 64.

<sup>75</sup> “Who we are,” Financial Action Task Force, accessed August 3, 2012, <http://www.fatf-gafi.org/pages/aboutus/>.

<sup>76</sup> Ibid. 75.

<sup>77</sup> UN Doc. S/RES/1617(2005), para. 7.

<sup>78</sup> UN Doc. S/RES/1989(2011), para. 41.

In other words, States should adhere to the decisions of the UNSC, and in case they require additional guidance, are encouraged to follow the FATF standards.

In the sense of its aim, the FATF set down forty recommendations, which were complemented by nine special recommendations following the tragic events of September 11, 2001. In February 2012, all forty and the nine special recommendations were revised. The IX Special recommendations, standards that are the subject of our focus, are as follows:<sup>79</sup>

- I. Ratification and implementation of UN instruments
- II. Criminalising the financing of terrorism and associated money laundering
- III. Freezing and confiscating terrorist asset
- IV. Reporting suspicious transactions related to terrorism
- V. International co-operation
- VI. Alternative remittance
- VII. Wire transfers
- VIII. Non-profit organizations
- IX. Cash couriers

It is plain that the FATF nine special recommendations represent the general concept of countering the financing of terrorism. For the purposes of this dissertation, two special recommendations will be focused on – SR I and SR III. . Strategically placed first, SR I is self-explanatory. In this recommendation the FATF encourages states to implement the 1999 Terrorist Financing Convention and subsequently UNSC Resolution 1373 (2001) – international legal instruments with global impact.<sup>80</sup> In essence, SR III complements SR I and consists of two main objectives that draw on Resolutions 1267 (1999) and 1373 (2001). The interpretative note of SR III explains that “[t]he intent of the first objective is preventative, while the intent of the second objective is mainly preventative and punitive.”<sup>81</sup>

The FATF, however, does not only set a series of standards that should be followed. It also periodically monitors and evaluates the performance of Member States in terms of compliance with its recommendations. Each year it publishes a comprehensive report that usually includes a detailed assessment of the performance of each FATF member country. These reports represent a great source of information that can be utilized in our research.

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<sup>79</sup> “FATF IX Special Recommendations,” Financial Action Task Force, accessed August 3, 2012, <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

<sup>80</sup> Ibid. 79, at 2.

<sup>81</sup> Ibid. 79, at 7.



To make things easier, the latest 2010–2011 report includes a comprehensive table (see Appendix 1) comparing the level of implementation of all nine special recommendations in each FATF member country.<sup>82</sup> It is necessary to highlight though that the FATF recognizes four different levels of compliance with the recommendations. In this regard, compliant (C) means excellent performance (the recommendation is fully observed with respect to all essential criteria)<sup>83</sup>, largely compliant (LC) means very good performance (only minor shortcomings exist, with a large majority of the essential criteria being fully met),<sup>84</sup> partially compliant (PC) means good performance (the country has taken some substantive action and complies with some of the essential criteria),<sup>85</sup> and lastly, non-compliant (NC), which means poor performance (major shortcomings exist, with a large majority of the essential criteria not being met).<sup>86</sup>

In effort to assess current data more precisely, I have used single digit numbers instead of acronyms to determine the level of compliance. Accordingly, C = 1; LC = 2; PC = 3; and NC = 4. The converted table (see Appendix 2) allows us to do basic mathematical calculations.

Simple averages uncover more precise statistics, lower numbers representing better performance. The average of the 34 FATF Member States across the nine special recommendations is 2.6. The average of the SR I and SR III combined is 2.5, which is a little better, however, rounded up it still falls at the level of partial compliance. The overall score is therefore not very positive. Each country considered separately, the best compliance with the nine special recommendations was achieved by the United Kingdom (1.6). Argentina, on the other hand, demonstrated the worst (3.4). If we narrow down the selection to SR I and SR III only, the United Kingdom emerges once again as the best-complying country (1.0). The worst performance was achieved by Brazil (4.0).

Simple mathematics confirmed that the statistics do not show positive data. Partial compliance should not be a standard that FATF Member States try to achieve. It is alarming that so many

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<sup>82</sup> “Financial Action Task Force Annual Report 2010-2011,” Financial Action Task Force, accessed August 3, 2012, <http://www.fatf-gafi.org/media/fatf/documents/reports/FORMATTED%20ANNUAL%20REPORT%20FOR%20PRINTING.pdf>.

<sup>83</sup> “Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations,” Financial Action Task Force, page 6, accessed August 3, 2012. [www.fatf-gafi.org/media/fatf/documents/reports/methodology.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/methodology.pdf).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

years after introduction of the nine special recommendations only one country, the United Kingdom, has been able to fully comply with both SR I and SR III. Even worse is that during the same period, Brazil was not able to adhere to any of these standards.

### **3.3. Council of Europe – MONEYVAL**

In 1998, the Council of Europe (CoE) created the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (or MONEYVAL). It comprises the CoE countries which are not members of the FATF (except for the Russian Federation, which is a member of both). The MONEYVAL periodically organizes so-called mutual evaluations. The outcome of these evaluations is usually published in mutual evaluation reports. During each country visit, MONEYVAL experts assess performance in accordance with the FATF standards.

Contrary to the FATF, MONEYVAL does not publish comprehensive annual reports. Even so, if we go through all thirty mutual evaluation reports, we can extract the most relevant data and put it in a table (see Appendix 3).<sup>87</sup> Similarly to the FATF table, single digit numbers are used instead of original abbreviations to determine the level of compliance and to increase the accuracy of evaluation (see Appendix 4).

Accordingly, the overall average of all special recommendations in all countries can be calculated as 2.8, therefore 0.2 worse than in the case of the FATF. The average of the selected SR I and SR III is 3.0, which is 0.3 worse than the FATF. Again, the initial statistics do not show very positive numbers. Both averages clearly fall within the partially compliant threshold, which should not be an acceptable standard.

When assessing each country separately, the table provided the following numbers. In the nine special recommendations average, Slovenia demonstrated the best performance (1.9) and Croatia showed the worst (3.4). The averages of SR I and SR III showed Bulgaria and the Czech Republic together as the best (2.0), and Andorra as the worst (4.0).

We can conclude from these numbers that the system, no matter how well designed it may be, is not fully effective. Hence, we are precluded from exploring its full efficiency due to persisting problems with (non-)compliance. As long as the majority of states do not fully

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<sup>87</sup> “Mutual Evaluation Reports,” Council of Europe – MONEYVAL, accessed August 15, 2012, [www.coe.int/t/dghl/monitoring/moneyval/Evaluations/Evaluation\\_reports\\_en.asp](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/Evaluation_reports_en.asp).

comply with the relevant legal standards, the system will not function properly. The distinct link between effectiveness and compliance is mentioned by the FATF President in his briefing to the Counter-Terrorism Committee.<sup>88</sup> The United Nations may produce an infinite number of binding and non-binding standards and norms; however, these efforts are futile until Member States adhere to them. The mere existence of organizations and groups of experts such as the FATF and MONEYVAL indicate the existence of weaknesses. Nevertheless, it is important to understand that the problem does not lie in the system as such, but in the willingness of the States that compose it. The figures above only prove the correctness of this argument.

## CONCLUSION

We have examined the history and current practice of targeted and global sanctions against terrorism. On this journey, the targets have grown in number, from Osama bin Laden, to his allies in the Taliban, and finally to his own organization of al Qaeda. In May 2011, the most wanted terrorist of all time, Osama bin Laden, was tracked down and killed at his private compound in Abbottabad, Pakistan. Al Qaeda may have been momentarily crippled but was by no means destroyed. The same applies to the Taliban, whose leader Mohammed Omar still escapes justice. The existence of these two groups can be compared to a smouldering coal. To put it out once and for all the international community will have to act, comply with the relevant international legal instruments, improve cooperation, and increase the effectiveness of the sanctions regime.

As we have learnt, the major weakness of this regime is lack of compliance with the measures set out in the UNSC resolutions and other relevant international legal instruments. This must change, and possibly in a rapid manner. Terrorists, especially al Qaeda members, are known for their ability to adapt to a new environment. The gaps in compliance only offer another opportunity for terrorists to be one step ahead. The Financial Action Task Force therefore, apart from publishing compliance reports, also warns about countries whose performance in terms of countering the financing of terrorism is exceptionally bad. Among the high-risk and non-cooperative jurisdictions, as they call these countries, the FATF name Iran and the Democratic People's Republic of Korea (DPRK). In its Public Statement<sup>89</sup> of June 22, 2012, the FATF

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<sup>88</sup> "Briefing to the United Nations Security Council Committee Established pursuant to Resolution 1373 (2001)," FATF President Paul Vlaanderen, accessed August 15, 2012, [www.un.org/en/sc/ctc/docs/statements/2009\\_10\\_26\\_fatf\\_brief.pdf](http://www.un.org/en/sc/ctc/docs/statements/2009_10_26_fatf_brief.pdf).

<sup>89</sup> "Public Statement – 22 June 2012," Financial Action Task Force, accessed August 3, 2012, <http://www.fatf-gafi.org/topics/key/fatfpublicstatement-22june2012.html>.

expressed its deep concern about Iran's and the DPRK's "failure to address the significant deficiencies in their anti-money laundering and combating the financing of terrorism regime and the serious threat this poses to the integrity of the international financial system."<sup>90</sup> In this regard, the FATF urged both Iran and the DPRK to address these deficiencies without further delay.<sup>91</sup>

In his address to the Council of Europe, the FATF President stated that "some jurisdictions expose us all to unacceptable risk by failing to implement effective AML/CFT systems. When a country chooses not to engage in the fight against money laundering and terrorist financing in a meaningful way, we must all be ready to take firm action."<sup>92</sup> Of course, the FATF is not empowered to force any State, even its members, to follow its guidelines. This is, though, in the competence of the UNSC. Insisting on adherence to the decisions of the UNSC is essential not only to increase overall effectiveness of counter-terrorism efforts, but also to maintain legitimacy of the United Nations as a whole.

I would like to conclude by quoting former US President Ronald W. Reagan, who said that "[i]t is up to us, in our time, to choose and choose wisely between the hard but necessary task of preserving peace and freedom and the temptation to ignore our duty and blindly hope for the best while the enemies of freedom grow stronger day by day."<sup>93</sup> Although these words addressed a slightly different topic in different times, it aptly fits the problem of countering terrorism. There is no doubt that the international community will face many obstacles on the way to a terror-free world. The difficulties must not, however, prevent it from continuing in the effort to maintain international peace and security.

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> "Speech by FATF President Paul Vlaanderen at the 30th Plenary Meeting of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)," FATF President Paul Vlaanderen, accessed August 15, 2012, [www.coe.int/t/dghl/monitoring/moneyval/Activities/Speech/Speech-FATFPresidentSept09\\_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Activities/Speech/Speech-FATFPresidentSept09_en.pdf).

<sup>93</sup> Ronald W. Reagan, "Address to the Nation" (address from the Oval Office on National Security, Washington DC, March 23, 1983).

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## APPENDICES

Appendix 1 – FATF table (extracted from the FATF Annual report 2010–2011)

	Argentina	Australia	Austria	Belgium	Brazil	Canada	China	Denmark	Finland	France	Germany	Greece	HK, China	Iceland	India	Ireland	Italy	Japan	Korea	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Portugal	Russia	Singapore	South Africa	Spain	Sweden	Switzerland	Turkey	United Kingdom	United States		
	2010	2005	2009	2005	2010	2008	2007	2006	2007	2011	2010	2007	2008	2006	2010	2006	2005	2008	2009	2010	2008	2011	2009	2005	2006	2008	2008	2009	2006	2006	2005	2007	2007	2006		
<b>IX Special Recommendations</b>																																				
I	PC	LC	LC	LC	NC	LC	PC	PC	PC	LC	PC	PC	PC	PC	PC	LC	PC	PC	PC	PC	PC	PC	PC	LC	PC	PC	LC	LC	PC	LC	PC	PC	C	LC		
II	PC	LC	PC	C	NC	LC	PC	PC	LC	C	LC	PC	PC	LC	PC	LC	LC	PC	PC	PC	PC	NC	LC	PC	PC	PC	PC	PC	LC	LC	LC	LC	PC	PC	C	C
III	NC	LC	PC	PC	NC	LC	NC	PC	PC	PC	PC	PC	PC	NC	LC	PC	LC	PC	PC	PC	PC	NC	LC	PC	PC	PC	PC	PC	PC	PC	PC	PC	PC	PC	C	LC
IV	NC	LC	PC	C	LC	LC	NC	LC	LC	PC	PC	PC	PC	LC	PC	C	PC	LC	NC	NC	PC	LC	LC	LC	LC	LC	LC	LC	LC	LC	LC	PC	PC	PC	C	LC
V	PC	LC	PC	LC	PC	LC	LC	LC	LC	LC	LC	LC	LC	LC	LC	C	C	PC	LC	PC	PC	PC	PC	LC	NC	PC	LC	LC	LC	LC	LC	LC	PC	C	LC	
VI	NC	PC	LC	C	LC	NC	LC	LC	PC	LC	LC	PC	PC	NC	LC	PC	LC	PC	PC	PC	PC	PC	LC	NC	PC	LC	NC	LC	PC	LC	PC	C	PC	LC	LC	
VII	PC	NC	C	LC	LC	NC	LC	PC	PC	C	C	PC	PC	NC	LC	NC	NC	LC	PC	PC	PC	C	NC	NC	NC	PC	LC	PC	LC	PC	LC	NC	PC	NC	PC	LC
VIII	NC	PC	PC	C	NC	LC	LC	LC	PC	LC	LC	NC	LC	NC	NC	PC	C	PC	PC	PC	PC	LC	PC	NC	LC	PC	LC	PC	LC	PC	LC	PC	LC	PC	LC	C
IX	PC	PC	PC	NC	PC	C	PC	PC	PC	LC	LC	NC	NC	PC	PC	C	NC	LC	NC	PC	LC	PC	PC	LC	NC	LC	PC	LC	PC	LC	NC	NC	LC	LC	C	

C Compliant    LC Largely Compliant    PC Partially Compliant    NC Non Compliant

Appendix 2 – FATF table (converted from the FATF Annual report 2010–2011)

	Argentina	Australia	Austria	Belgium	Brazil	Canada	China	Denmark	Finland	France	Germany	Greece	HK, China	Iceland	India	Ireland	Italy	Japan	Korea	Luxembourg	Mexico	Netherlands	New Zealand	Norway	Portugal	Russia	Singapore	South Africa	Spain	Sweden	Switzerland	Turkey	United Kingdom	United States	
	2010	2005	2009	2005	2010	2008	2007	2006	2007	2011	2010	2007	2008	2006	2010	2006	2005	2008	2009	2010	2008	2011	2009	2005	2006	2008	2008	2009	2006	2006	2005	2007	2007	2006	
<b>IX Special Recommendations</b>																																			
I	3	2	2	2	4	2	3	3	3	2	3	3	3	3	3	2	3	3	3	3	3	3	2	3	3	2	2	2	2	3	2	3	3	1	2
II	3	2	3	1	4	2	3	3	2	1	2	3	3	2	3	2	2	3	3	3	3	3	1	2	2	2	2	2	2	2	2	2	3	1	1
III	4	2	3	3	4	2	4	3	3	3	3	3	3	4	2	3	2	3	3	3	4	2	3	3	3	3	2	3	2	3	3	3	3	1	2
IV	4	2	3	1	2	2	4	2	2	2	3	3	2	2	3	1	3	2	4	4	3	2	2	2	2	3	1	2	2	3	3	3	3	1	2
V	3	2	3	2	3	2	2	2	2	2	2	2	2	2	2	1	1	3	2	3	3	3	3	2	2	2	2	2	2	2	2	2	3	1	2
VI	4	3	2	1	2	4	2	2	3	2	2	3	3	4	2	3	2	3	3	3	3	2	4	3	2	4	2	3	2	3	1	3	2	2	
VII	3	4	1	2	2	4	2	3	3	1	1	3	3	4	2	4	4	2	3	3	3	1	4	4	4	3	2	3	2	4	3	4	3	2	
VIII	4	3	3	1	4	2	2	2	3	2	2	4	2	4	4	3	1	3	3	3	3	2	3	4	2	3	2	3	2	3	2	3	2	2	1
IX	3	3	3	4	3	1	3	3	3	2	2	4	4	3	3	3	1	4	2	4	3	2	3	3	2	4	2	3	2	4	4	2	2	1	

1 Compliant    2 Largely Compliant    3 Partially Compliant    4 Non Compliant

Appendix 3 – MONEYVAL table (extracted from each of the Mutual Evaluation Reports)

	Albania	Andorra	Armenia	Azerbaijan	Bosnia and Herzegovina	Bulgaria	Croatia	Cyprus	Czech Republic	Estonia	Georgia	Hungary	Holy See	Israel	Latvia	Liechtenstein	Lithuania	Malta	Moldova	Monaco	Montenegro	Poland	Romania	Russia (also FATF member)	San Marino	Serbia	Slovak Republic	Slovenia	Republic of Macedonia	Ukraine			
	2011	2012	2009	2008	2009	2008	2008	2011	2011	2008	2007	2010	2012	2008	2006	2007	2006	2012	2007	2007	2009	2007	2008	2008	2011	2009	2011	2010	2008	2009			
<b>IX Special Recommendations</b>																																	
I	PC	NC	PC	PC	PC	LC	PC	LC	LC	PC	PC	PC	PC	LC	LC	PC	PC	LC	PC	LC	PC	PC	PC	LC	PC	PC	PC	LC	PC	PC	LC	PC	NC
II	PC	PC	PC	PC	PC	LC	PC	LC	PC	PC	NC	PC	LC	C	PC	PC	PC	LC	PC	LC	PC	NC	PC	PC	LC	PC	PC	PC	LC	PC	PC	PC	PC
III	PC	NC	NC	NC	NC	LC	NC	PC	LC	PC	PC	PC	NC	PC	PC	PC	PC	PC	NC	PC	NC	PC	PC	PC	PC	NC	PC	PC	PC	NC	PC	NC	PC
IV	PC	PC	LC	NC	LC	PC	NC	LC	LC	LC	PC	PC	PC	LC	PC	PC	PC	PC	NC	LC	LC	PC	PC	PC	LC	LC	LC	PC	LC	PC	PC	PC	PC
V	PC	LC	PC	PC	LC	C	PC	LC	LC	LC	PC	LC	LC	LC	PC	PC	C	C	LC	PC	LC	PC	LC	LC	LC	LC	LC	LC	LC	PC	PC	PC	PC
VI	PC	PC	LC	PC	PC	C	NC	LC	PC	LC	PC	C		PC	PC	LC	LC	C	PC	LC	PC	NC	NC	NC	PC	PC	LC	C	PC	C	PC	PC	
VII	PC	LC	LC	PC	PC	LC	PC	C	LC	LC	NC	C	NC	PC	NC	NC	PC	C	NC	PC	NC	NC	LC	PC	C	PC	C	C	C	NC	PC	PC	
VIII	NC	PC	PC	NC	NC	PC	NC	PC	PC	PC	PC	NC	NC	LC	C	PC	PC	PC	PC	PC	NC	NC	PC	PC	LC	NC	NC	PC	NC	NC	PC	NC	PC
IX	PC	NC	PC	PC	NC	PC	PC	LC	LC	PC	NC	PC	PC	LC	NC	NC	PC	LC	LC	PC	PC	LC	PC	NC	PC	PC	PC	C	PC	PC	PC	PC	PC

C Compliant LC Largely Compliant PC Partially Compliant NC Non Compliant

Appendix 4 – MONEYVAL (converted from each of the Mutual Evaluation Reports)

	Albania	Andorra	Armenia	Azerbaijan	Bosnia and Herzegovina	Bulgaria	Croatia	Cyprus	Czech Republic	Estonia	Georgia	Hungary	Holy See	Israel	Latvia	Liechtenstein	Lithuania	Malta	Moldova	Monaco	Montenegro	Poland	Romania	Russia (also FATF member)	San Marino	Serbia	Slovakia	Slovenia	Republic of Macedonia	Ukraine		
	2011	2012	2009	2008	2009	2008	2008	2011	2011	2008	2007	2010	2012	2008	2006	2007	2006	2012	2007	2007	2009	2007	2008	2008	2011	2009	2011	2010	2008	2009		
<b>IX Special Recommendations</b>																																
I	3	4	3	3	3	2	3	2	2	3	3	3	3	2	2	3	3	2	3	2	3	3	3	2	3	3	3	2	3	3	4	
II	3	3	3	3	3	2	3	2	3	3	4	3	2	1	3	3	3	2	3	2	3	4	3	3	2	3	3	3	2	3	3	3
III	3	4	4	4	4	2	4	3	2	3	3	3	4	3	3	3	3	3	4	3	4	3	3	3	3	4	3	3	4	3	3	3
IV	3	3	2	4	2	3	4	2	2	2	3	3	3	2	3	3	3	3	4	2	2	3	3	3	2	2	2	3	2	3	3	3
V	3	2	3	3	2	1	3	2	2	2	3	2	2	2	3	3	1	1	2	3	2	3	2	2	2	2	2	2	2	3	3	3
VI	3	3	2	3	3	1	4	2	3	2	3	1		3	3	2	2	1	3	2	3	4	4	4	3	3	2	1	3	3	3	
VII	3	2	2	3	3	2	3	1	2	2	4	1	4	3	4	4	3	1	4	3	4	4	2	3	1	3	1	1	4	3	3	
VIII	4	3	3	4	4	3	4	3	3	3	3	4	4	2	1	3	3	3	3	3	4	4	3	3	2	4	4	3	4	3	3	
IX	3	4	3	3	4	3	3	2	2	3	4	3	3	2	4	4	3	2	2	3	3	2	3	4	3	3	3	1	3	3	3	

1 Compliant 2 Largely Compliant 3 Partially Compliant 4 Non Compliant