

THE U.N. CONSOLIDATED LIST:
EFFECT OF COMMITTEE DYNAMICS ON
CREATION AND COMPLIANCE

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The Al-Qaida and Taliban Sanctions Committee (the “Committee”) was created by United Nations Resolution 1267 (1999). The fundamental responsibility entrusted to the Committee is the proscribing of individuals and entities that allegedly finance terrorism or are deemed terrorists on the United Nations Consolidated List (“Consolidated List” or “List”).

This paper addresses the question: Are Committee proceedings grounded in conflict or defined by consensus? The answer has a significant impact on the nature of the Consolidated List. Primarily, the narrative suggests that Committee proceedings are based on consensus, and consistent with the contention is the belief that the List is a product of consensus.¹

Based on empirical research we suggest precisely the opposite, *albeit* a controversial proposition: that the Committee proceedings are grounded and governed by conflict. This analysis locates the central dynamic creating the List as *acute* conflict among members, both manifest and latent.

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¹ Letter dated 13 January 2006 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, U.N. Doc. S/2006/22 (Jan. 17, 2006) [hereinafter Letter from the Chairman, U.N. Doc. S/2006/22]; Letter dated 2 April 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, U.N. Doc. S/2004/281 (Apr. 8, 2004) [hereinafter Letter from the Chairman, U.N. Doc. S/2004/281]; Letter dated 20 December 2002 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) addressed to the President of the Security Council, U.N. Doc. S/2002/1423 (Dec. 26, 2002) [hereinafter Letter from the Chairman, U.N. Doc. S/2002/1423].

Being a product of conflict, the List faithfully reflects the divisive tensions and conflicts prevalent among Committee members. Indeed, an argument can be made that the entries on the List are inversely proportionate to the conflicts among Committee members. In others words, an *increase* in conflicts among the members results in a corresponding *decrease* in the number of entries on the Consolidated List. An ostensible example of unrelenting and pervasive conflicts is the absence of substantive and procedural standards in the listing and delisting process, which in turn, makes the List a static instrument, one divorced from reality. Other noteworthy consequences include the dismal enforcement results and a manifestation of leaks.

To explicate the argument, two interrelated aspects are dealt with in the following analysis. The first contention is that the availability of the veto power to each Committee member results in making the veto a “*revolver* rather than a *resolver*”² of conflicts. Second, Committee practices (or perhaps more precisely, in practice, the absences of any standards) are due to acute conflicts among members. The analysis naturally gives way to the conclusion that the content and nature of the List is inextricably wedded to the nature of the Committee proceedings. The Consolidated List is an instrument epitomizing the disaccord prevalent among the Committee members, not one reflecting consensus or the will of the international community.

Part I provides the context in terms of the U.N. Resolutions that create the Committee and the veto power exercised by each Committee member. Thereafter, we explain how conflict trumps consensus with reference to a variety of issues. While exploring the pivotal dividing tension among Committee members, Part II explains the listing and delisting process on the Consolidated List as it currently stands. Due to acute conflicts, both processes are devoid of procedural and substantive standards. Part III explores some ramifications of divisive tensions and conflict, such as, the static nature of the List, the dismal enforcement results, and a manifestation of leaks.

² Ernest Cashmore, *The Social Organization of Canadian Immigration Law*, 3 CAN. J. SOC. 409, 421 (1978).

I

A. *Relevant U.N. Resolutions*

1. Security Council Resolution 1267 (15 October 1999)

The Security Council unanimously adopted Resolution 1267³ demanding that the Taliban cease its activities in support of international terrorism. It insisted that the Taliban turn over Usama bin Laden to appropriate authorities to bring him to justice.⁴ To enforce the demands, the Council imposed a flight ban on any aircraft owned, leased, or operated by or on behalf of the Taliban.⁵ Further, it ordered the freezing of the organizations' financial resources.⁶

The Resolution established a Sanctions Committee composed of the 15 Security Council members to ensure implementation of measures, to designate funds or other financial resources of the Taliban, and to consider requests for exemptions from the measures imposed.⁷

2. Security Council Resolution 1333 (19 December 2000)

By Resolution 1333 the Security Council imposed an arms embargo over the territory of Afghanistan controlled by the Taliban.⁸ Further, it expanded the air embargo and financial embargo to include freezing the funds of Usama Bin Laden and associates. It requested the Committee to maintain an updated list of suspect individuals and entities, including Usama bin Laden and the Al-Qaida organization).⁹ On 8 March 2001 the Committee published its first Consolidated List designating terrorists and terrorist financiers.¹⁰ The Resolution further mandated the Committee to maintain a list of agencies providing humanitarian aid in Afghanistan.¹¹

3 U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/PV.4051 (Oct. 15, 1999).

4 S.C. Res. 1267, ¶¶ 1-2, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

5 *Id.* ¶ 4(a).

6 *Id.* ¶ 4(b).

7 *Id.* ¶ 6.

8 S.C. Res. 1333, ¶¶ 5, 8, 10 & 11, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

9 *Id.* ¶ 8(c).

10 Press Release, Security Council, Security Council Committee, Established by Resolution 1267 (1999) Concerning Afghanistan, Issues Consolidated List, U.N. Doc. AFG/131-SC/7028 (Mar. 8, 2001).

11 S.C. Res. 1333, *supra* note 8, ¶ 12.

3. Security Council Resolution 1363 (30 July 2001)

The Resolution established a mechanism to monitor the implementation of the measures imposed by Resolutions 1267 and 1333. Since 2001 the monitoring mechanism's configuration has changed as new members have been appointed or the mandate renewed.¹² For example, initially in 2001 they were called the "Committee of Experts," and from 2001 to 2003 the mechanism was called the "Monitoring Group."¹³ The Committee of Experts and the Monitoring Group submitted four reports before their mandate lapsed.¹⁴ Via Resolution 1526,¹⁵ the experts' title was changed to the "Analytical Support and Sanctions Monitoring Team."¹⁶ This group has submitted several reports, the most recent dated 28 September 2009.¹⁷ Regardless of the configuration or titles, all experts share the same mandate—to assist the Committee

¹² S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

¹³ S.C. Res. 1455, *supra* note 12; S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001).

¹⁴ Sec. Council, Monitoring Group on Afghanistan established pursuant to Sec. Council resolution 1363 (2001) and extended by resolution 1390 (2002), *Third Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002)*, U.N. Doc. S/2002/1338/Annex (Dec. 17, 2002) [hereinafter Sec. Council, U.N. Doc. S/2002/1338/Annex]; Sec. Council, Monitoring Group on Afghanistan established pursuant to Sec. Council resolution 1363 (2001) and extended by resolution 1390 (2002), *Second Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002)*, U.N. Doc. S/2002/1050/Annex (Sept. 20, 2002) [hereinafter Sec. Council, U.N. Doc. S/2002/1050/Annex] and U.N. Doc. S/2002/1050/Corr.1 (Sept. 27, 2002); Sec. Council, Monitoring Group on Afghanistan established pursuant to Sec. Council resolution 1363 (2001) and extended by resolution 1390 (2002), *Report of the Monitoring Group Established Pursuant to Security Council Resolution 1363 (2001) and Extended by Resolution 1390 (2002)*, U.N. Doc. S/2002/541/Annex (May 15, 2002); Sec. Council, Monitoring Group on Afghanistan established pursuant to Sec. Council resolution 1363 (2001), *First Report of the Monitoring Group on Afghanistan Established Pursuant to Security Council Resolution 1363 (2001)*, U.N. Doc. S/2002/65/Annex (Jan. 15, 2002); Sec. Council, Comm. of Experts appointed pursuant to Sec. Council resolution 1333 (2000), paragraph 15(a), *Report of the Committee of Experts Appointed Pursuant to Security Council Resolution 1333 (2000), Paragraph 15 (a), Regarding Monitoring of the Arms Embargo Against the Taliban and the Closure of Terrorist Training Camps in the Taliban-held Areas of Afghanistan*, U.N. Doc. S/2001/511/Annex (May 22, 2001).

¹⁵ S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

¹⁶ *Id.* ¶¶ 1, 3, 6, & 7.

¹⁷ Sec. Council, Analytical Support and Sanctions Monitoring Team pursuant to resolution 1735 (2006), *Report of the Analytical Support and Sanctions Monitoring Team Pursuant to Resolution 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2008/324 (May 14, 2008) [hereinafter Sec. Council, U.N. Doc. S/2008/324].

and to monitor compliance for strengthening the measures. The terms used in this analysis are “Monitoring Team” or “Experts.”

4. Resolution 1617 (29 July 2005)

The Security Council provided a definition of the term “associated with” and called for member States to submit checklist provisions when submitting a name to be included on the List. It requested the Secretary-General to extend the mandate of the Monitoring Team for 17 months.¹⁸

5. Resolution 1730 (19 December 2006)

Resolution 1730 established the Focal Point within the Secretariat to receive delisting requests and directed the Committee to revise guidelines accordingly.¹⁹

B. *Committee Membership and the Veto Power*

Created by Security Council Resolution 1267 (1999) the Committee composition is congruent with Security Council membership (i.e., five Permanent and 10 non-permanent members). Each of the 15 Security Council members is allocated a Committee position²⁰ this is precisely where the semblance between the Council and Committee ends, giving way to two important differences. First, all Committee decisions are made by complete consensus among the 15 Committee members, whereas, in the Security Council, decisions can be made by majority vote that should include the concurring votes of all five Permanent members (i.e., no Permanent member should veto a decision). This is the rule of “Great Power Unanimity.”²¹ Second, in the Security Council

¹⁸ S.C. Res. 1617, ¶¶ 1, 2, 10, 19, 20, & 21, U.N. Doc. S/RES/1617 (July 29, 2005).

¹⁹ S.C. Res. 1730, ¶¶ 1 & 2, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

²⁰ SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES, GUIDELINES FOR THE CONDUCT OF ITS WORK, at cl. 1(b) (2008) [hereinafter 2008 COMMITTEE GUIDELINES], available at http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

²¹ Membership of the Security Council in 2007, http://www.un.org/sc/searchres_sc_year_english.asp?year=2007 (last visited Sept. 27, 2009).

the five Permanent members (also called the “P-5”²²) exclusively wield the veto power, whereas, in the Committee, *each* member exercises the veto or can place a “hold” regarding any administrative, procedural, or substantive matter.²³

When a member places a “hold” concerning any issue there is no statutory limit for resolution, although it ceases to have effect when a non-permanent Committee member’s membership term expires.²⁴ Since the Resolutions are silent about the time limit, operationally, a few interpretations are feasible. First, the “hold” can be for an unlimited time when placed by any of the five Permanent members that are not subject to the two-year Security Council membership duration. Alternatively, the “hold” could be for a two-year time period (i.e., the non-permanent Committee membership duration). Finally, it could be valid for an extended time, given regional affiliations and relationships among U.N. member States (i.e., assuming an incoming non-permanent member extends the hold placed by an outgoing member).

The availability of the veto to non-permanent members, or a relative parity of power among States within this international arena is a relatively new development, for it can safely be stated that during the past sixty-three years of the U.N. the veto was the exclusive prerogative of the five Permanent Members, one not extended to any other U.N. member.²⁵ Naturally this development has a tremendous impact on all Committee proceedings.

But a caveat should be added. The fact that each member has a veto power does not mean that no dominant State or group of States can emerge tilting or biasing the Committee proceedings in their favor. Neither is it suggested that each of the 15 Committee members, in practice, exerts equal influence on the Committee proceedings. Clearly, the system is biased in favor of the five Permanent members that are not subject to the same two-year Committee membership rules as the 10 non-permanent Committee members. But what we are suggesting is that, structurally, the framework within which the Committee functions, or perhaps more precisely, the veto as exercised by each Committee member, provides an

²² See DAVID J. WHITTAKER, UNITED NATIONS IN THE CONTEMPORARY WORLD (1997); Emily Bruemmer, *Join the Club: Japan’s Security Council Bid*, HARV. INT’L REV., July 2006, at 32.

²³ 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 3.

²⁴ 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 3(c).

²⁵ SEC. COUNCIL, PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL, U.N. Doc. S/96/Rev.7, U.N. Sales No. E.83.I.4 (1983), available at <http://www.un.org/Docs/sc/scrules.htm>.

opportunity to the non-permanent members—one that has never presented itself before in the history of the U.N.—to protect or forward their interests. As a result, conflicts and tensions rise to new heights.

C. *Conflict Trumps Consensus with Reference to Most Issues*

Conflict is conspicuous in most Committee proceedings with reference to a majority of issues. The result of the conflicts with unfailing regularity is the fracturing *and* trumping of consensus (i.e., since the mandate requires the Committee to make decisions by complete consensus among the 15 members). Though reasons for the conflicts and tensions may be diverse,²⁶ however, they leave in their wake severe discord and dissension that profoundly affect Committee proceedings.

In short, conflict preempts consensus on *infinitum* issues, such as consideration of proposals for the creation of an independent delisting mechanism submitted by U.N. members; adding submitted identifiers for the listed; transliteration of the List into other languages and the problem of lack of standardization in the transliteration of names; technical corrections to the permanent numbers identifying each name; technical additions for ease of reference; the scope of terms such as “associated with”; scope of the “releasable” case statement; a clearer definition of the scope of the arms embargo and travel ban; issues of wrongful listing; effect of listing on beneficiaries; issues regarding payment of compensation for damages by U.N. member States; obligations on U.N. members vis-à-vis petitions from the listed to delist; obligations of U.N. member States if a listed individual is located within their territory; enlarging the number of States that can petition for delisting to include the State that originally proposed the listing.²⁷

²⁶ See *supra* Part II.A.

²⁷ Sec. Council, U.N. Doc. S/2008/324, *supra* note 17; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1617 (2005) and 1735 (2006), *Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolution 1617 (2005) and 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2007/677/Annex (Nov. 29, 2007) [hereinafter Sec. Council, U.N. Doc. S/2007/677/Annex]; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005), *Sixth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals*

Acute conflicts characterize Committee work, or perhaps conflicts modulate and govern it, thereby, in most cases, resulting in a near paralysis of the Committee proceedings. The severity of these conflicts can be gauged by two recent examples. The first relates to a review of the List. This aspect escaped the attention of the Resolutions and Guidelines; hence, no statutory provision for a periodic review of the listed designations exists, making proscribing open-ended. However, it does not follow that the general U.N. membership failed to give cognizance to the issue. Some noteworthy calls for a review include the Watson White Paper titled *Strengthening Targeted Sanctions Through Fair and Clear Procedures* commissioned by the governments of Germany, Sweden, and Switzerland²⁸; requests by the Special Rapporteur for the United Nations Commission on Human Rights,²⁹ calls by the Legal Counsel of the United Nations,³⁰ remarks by circumspect U.N. members,³¹ and requests by the Monitoring

and Entities, U.N. Doc. S/2007/132/Annex (Mar. 8, 2007); Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to resolutions 1526 (2004) and 1617 (2005), *Fifth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2006/750/Annex (Sept. 20, 2006) [hereinafter Sec. Council, U.N. Doc. S/2006/750/Annex]; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004), *Third Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2005/572 (Sept. 9, 2005) [hereinafter Sec. Council, U.N. Doc. S/2005/572]; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004), *Second Report of the Analytical Support Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2005/83/Annex (Feb. 15, 2005) [hereinafter Sec. Council, U.N. Doc. S/2005/83/Annex]; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004), *First Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Resolution 1526 (2004) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2004/679/Annex (Aug. 25, 2004) [hereinafter Sec. Council, U.N. Doc. S/2004/679/Annex].

²⁸ WATSON INSTITUTE FOR INTERNATIONAL STUDIES, BROWN UNIVERSITY, *STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES* (2006) [hereinafter WATSON WHITE PAPER]; see also Sec. Council, U.N. Doc. S/2006/750/Annex, *supra* note 27, ¶ 38.

²⁹ High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/4/88 (Mar. 9, 2007); The Secretary-General, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/61/267 (Aug. 16, 2006).

³⁰ U.N. SCOR, 61st Sess., 5474th mtg. at 5, U.N. Doc. S/PV.5474 (June 22, 2006) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5474].

³¹ U.N. SCOR, 61st Sess., 5446th mtg. at 28, U.N. Doc. S/PV.5446 (May 30, 2006)

Team in the fourth, fifth, and seventh reports.³² These statements, on one hand, express dismay at the Committee's lack of review of the List, and on the other, encourage the Committee to undertake a review.

A review of the Consolidated List is essential, since it serves several purposes. The Monitoring Team articulates the rationale:

[T]o update entries which may have been neglected; and, at discretion of the Committee, to remove names which no longer met the criteria for listing. As the sanctions are intended to be preventive and temporary in nature, and may escape some criminal procedural requirements on this basis, it is necessary as a matter of fairness to ensure that they are not applied any longer than the rationale that occasioned them continues, and in particular to ensure that listings do not become permanent (and therefore punitive) through neglect. An effective review also enhances political support for the sanctions regime and decreases the likelihood that legal challenges, when they do occur, will succeed. Finally, the chance of a review may help persuade listed individuals and entities to end their support for Al-Qaida and the Taliban.³³

Perhaps in response to the aforementioned calls for a review, the Committee responded by making strenuous efforts to amend its Guidelines to include a provision for review. By late 2006 paragraph 6(i) of the Committee Guidelines was amended, which authorized the Secretariat to annually circulate to the Committee the names on the Consolidated List which had not been updated in four or more years.³⁴

Although some observed that the amendment was "watered down and became vague,"³⁵ considerable efforts

[hereinafter U.N. SCOR, U.N. Doc. S/PV.5446].

³² Sec. Council, U.N. Doc. S/2007/677/Annex, *supra* note 27; Sec. Council, U.N. Doc. S/2006/750/Annex, *supra* note 27; Sec. Council, Analytical Support and Sanctions Monitoring Team appointed pursuant to Security Council resolutions 1526 (2004) and 1617 (2005), *Fourth Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1526 (2004) and 1617 (2005) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, U.N. Doc. S/2006/154/Annex (Mar. 10, 2006) [hereinafter Sec. Council, U.N. Doc. S/2006/154/Annex].

³³ Sec. Council, U.N. Doc. S/2007/677/Annex, *supra* note 27, ¶ 41.

³⁴ SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES, GUIDELINES FOR THE CONDUCT OF ITS WORK, at cl. 6(i) (2006) [hereinafter 2006 COMMITTEE GUIDELINES], available at http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf.

³⁵ U.N. SCOR, 62d Sess., 5779th mtg. at 22–23, U.N. Doc. S/PV.5779 (Nov. 14, 2007) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5779].

during the three years preceding the amendment were undertaken by the Committee to amend its Guidelines and conduct a review of the List. Finally, in March 2007, the U.N. Secretariat circulated to the Committee a list of 115 names—of which had been updated since the first List was formulated. The Committee undertook to conclude the review by July 2007.³⁶

But incisive conflicts among Committee members severely undermined the undertaken review, making the whole exercise futile and meaningless. The appalling results of the review reflect chronic conflict—for each of the 115 names subject to review, the Committee failed to reach a consensus regarding *any* submission. Therefore, “the review ended without any changes to the List.”³⁷

Consider another example explaining how acute conflicts define the Committee work, often resulting in a near paralysis. The example relates to individuals who are deceased but whose names remain on the Consolidated List. Similar to the previous example, the Resolutions and Guidelines remain silent; therefore, there is an absence of statutory guidance to resolve the issue. Conflicts encase the issue: some Committee members resist delisting on the grounds of preventing the use of the deceased’s estate for criminal purposes; conversely, other members support delisting deceased individuals’ names to project an image of the List as a dynamic instrument.³⁸

Nonetheless, it remains true that the conflicts have prevented Committee members from reaching a consensus regarding the deceased for several years. Let alone the issue of actual delisting of the deceased, the Committee seemingly failed to agree on a process to be undertaken for the request (i.e., who is qualified to undertake the process to request the delisting of a deceased person, which is distinct from delisting of a living individual).³⁹

³⁶ *Id.* at 10.

³⁷ Sec. Council, U.N. Doc. S/2007/677/Annex, *supra* note 27.

³⁸ Sec. Council, U.N. Doc. S/2002/1050/Annex, *supra* note 14; U.N. SCOR, 61st Sess., 5375th mtg., U.N. Doc. S/PV.5375 (Feb. 21, 2006) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5375]; U.N. SCOR, 60th Sess., 5168th mtg., UN Doc. S/PV.5168 (Apr. 25 2005) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5168].

³⁹ *Terrorism*, SECURITY COUNCIL REP., Dec. 3, 2008, http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4809475/k.4BAC/Update_Report_No_1brTerrorismbr3_December_2008.htm [hereinafter SECURITY COUNCIL REP., Dec. 3, 2008]; *Counter-Terrorism: Al-Qaida and Taliban*, SECURITY COUNCIL REP., June 26, 2008, http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4294269/k.73F4/Update_Report_No_9brCounterTerrorism_Al_Qaida_and_Talibanbr26_June_2008.htm#Expected [hereinafter SECURITY COUNCIL REP., June 26, 2008].

The issue might be considered inconsequential, if the number were not significant. The Committee is unable to reach an agreement for close to a tenth of the listed, more precisely, the 32 reportedly deceased individuals presently listed. The Monitoring Team suggested in the Eighth report that, “more could be done” although the Committee has looked into the matter at length regarding the deceased:

As at the end of March 2008, 12 individuals were identified on the List as dead or reportedly dead . . . In addition to the 12 individuals on the List recorded as dead, the Team is aware of 7 others who have been reported as dead by their State of residence or citizenship either to the Committee, the Team or INTERPOL, and a further 13 whose deaths have been reported in open sources⁴⁰

Clearly, in each example, conflict trumped consensus and agreement among the Committee members, resulting, thereby, in Committee paralysis and no amendment to the List. And though these examples are important, perhaps the most crucial and overt example of the conflicts trumping consensus is found in the absence of procedural and substantive standards for listing and delisting individuals and entities on the Consolidated List.

II

A. Dividing Tensions Among Committee Members (and by Extension, Among the U.N. Membership)

We argue that due to the availability of the veto power to each of the 15 Committee members conflicts rise to new heights. In most cases, conflict trumps consensus and results in Committee paralysis—because the Committee makes decisions by *complete* consensus, due to members’ differing priorities or interests, often, it is unable to make *any* decision.⁴¹ The veto can, therefore, can be viewed as serving as

⁴⁰ Sec. Council, U.N. Doc. S/2008/324, *supra* note 17, ¶¶ 31-32.

⁴¹ *See, e.g.*, Letter dated 1 December 2005 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities Addressed to the President of the Security Council, at 2, U.N. Doc. S/2005/761 (Dec. 6, 2005) [hereinafter Letter from the Chairman, U.N. Doc. S/2005/761] (“As at 1 November 2005, the addition of 139 individuals and 1 entity, submitted to it over the past years, is pending Committee approval. The Committee is also still considering more than 500 technical corrections submitted to it by the Monitoring Team.”); *see also* Letter from the Chairman, U.N. Doc. S/2006/22, *supra* note 1.

an effective restraint or check in the decision making process (since every Committee member is to be satisfied), or conversely, hijacking the Committee's work, precisely due to the same reason.

Another obvious example of conflicts is the absence of standards for listing and de-listing. Here the veto not only undercuts consensus and pre-empts the formulation of standards, but additionally, exposes the severe tensions among Committee members. The tensions and contrasting stances among the members (and by extension, among the U.N. membership) are obvious, deserving a special mention.

While no State wants to seem soft on issues regarding terrorism, and all 192 U.N. members concur that it is a serious global threat,⁴² the Consolidated List, considered the core or "the operational centerpiece"⁴³ of sanctions measures, is viewed differently by various Committee members.

On one extreme are those that take a hard stand and do not want to seem accommodating or soft on any issue,⁴⁴ and at the other side are those member States that attempt to deal with issues regarding terrorism within the framework of human rights.⁴⁵ From the first perspective, the Consolidated List is viewed as a punishing and repressive instrument; whereas from the second, as a reformatory and progressive measure.

The former take a hard line stand and view the List as exemplary, with the obligation to impose restrictions on all persons and entities they have identified as being members of Al-Qaida or the Taliban, even *prior* to their being added by the Committee to the List.⁴⁶ Additionally, this group focuses on placing individuals on the List; opposes delisting an individual on the assumption that an individual would return to

⁴² High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

⁴³ U.N. SCOR, 59th Sess., 5104th mtg., U.N. Doc. S/PV.5104 (Dec. 17, 2004) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5104].

⁴⁴ U.N. SCOR, S/PV.5446, *supra* note 31; U.N. SCOR, 61st Sess., 5538th mtg., U.N. Doc. S/PV.5538 (Sept. 28, 2006) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5538]; U.N. SCOR, U.N. Doc. S/PV.5375, *supra* note 38.

⁴⁵ U.N. SCOR, U.N. Doc. S/PV.5168, *supra* note 38, at 23.

Luxembourg statement on behalf of the European Union: The EU is convinced that efforts to combat terrorism must respect human rights and fundamental freedoms. Counter-terrorism actions must at all times be accompanied by the respect of due process and the rule of law. There can be no trade-off between human rights and effective security measures. Indeed, respect for human rights must remain an integral part of any global counter-terrorism strategy.

Id.

⁴⁶ Sec. Council, U.N. Doc. S/2002/1050/Annex, *supra* note 14, ¶¶ 21–43.

terrorism if delisted; and is opposed to delisting a deceased person's name on the assumption that the deceased's funds or travel documents may be misused for future criminal activity.⁴⁷

An unfortunate consequence of these opposing stances (coupled with ancillary tensions that may relate to and extend from a State's level of economic development, ideological, religious, or national interests, or simply political differences⁴⁸) is the absence of listing and de-listing standards.

B. *An Absence of Standards for Listing and Delisting*

The following analysis explains the process for listing and delisting as currently followed by the Committee. Notwithstanding several requests, suggestions, and proposals by the U.N. membership,⁴⁹ the Committee lacks consensus to formulate any standards. Therefore, both processes are devoid of any procedural or substantive standards.

1. Listing Process and Standards

Committee Guidelines suggest that any U.N. member or multiple members can propose a name to the Committee for inclusion on the List.⁵⁰ Though multiple U.N. members are seldom known to propose, a noteworthy exception was the proscribing of the Jemaah Islamiyah organization, which was

⁴⁷ *Id.*; see also, Sec. Council, Committee established pursuant to resolutions 1267 (1999), *Written Assessment Pursuant to Paragraph 17 of Security Council Resolution 1617 (2005)*, ¶ 43, U.N. Doc. S/2006/1046/Annex (Dec. 28, 2006).

⁴⁸ See, e.g., U.N. SCOR, S/PV.5446, *supra* note 31 (Ghana statement); Identical letters dated 19 May 2006 from the Permanent Representatives of Germany, Sweden and Switzerland to the United Nations addressed to the President of the General Assembly and the President of the Security Council, U.N. Doc. A/60/887-S/2006/331 (July 14, 2006) [hereinafter Identical Letters, U.N. Doc. A/60/887-S/2006/331]; U.N. SCOR, 60th Sess., 5293d mtg., U.N. Doc. S/PV.5293 (Oct. 26, 2005) (Samoa statement); *id.* (Fiji statement).

⁴⁹ See, e.g., Identical Letters, U.N. Doc. A/60/887-S/2006/331, *supra* note 48; Letter dated 21 October 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, U.N. Doc. S/2005/672 (Oct. 25, 2005) [hereinafter Letter from the Chairman, U.N. Doc. S/2005/672]; U.N. SCOR, U.N. Doc. S/PV.5474, *supra* note 30; U.N. SCOR, S/PV.5446, *supra* note 31; U.N. SCOR, U.N. Doc. S/PV.5168, *supra* note 38.

⁵⁰ 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 6.

supported by over 50 U.N. member States.⁵¹ The consensus of all 15 Committee members is required for listing.⁵² The standards for inclusion on the List are equally straightforward, *albeit* due to their absence, with the exception of the term “associated with.”⁵³

The Resolutions and Guidelines are ominously silent regarding any evidentiary standards for proscribing an individual, except “associated with,” as defined by Resolution 1617 (2005). In order to be proscribed on the List, it is not necessary to be accused, investigated (civil, administrative, or criminal), or convicted of any crime. Neither are judicial decisions a prerequisite for the initiation or completion of the proscribing process. The Committee chair consistently reminds U.N. member States of the purport of the List:

States [are] reminded of the meaning of a United Nations listing. A criminal conviction or indictment is not a prerequisite for inclusion on the Consolidated List, and States need not wait until national administrative, civil, or criminal proceedings can be brought or concluded against an individual or entity before proposing names for the List.⁵⁴

Furthermore, procedurally, due process rights do not exist—the listed are not informed before, during, or after the Committee proceedings or decisions. No provisions exist for providing any information to a proscribed individual concerning the reason for the listing; neither are there any provisions to provide a hearing to the listed in any forum before, during, or upon being proscribed. In short, “the will” of the Committee members is all that is required, as the Monitoring Team explains.⁵⁵

Resolution 1617 (2005) determines the evidentiary standard for inclusion on the Consolidated List as “associated with” Al-Qaida or the Taliban.⁵⁶ “Associated with” is defined by clause 2 of Resolution 1617 to include:

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in

⁵¹ Sec. Council, U.N. Doc. S/2002/1338/Annex, *supra* note 14, ¶ 18.

⁵² 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 3(a).

⁵³ 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 6 (c).

⁵⁴ Letter dated 1 December 2005 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, U.N. Doc. S/2005/760 (Dec. 6, 2005).

⁵⁵ Sec. Council, U.N. Doc. S/2005/572, *supra* note 27.

⁵⁶ S.C. Res. 1617, *supra* note 18.

conjunction with, under the name of, on behalf of, or in support of;

- supplying, selling, or transferring arms and related materiel to;
- recruiting for; or
- otherwise supporting acts or activities of

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group, or a derivative thereof.⁵⁷

Several issues plague the definition. First, “associated with” is not a benchmark or clear standard, but a subjective criterion; therefore, it is subject to diverse interpretations among Committee (and by extension, U.N.) members. In other words, different member States interpret the definition narrowly or broadly as applicable to their context, thereby setting their own standard for classifying individuals as terrorist financiers or terrorists. This has resulted in the criminalizing of entire communities.⁵⁸

The same is relevant within the context of a request for proscribing of individuals (i.e., States interpret the definition as applicable to their context since “associated with” is a subjective standard). For example, recent proscriptive submissions to the Committee reflect a quantitative and qualitative variance:

At one end of the continuum, a joint submission from two Member States recommending the listing of three individuals allegedly included a general background on the organization with which they were affiliated, followed by six detailed paragraphs on each individual, with specific information relating to actions they have allegedly taken. Another statement of case proposing the listing of six individuals included 70 pages of faxed material, including copies of arrest warrants. At the other end of the spectrum was a statement of case that purportedly included 74 names, with only a single, general paragraph of justification.⁵⁹

Connected to the broad definition is the issue of the ever-widening scope of the List. The List, corresponding to the evolving Committee mandate, evolved into being unbound by geographic limitations. The Monitoring Team justifies the

⁵⁷ *Id.* at ¶ 2.

⁵⁸ BEN HAYES, STATEWATCH, TERRORISING THE RULE OF LAW: THE POLICY AND PRACTICE OF PROSCRIPTION (2005), <http://www.statewatch.org/terrorlists/terrorlists.pdf>.

⁵⁹ WATSON WHITE PAPER, *supra* note 28, at 26.

evolution as reflecting the “geographic diversity of the threat posed by Al-Qaida, the Taliban, and associated groups.”⁶⁰ However, the steadily widening scope has led U.N. members to express strong concerns.⁶¹ Some caution that the notion of “associates of terrorists” should not be interpreted too expansively.⁶² Others insist that the criteria for identifying the individuals or entities targeted by sanctions should be further developed and refined.⁶³

In view of these differences, the interpretation given by the Monitoring Team regarding “associated with” is of particular significance. It explicitly advises that U.N. member States to interpret the “associated with” language *broadly* in submitting names, leaving it up to the Committee ultimately to ensure that each case fits within the scope of the sanctions program.⁶⁴

In any case, the standard “associated with” was clarified in 2005 by U.N. Resolution 1617, whereas, the first resolution (i.e., U.N. Resolution 1267) was passed in 1999, and the first Consolidated List was published on March 8, 2001. Unfortunately, the Resolutions and Guidelines are silent regarding any other evidentiary standard.

Further, justifications (i.e., request for proscribing to be accompanied by a statement of case providing some justification, reason, basis, cause, or connection supporting the designation) were *not* a prerequisite for listing individuals. This aspect is especially problematic, given the serious implications the follow from proscribing (such as, the asset freeze and travel ban). Moreover, providing a statement of case when proposing a name for inclusion has not always been a practice; alternatively, if such a practice existed, perhaps, the information provided was inadequate or insufficient. Continuous insistence of the Monitoring Team explains the observation. Frequently it insists “that States provide, to the extent possible, a narrative description of the information that forms the basis or justification for adding a name to the List.”⁶⁵ Clearly such statements demonstrate an absence of

⁶⁰ Sec. Council, U.N. Doc. S/2005/572, *supra* note 27, ¶ 10.

⁶¹ U.N. SCOR, U.N. Doc. S/PV.5446, *supra* note 31, at 27 (Statement of Switzerland on behalf of Switzerland, Sweden and Germany).

⁶² U.N. SCOR, U.N. Doc. S/PV.5104, *supra* note 43, at 9 (Pakistan statement).

⁶³ U.N. SCOR, U.N. Doc. S/PV.5446, *supra* note 31, at 27 (Statement of Switzerland on behalf of Switzerland, Sweden and Germany).

⁶⁴ Sec. Council, U.N. Doc. S/2005/83/Annex, *supra* note 27.

⁶⁵ *Id.* at ¶ 55; *see also* Sec. Council, Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolution 1390 (2002) and 1455 (2003), *Report of the Monitoring Group Established Pursuant to Resolution 1363 (2001) and Extended by Resolution 1390 (2002) and 1455 (2003)*, U.N. Doc. S/2003/669/Annex

the practice.

In a nascent development, Resolution 1617 (2005), made the requirement of a case statement mandatory: “[The Security Council] [*d*]ecides that, when proposing names for the consolidated list, States shall . . . henceforth also provide to the Committee a statement of case describing the basis of the proposal; and further encourages States to identify any undertaking and entities owned or controlled, directly or indirectly, by the proposed subject.”⁶⁶ Though the mandatory obligation is certainly a positive step, the Resolution came short of creating a threshold standard for justifications and evidence⁶⁷ (Thus, the listing process still lacks substantive standards.

Moreover, the new guidelines requiring justifications are applicable to the recent listings and are inapplicable to previous ones. Neither has any mechanism been established to review the old listings to ensure that they meet the new standard.⁶⁸ Therefore, for the earlier listings (i.e., the period extending from March 2001 when the first List was published until 2005), the mandatory clause is inapplicable. Some observe that a general review of all the listings would be a major undertaking, because many designated individuals and entities were placed on the Consolidated List without the designating country providing the Committee with adequate supporting information and evidence.⁶⁹

Because the Resolutions are silent regarding any other evidentiary standard or benchmark justification (apart from the subjective “associated with”), the listing process permits prosecution without stated cause, simply since, “[in most cases] the criteria and concerns of the state originally proposing the listing are generally unknown.”⁷⁰

Unfortunately several years and innumerable attempts

(July 8, 2003).

⁶⁶ S.C. Res. 1617, *supra* note 18.

⁶⁷ U.N. SCOR, U.N. Doc. S/PV.5446, *supra* note 31.

⁶⁸ *1267 Committee (Al-Qaida/Taliban Sanctions)*, SECURITY COUNCIL REP., Apr. 12, 2006, http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1545275/k.C74E/Update_Report_No_2BR1267_CommitteeBRAIQaidaTaliban_SanctionsBR12_April_2006.htm [hereinafter SECURITY COUNCIL REP., Apr. 12, 2006]; *The 1267 (Al-Qaida/Taliban) Committee and the 1540 (WMD) Sanctions Committee*, SECURITY COUNCIL REP., Jan. 16, 2006, http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.1355491/k.48B7/UPDATE_REPORT_NO_5BRThe_1267_AlQaidaTaliban_Committee_and_The_1540_WMD_Sanctions_CommitteeBR16_JANUARY_2006.htm [hereinafter SECURITY COUNCIL REP., Jan. 16, 2006].

⁶⁹ SECURITY COUNCIL REP., Apr. 12, 2006, *supra* note 68; SECURITY COUNCIL REP., Jan. 16, 2006, *supra* note 68.

⁷⁰ WATSON WHITE PAPER, *supra* note 28, at 36.

later, severe conflicts among Committee members have prevented the formulation of substantive standards for listing individuals or entities on the Consolidated List. The same applies to delisting procedures and substantive standards.

2. An Absence of Procedural and Substantive Standards for Delisting

The Resolutions and Committee Guidelines are silent regarding the standards and criteria for delisting. The Watson study noted that the criteria for delisting is “[u]nspecified.” Furthermore, it stated, “more specific guidance as to what constitutes an adequate justification for delisting and the degree of information required is not available. . . . The current procedures . . . lack specific guidance from the . . . [Committee] on justifications for delisting.”⁷¹

Equally problematic, the process is immeasurably arduous; one is which States “negotiated bilaterally.”⁷² It is a confidential and bilateral (state-to-state) delisting procedure that relies on diplomatic protection of individuals as the sole remedy for initiating delisting requests.⁷³

The procedure for delisting is as follows: a petitioner requests the government of citizenship or residence to review the case. The petitioned government upon reviewing (i.e., conducting independent investigations) holds bilateral consultations with the originally proposing State (assuming it is not the proposing State itself), and then forwards the request to the Committee. Decisions to delist are made by consensus of all 15 members.⁷⁴

Some controversial aspects of the delisting process are explicit: (a) until 2006 the delisting process could be undertaken *only* by a State of residence or citizenship and not by any other State (i.e., only residence or citizenship States had standing), and (b) the listed individuals or their legal representatives had no standing. In December 2006, the Focal Point was established to receive delisting requests, but perhaps the most contentious issue is that the Committee is the sole and final authority pertaining to all delisting issues — no independent review mechanism exists (i.e., even to review a delisting request).

⁷¹ *Id.* at 35, 36.

⁷² *Id.* at 35.

⁷³ *Id.* at 49.

⁷⁴ 2008 COMMITTEE GUIDELINES, *supra* note 20, cls. 3(a), 7.

The issue of standing is intricate. The Focal Point was established to receive delisting requests, it is merely a conduit that facilitates communication between the listed individual and the Committee and lacks any other powers. It fails to “meet the minimum standard required to ensure fair and clear procedure”⁷⁵ and, “to provide effective recourse” to a petitioner,⁷⁶ since “legal principles and procedures, transparency, applicable legal standards, the rule of law, human rights and peremptory norms” have been largely ignored while creating this mechanism.⁷⁷ Moreover, if a State of residence or citizenship was originally the State that proposed the listing, or if a State is not sympathetic for any reason, quite naturally, a proscribed individuals’ or entity’s request may fail to receive fair or adequate consideration. Neither are U.N. member States obligated by any Resolution to assist, ascertain, or forward petitions to the Committee. Nor do any Resolutions require U.N. member States to inform the Committee about receiving a delisting request.

It is commendable that U.N. members have undertaken the delisting process and certain individuals and entities have been delisted (19, as of April 20, 2007); however, no information is available regarding the number of requests received or declined, or about investigations conducted by any U.N. member. Perhaps the information is lacking because the Resolutions do not address this issue. However, due to the omission and the lack of mechanisms to ensure that U.N. members forward to the Committee petitions for delisting, the proscribed are resorting to the conventional forums of justice. For example, in 2005 a Brussels court directed the government of Belgium to petition the United Nations for delisting, because two listed applicants had not been criminally indicted after a lengthy investigation.⁷⁸

In theory, it may be argued that the delisting process is narrowly defined to prevent forum shopping by the listed individuals (i.e., approaching another state that is sympathetic, assuming a lack of support from the country of citizenship/residence). But a counter-argument from an operational perspective is clearly more persuasive. Because the consent of all 15 Committee members is required for

⁷⁵ U.N. SCOR, U.N. Doc. S/PV.5779, *supra* note 35, at 25.

⁷⁶ U.N. SCOR, 62d Sess., 5679th mtg., U.N. Doc. S/PV.5679 (May 22, 2007) [hereinafter U.N. SCOR, U.N. Doc. S/PV.5679].

⁷⁷ *Id.*

⁷⁸ Sec. Council, U.N. Doc. S/2005/572, *supra* note 27, at Annex II (discussing the February 11, 2005 decision in Belgium).

delisting, without the support of the country of citizenship, delisting is simply infeasible. Nonetheless, the Monitoring Team has proposed that petitions always be forwarded to the Committee, with an approval, objection, or neutral position from the relevant State.⁷⁹

A far more problematic issue is that the Committee is the exclusive entity exercising absolute authority vis-à-vis the listed, and *no* other forum exists for the listed to challenge the listing on any grounds. (It should be clarified that the 120-day reports to the Security Council are merely updates involving the work of the Committee. They are not forums for debate or even ones where decisions are reviewed. In any case, the membership of the Committee is congruent with the Council to which reports are submitted.) Simply, Committee decisions are not subject to any review on any grounds (technical, administrative, statutory, procedural, and substantive, etc.) by *any* independent forum. Thus, the narrow process could be one of the many reasons for the mere 19 delistings by the Committee from 1999 to 2007, and also for the numerous cases pending in various courts and different jurisdictions regarding the measures.⁸⁰ Essentially, the process offers the listed *no* options for review of the Committee's decision.

In a recent trial the Court of First Instance noted, “in circumstances of this case . . . it makes possible for the Council to freeze applicant's funds indefinitely without giving him any opportunity to make known his views on the correctness and relevance of the facts and circumstances alleged and on the evidence adduced against him.”⁸¹

Regardless of the cause of conflict among Committee members, a profound consequence endures: that conflict preempts consensus, and, thereby, prevents the formulation of standards. Therefore, both processes currently remain devoid of substantive and procedural standards.⁸²

79 Sec. Council, U.N. Doc. S/2005/83/Annex, *supra* note 27, at ¶ 56.

80 *See, e.g.*, Letter from the Chairman, U.N. Doc. S/2005/761, *supra* note 41.

81 Case T-315/01, Kadi v. Council of the E.U., [2005] E.R.C. II-3649, at ¶ 143.

82 Kalyani Munshani, *The Essence of Terrorist Finance—An Empirical Study of the United Nations Sanctions Committee and the U.N. Consolidated List*, 18 MICH. ST. J. INT'L L. (forthcoming 2010).

III

A. *Another Consequence of Conflicts—A Static List*

We argue that severe conflicts trump consensus and prevent the formulation of standards. Theoretically, an absence—of standards, criteria and justifications, and due process procedures—may logically simplify and, therefore, facilitate *an increase* in listing of individuals. But remarkably, the List “remains static.”⁸³ During 2007 only five names were added—making the year “the lowest-ever annual listing rate.”⁸⁴ Simply, another consequence of pervasive conflicts among Committee members is the “strikingly . . . downward trend.”⁸⁵

It is feasible that the lack of standards, despite several noteworthy calls for their formulation and requests in most Security Council meetings⁸⁶ has resulted in the general U.N. membership reluctance in forwarding names or providing identifiers for already proscribed names. In other words, overcome by “reporting fatigue,”⁸⁷ “States remain reluctant to submit names,”⁸⁸ making the List—an operational centerpiece and an “accurate reflection of the threat”⁸⁹—a static and inaccurate instrument, if not remote and divorced from reality.

The overwhelming inaccuracy is detailed by the Monitoring Team, while explaining that of the 182 individuals associated with Al-Qaida on the Consolidated List, only 92 (51%) are clearly linked by address to any State; of the 116 listed entities belonging to or associated with Al-Qaida, only the location of 75 (65%) is recorded. Further, the List also contains 20 entities with an address in Somalia, where there is no central authority capable of implementing the sanctions, nor a banking system able to freeze assets.⁹⁰

⁸³ U.N. SCOR, U.N. Doc. S/PV.5779, *supra* note 35, at 20.

⁸⁴ *Id.* at 23.

⁸⁵ *Id.*

⁸⁶ *See, e.g.*, U.N. SCOR, U.N. Doc. S/PV.5474, *supra* note 30; U.N. SCOR, U.N. Doc. S/PV.5446, *supra* note 31; U.N. SCOR, U.N. Doc. S/PV.5168, *supra* note 38; Identical Letters, U.N. Doc. A/60/887-S/2006/331, *supra* note 48; Letter from the Chairman, U.N. Doc. S/2005/672, *supra* note 49.

⁸⁷ U.N. SCOR, U.N. Doc. S/PV.5375, *supra* note 38, at 19; *see also* Sec. Council, U.N. Doc. S/2005/572, *supra* note 27.

⁸⁸ Sec. Council, U.N. Doc. S/2008/324, *supra* note 17, at ¶ 28; *see also* Sec. Council, U.N. Doc. S/2007/677/Annex, *supra* note 27, at ¶ 27.

⁸⁹ Sec. Council, U.N. Doc. S/2008/324, *supra* note 17, at ¶ 28.

⁹⁰ Sec. Council, U.N. Doc. S/2005/572, *supra* note 27, at ¶ 65.

Moreover, a delegation in May 2007 observed that the Committee has not updated the Taliban sanctions List for the past four years.⁹¹ During the following six months, one individual was added to the Taliban section of the list.⁹² The Security Council Reporter observes: “Only one new name was added to the Taliban list in 2007, the first since 2001 when it lost power in Kabul.”⁹³

The Monitoring Team observe that the lacuna continues to severely limit the contribution of the List to the war on terrorism:

[A]lthough the list has grown in numbers, it has not kept pace with [reality] . . . Only 272 individuals associated with Al-Qaida network have been designated on the List, despite the fact that some 4,000 individuals have been arrested or detained on the basis of their links with Al-Qaida in 102 countries.⁹⁴

Indeed, the List has become so inaccurate and far removed from reality that the Monitoring Team suggests that *the Team*—not the U.N membership—forward a list of names for the Committee to consider. Recently it reiterated the request:

The second most immediate objective concerning the List is to ensure that it is an accurate reflection of the threat and, as such, incorporates the names of recently identified Taliban and Al-Qaida associates worthy of listing. States remain reluctant to submit names. . . the Team has suggested providing the Committee at regular intervals with a report on individuals and entities associated with the Taliban and Al-Qaida that have been especially active in the period concerned. The Committee is considering this proposal.⁹⁵

⁹¹ U.N. SCOR, U.N. Doc. S/PV.5679, *supra* note 76.

⁹² U.N. SCOR, U.N. Doc. S/PV.5779, *supra* note 35.

⁹³ SECURITY COUNCIL REP., June 26, 2008, *supra* note 39.

⁹⁴ Sec. Council, Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolution 1390 (2002) and 1455 (2003), *Report of the Monitoring Group Established Pursuant to Resolution 1363 (2001) and Extended by Resolution 1390 (2002) and 1455 (2003) on Sanctions Against Al-Qaida, the Taliban and Individuals and Entities Associated with Them*, ¶ 17, U.N. Doc. S/2003/1070/Annex (Dec. 2, 2003) [hereinafter Sec. Council, U.N. Doc. S/2003/1070/Annex].

⁹⁵ Sec. Council, U.N. Doc. S/2008/324, *supra* note 17, at ¶ 28; *see also* Sec. Council, U.N. Doc. S/2007/677/Annex, *supra* note 27, at ¶ 27.

1. An Ancillary Facet of the Static Nature

An ancillary facet of the instrument's static nature can also be found in the asset freeze enforcement result. Asset freeze, the Monitoring Team suggests, "is the most effective and easiest of the measures to enforce."⁹⁶ However, its results demonstrate a static nature and a conflicted reality, because "the amount [frozen] has hardly changed, despite several additions and amendments to the List over the years."⁹⁷

The same report clarifies:

[T]here have been two very distinct periods in the history of the assets freeze: the initial crackdown following the terrorist attacks in the United States on 11 September 2001, and the subsequent period from mid-2002. The great majority of the assets reported as frozen were identified in the initial period; since then the amount has hardly changed, despite several additions and amendments to the List.⁹⁸

The lack of frozen assets, "despite several additions and amendments to the List over the years," is subject to a few interpretations. A feasible interpretation could be that the listed do not have any assets. Alternatively, it is also possible that U.N. member States are in the process of acquiring the capacity to freeze assets (see, for example, the Counter Terrorism Committee mandate). Still another interpretation offered is that the larger U.N. community—due to the lack of standards and other conflicts that define the work of the Committee, together with the overwhelming inaccuracies present in the instrument—lacks the will and/or is simply incapable of enforcing the 15 U.N. Committee member decisions regarding the listing of individuals. In other words, despite the best of intentions, the measure compels non-compliance.⁹⁹ As a result, despite several changes or amendments to the List, no assets have been frozen by the U.N. membership.

The same may apply to the travel ban, as the Committee reports: "In the five years the travel ban has been in place,

⁹⁶ Sec. Council, U.N. Doc. S/2006/750/Annex, *supra* note 27, at ¶ 63.

⁹⁷ *Id.* at ¶ 61.

⁹⁸ *Id.* at ¶ 61.

⁹⁹ Sec. Council, U.N. Doc. S/2002/1050/Annex, *supra* note 27, at ¶ 39 ("Luxembourg, for example, recently released funds related to an entity that had been linked with al-Barakaat because the Luxembourg regulatory authorities did not have access to releasable intelligence information related to the case.").

not a single individual is reported to have been stopped at a border as a consequence of being on the Committee's list."¹⁰⁰ Or to the arms embargo: "As with the travel ban, the Committee notes that no cases of enforcement of the arms embargo have been reported to the Committee."¹⁰¹

It is clear that conflict amongst Committee members has largely negative consequences. Foremost, it precludes the formulation of standards. It follows then, on one hand, a lack of standards results in the larger U.N. membership reluctance to forward names, and on the other, an ineffective enforcement of the instrument. The corollary, of course, is that the List becomes an inaccurate, and essentially, a static instrument. A final noteworthy consequence of acute conflict is the manifestation of leaks, which further undermines the List, and additionally, reflects dissension among Committee members regarding key decisions.

B. *A Manifestation of Leaks*

Committee meetings are closed sessions,¹⁰² wherein the Chatham House Rule applies. In practice this means that attendance is limited to participants and proceeding particulars are not disclosed; merely broad talking points are discussed with non-participants.¹⁰³

Notwithstanding these safeguards, leaks involving the most important decisions occur frequently, undermining Committee proceedings and by extension, the List. Take, for example, the incidents involving the proscribing of seven Egyptian nationals and the listing of Al-Haramain Islamic Foundation.

In the first instance, the Committee determined to proscribe seven individuals, and the process of adding them to the List was underway. However, *before* they could be listed, the decision of the Committee was published in the national

¹⁰⁰ Sec. Council, Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, *Written Assessment Pursuant to Paragraph 15 of Security Council Resolution 1455 (2003) of Action Taken by States to Implement the Measures Contained in Paragraph 1 of Resolution 1455 (2003)*, at 4, U.N. Doc. S/2004/1037 (Dec. 31, 2004).

¹⁰¹ *Id.*

¹⁰² 2008 COMMITTEE GUIDELINES, *supra* note 20, at cl. 2(b).

¹⁰³ The Chatham House Rule states: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed." About the Chatham House Rule, <http://www.chathamhouse.org.uk/about/chathamhouserule/> (last visited Dec. 21, 2009).

newspaper in Egypt. Detailed and specific information was provided by a “Security Council source.” It is noteworthy that Egypt was not a member of the Committee at the time of the leak.¹⁰⁴

KUNA, the national Egyptian newspaper, in its Saturday edition reported that:

[The] Sanctions Committee is set to add the names of seven Egyptians this weekend on its consolidated list of individuals and entities related to those two terrorist organizations, a Security Council source told KUNA on Friday. . . . Egypt actually presented the committee last March with 20 names. Three committee members—the US, UK, and Denmark—held the names until Egypt provided evidence. They lifted the hold on only the seven names because the evidence is ‘convincing’.¹⁰⁵

Interestingly, every reported fact was specific and highly confidential, given the closed meetings. Neither are these details available in any of the Committee’s 120-day reports. Subsequent listing of the individuals on the Consolidated List confirmed the accuracy of the information. Arguably, in this situation, confidentiality is warranted so that enforcement of the sanctions is effective. However, it does not follow that conflict and/or the previously mentioned ancillary tensions permit confidentiality regarding Committee decisions.

Another case in point was the Al-Haramain Islamic Foundation incident, wherein the phased proscribing and leaks permitted the movement of assets.¹⁰⁶

In two other instances the unedited reports—“citing . . . failures by some States in halting terrorist financial networks”—of the Monitoring Team were published by the media *before* the Committee could debate the findings or recommendations or make the 120-day report in the Security

¹⁰⁴ The Security Council Consisted of Algeria, Argentina, Benin, Brazil, China (Permanent Member), Denmark, France (Permanent Member), Greece, Japan, Philippines, Romania, Russian Federation (Permanent Member), United Kingdom (Permanent Member), United Republic of Tanzania, United States (Permanent Member). Membership of the Security Council in 2005, http://www.un.org/sc/searchres_sc_year_english.asp?year=2005.

¹⁰⁵ See *Seven Egyptians to be Added on List of Al-Qaida Sanctions Panel*, KUNA, Sept. 30, 2005, <http://www.kuna.net.kw/NewsAgenciesPublicSite/ArticleDetails.aspx?Language=en&id=1580799> (“The seven are Hani Youssef Al-Sibai, Madhat Mursi Al-Sayyid Umr, Al-Sayyid Ahmad Fathi Husayn Alaywah, Zaki Izzat Zaki Ahmad, Abdullah Muhammad Rajab Abdl-al-Rahman, Muhammed Ahmad Shawqi Al-Islambuli and Ali S’ad Muhammad Mustafa Bakri The Egyptian Mission was not available to describe what the charges are [that led to the addition of these specific names].”).

¹⁰⁶ U.N. SCOR, U.N. Doc. S/PV.5538, *supra* note 44.

Council.¹⁰⁷

Notwithstanding the cause, minimally, the mere manifestation of a leak reflects dissension among the Committee members concerning key decisions. Besides, it undercuts the ability of the U.N. members to freeze assets, in turn, further limiting the List's purpose.

CONCLUSION

The narrative suggests that the U.N. Committee proceedings are based on consensus and that the List is a product of consensus, one reflecting the will of the international community¹⁰⁸ that “in the absence of an agreed upon definition of terrorism, the Consolidated List provides the only consensus on what Al-Qaida comprises.”¹⁰⁹ Moreover, the List is,

an expression of the resolve of the international community to defeat terrorism. . . . [A]longside the 12 thematic conventions against terrorism, and in the absence of a universally agreed definition of terrorism, the List stands both as a symbol of international resolve and as a practical measure to address the global challenge to international peace and security.¹¹⁰

However, empirical reality finds a diametrically opposed situation.

The central dynamic creating the List is acute conflict due to a relative equivalence of power (i.e., the exercise of the veto power), among the 15 Committee members. Though conflicts maybe either manifest or latent, it remains that within the Committee conflict reigns supreme. And the Committee is embroiled in unlimited conflicts that preempt consensus with reference to numerous issues, with the adverse consequence of making the List a static and inaccurate instrument—one of questionable value. In this sense, the availability of the veto to each Committee member results in making the veto a

¹⁰⁷ Sec. Council, Committee established pursuant to resolution 1267 (1999), *Report of the Security Council Committee established pursuant to resolution 1267 (1999)*, ¶ 17, U.N. Doc. S/2002/1423/Annex (Dec. 26, 2002).

¹⁰⁸ Letter from the Chairman, U.N. Doc. S/2006/22, *supra* note 1; Letter from the Chairman, U.N. Doc. S/2004/281, *supra* note 1; Letter from the Chairman, U.N. Doc. S/2002/1423, *supra* note 1.

¹⁰⁹ Sec. Council, U.N. Doc. S/2004/679/Annex, *supra* note 27, ¶ 35; *see also* Sec. Council, U.N. Doc. S/2005/83/Annex, *supra* note 27.

¹¹⁰ Sec. Council, U.N. Doc. S/2005/572, *supra* note 27, at ¶ 19.

“*revolver* rather than a *resolver*”¹¹¹ of conflicts. It exacerbates conflicts rather than producing long-term formulations for its dissolutions.¹¹²

Overwhelmingly, conflict is conspicuous in Committee proceedings. The absence of procedural and substantive standards for listing and delisting are perhaps the most overt consequence of intense and pervasive conflict. It not only prevents delisting of individuals and entities (i.e., merely 19 were delisted from 1999 till 2007), but additionally, listing (i.e., the 4,000 individuals arrested or detained on the basis of their links with Al-Qaida in 102 countries).¹¹³

Clearly the nature and content of the Consolidated List is defined by the divisive tensions and conflicts within the Committee. In other words, the crystallized output (that is, the List) of such a conflicted system (that is, the U.N. Committee) faithfully reflects the tensions and conflicts that essentially define Committee processes. In essence and substance it is inextricably wedded to the inherent nature of the Committee processes; therefore, in practice it is an extension of the conflicts and tensions. It provides the formalization and legitimization of Committee conflicts.

¹¹¹ Cashmore, *supra* note 2, at 421.

¹¹² *Id.* at 429.

¹¹³ Sec. Council, U.N. Doc. S/2003/1070/Annex, *supra* note 94, at ¶ 17.