UN-EU-Terrorist Listings – Legal Foundations and Impacts*

By Attorney at Law Dr. **Anna Oehmichen**, Mainz**

In the aftermath of September 11th, 2001, both at the level of the UN and at the level of the EU, terrorist listings have been created. On these lists are individuals and entities that are considered as either being associated to Al-Qaida/the Taliban or to terrorist activities in general. The decision of who should appear on these lists is taken by the Member States; a criminal conviction is not required. The lists are regularly updated. Persons who appear on these lists are subject to a vast variety of restrictive measures such as travel bans and the freezing of assets. This contribution aims to explain the legal foundations of the UN and EU listings and draw a clearer picture of the far-reaching impacts.

I. Introduction

Imagine your name is Yad Ghali. Your parents are from the Ivory Coast but you were born and grew up in Germany. You are on your way to skiing vacations to Switzerland, and at the frontier you are stopped. They tell you that you are blacklisted because of "your relations to Al-Qaida". You may not travel abroad. You do not understand, so they show you a list and you see the name "Iyad AG Ghali" on it. When you point out the different spelling, they laugh at you but insist that you are travel-banned. You decide to find a hotel and to see if you can solve the problem the next day, as you have a friend in Geneva, a famous lawyer, who will probably be able to help you. When you try to withdraw money at the bank to pay the hotel, you realize that your account is blocked. You try to check in at the hotel, but your credit card doesn't work either. With all your charms, your good looks and your business card, you eventually convince the receptionist that it must be a technical problem and, in any case, you have a friend who is a renowned Swiss lawyer and who will be able to help you fixing the situation, and, in the worst case, at least lend you money to pay the hotel. The next day your Swiss lawyer-friend comes to see you. You tell him your story. But when you ask him to lend you money to pay your hotel debts, he tells you: "Sorry, I cannot lend you anything. If I provide money to a blacklisted person, I commit a criminal offence." And he shows you the law that really says so… A nightmare!

This, in a nutshell, is what blacklisting can do to any one of us. Already before, but especially after September 11th, different systems of blacklisting have been established worldwide with the main aim to prevent alleged terrorists from moving and utilizing their financial resources. Actually, black lists or then called proscription lists originated in the Ancient Rome and were first used by the dictator *Sulla* around 82 or 81 BC. To avenge massacres by *Gaius Marius* and his son, some 520 wealthy opponents of *Sulla* were proscribed. The proscribed persons were publicly condemned enemies of the states. Rewards were offered to anyone killing or betraying the proscribed persons, and severe penalties were inflicted on anyone harbouring them. Their properties were confiscated, and their sons and grandsons were forever barred from public office and from the Senate.[1] Today's black lists are of a comparable intensity: Non-convicted people (i.e. presumed innocents) can be banned from travelling, their assets can be frozen, and making available such funds to them can be prohibited and criminally sanctioned. Since September 11th, especially suspected terrorists or presumed allies of Osama bin Laden were – at least officially – targeted by blacklisting, but the current listings of individuals and legal entities in the context of the Ukrainian crisis show that, just like in ancient Rome, political opponents can also be the target.

The modern blacklists in the context of the "war against terror" originated in the United States, but listings were also introduced at the level of the United Nations and in the EU. In addition, countries have introduced national blacklists. In the following, I shall give you a brief outline of the main legal foundations for these blacklists and their practical implications. To demonstrate the severe practical implications, I shall focus on the UN sanctions under Security Council Resolution 1267 (1999).

II. Legal Foundations

1. UN Level

The first United Nations blacklist was established by Security Council Resolution 1267 (1999). By this resolution, one global list was introduced which has since then been regularly updated by a special Committee established for this purpose, consisting of Members of the UN Security Council. The resolution was passed as a consequence of the 1998 Al-Qaida attacks on US embassies in Kenia and Tanzania.

In addition, directly after September 11th, on September 28th, 2001, UN SC Resolution 1373 was passed, which encouraged Member States to create their own blacklists and adopt other counter-terror measures. This Resolution requires Member States to criminalise the support of terrorism by freezing assets of those "who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts" and the entities controlled by them. States have discretion to blacklist at the national level any individual or entity they deem relevant. Commentators have described this resolution therefore as the "most sweeping sanctioning measures ever adopted by the S.C.".[2]

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* The present contribution is based on a short keynote presentation given during the interdisciplinary and international conference "The Psychology of Crime-Related Radicalisation", organized by Prof. *Dr. Mark A. Zöller* and Prof. *Dr. Eva Walther* on May 8th/9th, 2014, in Trier, Germany.

** *Dr. Anna Oehmichen* is defense counsel in a boutique law firm specialized on white-collar crime law in Mainz, Germany.

[1] Encyclopedia Britannica, proscription, http://www.britannica.com/EBchecked/topic/479342/proscription; (weblinks in this contribution were all last accessed on August 7, 2014).

[2] *Eckes*, EU Counter-Terrorist Policies and Fundamental Rights, The Case of Individual Sanctions, 2009, p. 38.

2. EU Level

At the level of the EU, both Resolutions were implemented into EU law.[3] Thus, the UN Resolution 1267 (and the subsequent amendments in Resolutions 1333 and 1390) and their respective lists were directly implemented into EU law by way of Common Position 2002/402/CFSP and EC Regulation 881/2002. The list introduced in this manner presents a copy-paste of the list established under UN S.C. Resolution 1267.

Secondly, UN Resolution 1373 was implemented at EU level through Common Position 2001/931/CFSP and EC Regulation 2580/2001. The list established by this regulation is directed at "persons, groups and entities involved in terrorist acts". It is thus not limited to Islamic terrorism, but also lists revolutionary groups such as ETA, PKK or LTTE.

EC Regulations are directly applicable in national law, i.e. they need no special implementation Act in order to be enforceable at the national level.[4]

3. National Level

a) Criminalisation of Providing Support to Listed Persons

In Germany, a violation of the above mentioned EC Regulations is also punishable under the German Foreign Trade and Payments Act.[5] Thus, under Section 18 (1) (1) (b) of this Act, a prison sentence from three months up to five years is imposed on anyone who (knowingly) violates a prohibition on the disposal of frozen money and economic assets of a 'directly applicable act of the European Communities or the European Union published in the Official Journal of the European Communities or the European Union which serves to implement an economic sanction adopted by the Council of the European Union in the field of Common Foreign and Security Policy. Whoever negligently violates such a prohibition can be fined.[6] Under the conditions of Sections 130, 30 of the German Act on Regulatory Offences[7], companies can also be fined for such violations.

Moreover, the Money Laundering Act[8] imposes on certain professions (especially financial institutions, but also lawyers and legal advisors, auditors etc.) the due diligence duty to denounce suspicious transactions in terms of money-laundering. Until 2005 such notifications were predominantly based on a (presumed) terrorist listing.[9]

b) Excursus: National blacklists, in particular: US listings

It is worth mentioning that some States have introduced their own blacklists that go far beyond the UN and EU counter terror lists described above. The most prominent example is the United States. In the context of the "war against terrorism", a blacklist was first introduced by Executive Order 13224 blocking Terrorist Property and a summary of the Terrorism Sanctions Regulations on September 23rd, 2001 (Title 31 Part 595 of the U.S. Code of Federal Regulations).[10] The list initially named 27 individuals and legal entities. However, subsequently, every few months, it was extended with more names of both individuals and companies. The current list comprises 36 pages filled densely with names.[11] Even more worrisome in view of its secrecy (the list is not public) and lack of redress is the so-called "no-fly list" of the FBI. It started out as a "no transport" list on September 11th, 2001, entailing then only 16 individuals that should be prevented from boarding an airplane.[12] As of today, it is supposed to contain about 47.000 people.[13] Recently, a federal Court in Oregon declared this list as unconstitutional for depriving citizens of their due process rights.[14] However, it should be taken into account that the blacklists in the context of terrorism form only a small part of the national financial sanctions programme of the USA. The US Treasury Office of Foreign Assets Control provides a list of currently no less than 914 pages of "specially designated nationals and blocked persons" (SDN list).[15] This list seems to expand at extremely high speed. When I accessed earlier on June 1st, 2014, the list was "only" around 600 pages long. It entails terrorist sanctions, but also any other sanctioned persons, e.g. those prescribed under the Sergei Magnitsky Rule of Law Accountability Act of 2012, as well as sanctions in relation to Libya, Iran, Ukraine, to name a few.

[3] The legal basis for this is Article 301 of the EC Treaty. Under this provision, the EU Council takes a decision to adopt sanctions in a "common position" on matters of concern under the Common Foreign and Security Policy, and the decisions are then implemented by Community (EC) Regulations which have direct effect or are directly applicable in the Member States.

[4] Art. 288 (2) of the Treaty on the Functioning of the European Union.

[5] Außenwirtschaftsgesetz, AWG.

[6] Section 19 (1) of the German Foreign Trade and Payments Act.

[7] Ordnungswidrigkeitsgesetz, OWiG.

[8] Geldwäschegesetz, GwG, Sections 3-9.

[9] *Al-Jumaili*, Neue Juristische Online Zeitschrift 2008, 188 (204).

[10] Other legal bases for terrorist listing in the US are the Terrorism List Governments Sanctions Regulations (Title 31 Part 596 of the U.S. Code of Federal Regulations), and Foreign Terrorist Organizations Sanctions Regulations (Title 31 Part 597 of the U.S. Code of Federal Regulation).

[11] http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf (August 3rd, 2014).

[12] Cf. the TSA Watch List of Dec. 2002, https://www.aclunc.org/sites/default/files/asset_upload_file371_3549.pdf.

[13] *Hesse/Obermaier*, Süddeutsche Zeitung, August7th, 2014, 1.

[14] *Shamsi/Handeyside*, American Civil Liberties Union, June 25th, 2014, https://www.aclu.org/blog/national-security-technology-and-liberty/no-fly-list-blog;
Phelps/Muskal, Los Angeles Times, June 24th, 2014, http://www.latimes.com/nation/la-na-no-fly-list-violates-rights-federal-ruling-20140624-story.html.

[15] http://www.treasury.gov/ofac/downloads/t11sdn.pdf.

III. SC 1267 -listing – legal framework and requirements

1. Background

The first UN SC Resolution that established a system of blacklisting of terrorist groups and individuals was UN SC Res. 1267 (1999). On basis of this resolution, a sanctions regime and a Security Council Committee (so-called "Sanctions Committee") were established. The Sanctions Committee consists of all 15 Member States of the Security Council. This Committee has issued a list of individuals and entities related to Al-Qaida and associated individuals and entities, which has since then regularly been updated.[16]

The Resolution (and all subsequent ones) have all been adopted under Chapter VII of the United Nations Charter and require all States to take the following measures in connection with any individual or entity associated with Al-Qaida, as designated by the Committee:

- freeze without delay the funds and other financial assets or economic resources of designated individuals and entities (*assets freeze*),
- prevent the entry into or transit through their territories by designated individuals (*travel ban*), and
- prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities (*arms embargo*).[17]

The wideness of these regulations becomes evident if one looks at how funds and other financial assets as well as economic resources are defined by the UN Sanctions Committee:

> "'Funds and other financial assets' should be understood to include, but not be limited to:
> a. cash, cheques, claims on money, drafts, money orders, bearer instruments, and other payment instruments;
> b. deposits with financial institutions or other entities and balances on accounts, including but not limited to: (1) fixed or term deposit accounts, (2) balances on share trading accounts with banks, brokerage firms or other investment trading accounts;
> c. debts and debt obligations, including trade debts, other accounts receivable, notes receivable, and other claims of money on others;
> d. equity and other financial interest in a sole trader or partnership;
> e. publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
> f. interest, dividends or other income on or value accruing from or generated by assets;
> g. credit, right of set-off, guarantees, performance bonds or other financial commitments;
> h. letters of credit, bills of lading, bills of sale; notes receivable and other documents evidencing an interest in funds or financial resources and any other instruments of export-financing;
> i. insurance and reinsurance.[18]
> 'Economic resources' includes assets of every kind, whether movable or immovable, tangible or intangible, actual or potential, which are not funds but potentially may be used to obtain funds, goods or services, such as:
> a. land, buildings or other real estate;
> b. equipment, including computers, computer software, tools, and machinery;
> c. office furniture, fittings and fixtures and other items of a fixed nature;
> d. vessels, aircraft and motor vehicles;
> e. inventories of goods;
> f. works of art, cultural property, precious stones, jewellery or gold;
> g. commodities, including oil, minerals, or timber;
> h. arms and related materiel;
> i. patents, trademarks, copyrights, trade names, franchises, goodwill, and other forms of intellectual property;
> j. internet hosting or related services;
> k. any other assets, whether tangible or intangible, actual or potential."[19]

Only as of 2009,[20] the office of an independent delisting Ombudsperson was established to assist persons in getting their delisting requests before the Sanctions Committee. The procedures for listing and de-listing are now regulated in specific guidelines.[21]

2. Who can be on the list?

Both individuals and legal entities can be on listed. The 1267-List is 47 pages long and lists 212 individuals and 67

[16] The sanctions regime was first established by resolution 1267 (1999) on October 15th, 1999 and has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011) and resolution 2083 (2012) so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, wherever located. The names of the targeted individuals and entities are placed on the Al-Qaida Sanctions List.

[17] For further information on the committee, please refer to http://www.un.org/sc/committees/1267/.

[18] Assets Freeze, Explanation of Terms. Approved by the Al-Qaida Sanctions Committee on December 30th, 2013, http://www.un.org/sc/committees/1267/pdf/EoT%20assets%20freeze%20-%20English.pdf.

[19] Assets Freeze (note 18).

[20] UN Security Council Resolution 1904 (2009).

[21] Guidelines of the Committee for the Conduct of its Work, last amended on April 15th, 2013, online available at www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.

legal entities.[22] When it was firstly published in March 2001, only 162 individuals and seven entities were on the list.[23]

The following rudimentary information is provided with regard to the listed person:

- Permanent reference number.
- Name: name of entity and any acronyms.
- Name (original script): name as it would appear in the original script (e.g. Arabic, Cyrillic, Farsi/Dari).
- A.k.a.: Alias(es) (also known as) and any acronyms.
- F.k.a.: formerly known as and any acronyms.
- Address: Address(es) where entity is domiciled or registered or has branch(es)/office(s) or correspondence address(es).
- Listed on: date on which the Al-Qaida Sanctions Committee placed the entity on the Al-Qaida Sanctions List and of any amendments it made regarding the listed entity.
- Other information: Supplementary information relevant to identification of the entity.[24]

In the example case mentioned in the introduction, Mr. Ghali would now notice that he is not the person listed, as he is from Ivory Coast and not from Mali like the "Iyad Ghali" listed on the UN Sanctions List,[25] and has never heard of Ansar Eddine and the other groups mentioned in the list. He was thus simply confused with somebody else. The devastating consequences name confusions can have in the fight against terrorism were bitterly demonstrated in the publicly known case of El-Masri. Mr. El-Masri was kidnapped during his vacations in Macedonia, and brought via an extraordinary rendition flight to Afghanistan by the CIA, where he was held for several months in prison and severely tortured. By the end of 2004, when it turned out that his passport was indeed authentic, he was released in Albania close to the Macedonian border.[26]

3. Who decides who will be on the list?

UN Member States and International Organisations may make submissions.[27] There is a standard form available online that can be filled out to list a relevant person.[28] Thus, any State can nominate an individual or entity, with each Member of the SC retaining the right to object within five working days. This means that the governmental authorities of 193 Member States decide who should be listed. Considering that many of these states are governed by totalitarian regimes and dictatorships, it is obvious that the list will also allow national political enemies to be stigmatised as international terrorists. Once a Member State or an International Organisation has made a suggestion of a listed person, the Sanctions Committee then decides by consensus according to its guidelines. Once a listing request has been approved, the list is updated. After publication but within three working days after a name is added to the Al-Qaida Sanctions List, the Secretariat notifies the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known). The Secretariat includes with this notification a copy of the narrative summary of reasons for listing, a description of the effects of designation, as well as the Committee's procedures for considering de-listing requests.[29]

Member States receiving such notification are required to take, in accordance with their domestic laws and practices, "all possible measures" to notify or inform in a timely manner, the listed individual or entity of the measures imposed on them, any information on reasons for listing available on the Committee's website as well as all the information provided by the Secretariat in the above-mentioned notification.[30] However, whether these measures are actually taken or not will then lie in the discretion of the respective Member State, without any further monitoring.

4. What are the criteria to be listed?

According to the so-called "Fact Sheet on Listing", "Member States are encouraged to establish a national mechanism or procedure to identify and assess appropriate candidates to propose to the Committee for listing. A criminal charge or conviction is not necessary for inclusion on the Al-Qaida Sanctions List as the sanctions are intended to be preventive in nature."[31]

The fact sheet thus invites Member States to deliberately ignore the presumption of innocence, according to which everybody is to be presumed innocent unless proven guilty by a competent court in a procedure governed by the rule of law. Not even criminal charges are necessary.

In addition, the criterion that one only needs to be "associated with" Al-Qaida, Usama bin Laden or the Taliban, further broadens the scope of application. Pursuant to UN Security Council Resolution 1617 (2005) (para. 2), associated with means:

[22] http://www.un.org/sc/committees/1267/pdf/AQList.pdf.
[23] *Sullivan/Hayes*, Blacklisted, Targeted sanctions, preemptive security and fundamental rights, 2010, p. 12.
[24] http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml.
[25] P. 4 of the list in its version of 9 September 2014, cf. http://www.un.org/sc/committees/1267/pdf/AQList.pdf.
[26] El-Masri brought his case before the European Court of Human Rights. By judgment of December 13th, 2012, the Court recognized that the Former Yugoslav Republic of Macedonia had violated Arts. 3, 5, 8 and 13 and granted El-Masri compensation amounting to 60,000 EUR for the damage suffered, ECHR (Grand Chamber), judgment of December 13th, 2012 –39630/09 (El-Masri v. the former Yugoslav Republic of Macedonia).
[27] http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml.
[28] www.un.org/sc/committees/1267/pdf/sfl_ent_basic.pdf.
[29] Paragraph 17 of resolution 2083 (2012).
[30] Paragraph 17 of resolution 1822 (2008), which was reaffirmed in paragraph 20 of resolution 1989 (2011).
[31] Fact Sheet on Listing, online available at: www.un.org/sc/committees/1267/fact_sheet_listing.shtml.

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- supplying, selling or transferring arms and related materiel to;
- recruiting for; or
- otherwise supporting acts or activities of;
  Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.
  Moreover, pursuant to para. 3 of the same resolution, the scope also extends to undertakings or entities "owned or controlled, directly or indirectly, by, or otherwise supporting, such an individual, group, undertaking or entity associated with Al-Qaida, Usama bin Laden or the Taliban".

It thus becomes increasingly difficult *not* to be associated with Al-Qaida. This is particularly true with regards to Al-Qaida and modern Islamic terrorism, where the organizational structure in general is not well developed, with many splinter groups or derivates thereof. As any single offender ("lone wolf") calls himself a follower of Al-Qaida, any association, voluntary or involuntary, with such a person may thus already lead to eligibility to be listed.

It is only since 2006[32] that Member States also need to provide a detailed statement of case in support of the proposed listing. This statement of case should provide as much detail as possible, including:

- specific findings demonstrating the association or activities alleged;
- the nature of the supporting evidence (e.g., intelligence, law enforcement, judicial, media, admissions by subject, etc.);
- supporting evidence or documents that can be supplied; and
- the details of any connection with a currently listed individual or entity.[33]

It is clear from the above that no real evidence for the involvement is needed, mere "findings" suffice. In addition, as of 2012, the statement of case shall be releasable, upon request, except for the parts a Member State identifies as being confidential to the Committee.[34] It is thus, again, at the entire discretion of the respective Member State whether to release information or not. Considering that the list concerns alleged terrorist offenders, it is likely that most states will base their request on intelligence information that remains, for reasons of state security, wholly confidential.

5. How can you get off the list?

Originally, the listed persons were not even informed about their listing.[35] Moreover, there was no mechanism to be removed from the list. In response to strong criticism, a complex de-listing procedure was eventually put in place. The website of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and Associated Individuals and Entities also provides a fact sheet on de-listing. Further procedures are outlined in the Committee's guidelines[36] and in the Procedures for removing the names of deceased individuals as described in the Committee's Note Verbale SCA/2/06(8).[37] According to the fact sheet, there are two ways of being delisted: either by a delisting request of a Member State or by a petition to the Ombudsman (introduced in 2009).[38] There is also a standard form for requests for de-listing.[39] On this form, you may fill out certain personal data (name, associated entity on the Al-Qaida Sanctions List, other information). Under Section V, "justification", the de-listing request should explain why the individual or entity concerned no longer meets the criteria for inclusion on the Al-Qaida Sanctions List. If someone was listed wrongfully and thus never met the criteria, it seems rather difficult for this person to prove why he "no longer" meets the criteria. How can you prove you are not a member of Al-Qaida? Should you write an e-mail to Al-Qaida requesting kindly a small confirmation letter that you are not a member, or that your membership has expired? The idea of the presumption of innocence is that it is much harder to prove that you have *not* done anything than to prove that you have actually done it. The perversion of this principle in the case of terrorist listings is a severe draw-back from all human rights achievements attained in the course of the 20th century.

The procedure by petition to the Ombudsman is rather cumbersome: The Ombudsman drafts a comprehensive report with all de-listing requests. Subsequently, this report is being translated in all official languages of the UN. The Committee has then fifteen days to review the comprehensive report, after which it shall hear the Ombudsman and will have further thirty days to complete its considerations. If the Ombudsman recommends retaining the listing, "the Committee will complete its consideration of the Comprehensive Report and notify the Ombudsperson that the listing will be retained". In other words, if the Ombudsman recommends retaining the listing, the only way to get off the list is to apply to a Member State to initiate a delisting request. There is no legal remedy available against the decision of the Ombudsman, so that the discretion of the Member States to put somebody on the list has only been shifted to the discretion of the Ombudsman (and, in case he recommends delisting, the Committee, i.e. the very

[32] UN Security Council Resolution 1735 (2006), para. 5.
[33] Fact Sheet on Listing, www.un.org/sc/committees/1267/fact_sheet_listing.shtml.
[34] UN Security Council Resolution 2083 (2012), para. 11.
[35] *Cameron*, Human Rights Law Review 2003, 225 (229).
[36] http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf.
[37] http://www.un.org/sc/committees/1267/deceased_individuals.shtml.
[38] Fact Sheet on De-Listing, http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml.
The Ombudsman was introduced based on S. C. Resolution 1904 (2009), cf. http://www.un.org/en/sc/ombudsperson/.
[39] http://www.un.org/sc/committees/1267/pdf/De-listing%20form%20-%20English.pdf.

organ that initially decided the listing). Only in case the Ombudsman recommends delisting, the considerations of the Committee will be communicated and, subsequently, objections may be raised within ten days. If no objections have been received, the decision will be adopted, and the following day, the Sanctioning list shall be amended accordingly.[40]

The statistics show that the few de-listing requests the Ombudsman submitted to the Committee proved rather successful: At least in August 2013, when the website was lastly updated, out of the 49 delisting requests forwarded to the Committee by the Ombudsman, 34 Comprehensive Reports were submitted to the Committee. The Committee had concluded its consideration of 32 of these Comprehensive Reports on specific de-listing requests, and out of these, the vast majority (27) of the petitioners were actually de-listed.[41] Unfortunately, the website is silent about the number of delisting requests submitted to the Ombudsman, so that it is not possible to estimate the success chances for a delisting request.

The cases of the persons that were delisted or that are in the process of being delisted can be retrieved online at the website of the Ombudsman.[42] They are not anonymized. Thus the stigmatizing effect of the listing persists.

IV. Human Rights implications

1. Limitations of Human Rights[43]

It is no big secret that from a human rights' perspective, the blacklists are extremely problematic. Fair trial standards (in particular, the right to be heard and the right to be informed), the right to judicial review and effective remedy, as well as, of course, the right to property, can be jeopardized.

a) Fair trial

The right to fair trial is one of the most essential rights of the defendant in criminal proceedings. It is guaranteed, inter alia, under Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, and Art. 6 of the European Convention of Human Rights. In the jurisprudence of the European Court of Human Rights, it is often mentioned together with the equality of arms principle, however, without specifying the relationship between these principles further. In any case, the fair trial principle should have a protective effect on the side of the accused, it should strengthen the position of the accused as a subject with own rights, and thereby compensate, at least partially, the structural overweight of the power of the state during trial.[44] One can argue that this right does not apply to blacklisting institutions as it is not a criminal, but only an administrative measure.[45] However, according to the case law of the European Court of Human Rights, the question whether a certain measure is classified as "criminal" is defined by the European Court of Human Rights autonomously, independent of the formal classification under national law, by looking at the very nature of the offence and the severity of the penalty.[46] In light of this jurisprudence, it is clear that a financial sanction, which, unlike a fine under German criminal law, does not take into account the economic conditions of the concerned persons, can have, in reality, a much more punitive effect than a formally criminal fine, with the consequence that the fair trial principle must apply to such a measure a fortiori.[47]

The principle of fair trial encompasses several rights that can be at stake in the case of terrorist listings, in particular:

- The right to be heard, which entails the state's obligation to notify the listed persons of the evidence against them and provide them the opportunity to make their views known.
- The right to be informed of the charges against one and the underlying information. It is essential that the designated individuals and entities are enabled to access incriminating information that justifies the blacklisting. (It is impossible to oppose allegations if you do not know them.)

Notification of the listing is only done after, but not before a person is put on the blacklist. Designated individuals are thus denied the opportunity to be heard before the decision to put them on the list is taken. They are thus informed, but have no way of influencing the decision.[48] Moreover, it remains in the hands of the authorities of the respective state if and how they notify the concerned persons so that fair trial rights can be violated if a state decides not to inform or to delay the information excessively. It will entirely depend upon the legal system of the state in which the listed person resides whether and to which extent fair trial principles are observed.

Originally, only names and aliases were on the list. Only as of 2008 and 2009[49], a "narrative summary" is required to be published. However, secret intelligence material is still excluded, which, in the context of terrorist suspects, means that in most cases, such narrative summary will be very limited if not absent. Until today, the right to be informed and the right to be heard are not duly observed, as the Kadi case (see infra, III. 2.) illustrated.

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[40] Cf. Section 7 of the Committee's Guidelines.

[41] http://www.un.org/sc/committees/1267/delisting.shtml.

[42] Cf. http://www.un.org/en/sc/ombudsperson/status.shtml.

[43] For a more comprehensive human rights study on blacklisting, cf. *Sullivan/Hayes* (Fn. 23) (also online available at www.ecchr.de/ecchr-publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html).

[44] *Kühne*, Strafprozessrecht, 8th ed. 2010, margin no. 286.1.

[45] Thus maintained by blacklisting authorities, cf. the references provided by *Sullivan/Hayes* (Fn. 23) p. 28, note 7.

[46] Cf. e.g. ECHR, judgment of 8 June 1976 – 5100/71, 5101/71, 5102/71, 5354/72, 5370/72 (Engel and Others v. The Netherlands), para. 82. See also *Esser*, in: Löwe/Rosenberg (eds.), Die Strafprozessordnung und das Gerichtsverfassungsgesetz, Vol. 11, 26th ed. 2012, Einführung EMRK margin no. 116.

[47] *Kühne*, ZRP 2013, 246; *Sullivan/Hayes* (Fn. 23), p. 28.

[48] See also *Sullivan/Hayes* (Fn. 23), p. 28 f.

[49] Through Resolution 1822 (2008) and Resolution 1904 (2009).

b) The Right to judicial review and effective remedy

According to Art. 8 of the Universal Declaration of Human Rights and Art. 2 (3) of the International Covenant on Civil and Political Rights, the right to an effective remedy against violations of fundamental rights is granted. At the European level, Art. 6 of the European Convention on Human Rights guarantees the right to judicial review as a component of the fair trial and the right to an effective remedy pursuant to Art. 13 of the Convention.

Until the Kadi decision before the European Court of Justice (see infra III. 2.), there was no legal remedy provided for against the listing. This situation has substantially improved through the ECJ's case law. However, at the level of the UN, the situation is far from satisfying, given that the organ that decides upon the de-listing request, i.e. the Sanctions Committee, is the very same organ that put someone on the list in the first place (see supra II. 5.).

c) Right to Property

Under Art. 1 of Protocol 1 to the European Convention of Human Rights, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The right to property is also guaranteed under Art. 17 of the Charta of Fundamental Rights of the European Union.

This right is clearly restricted by the blacklistings, as the listed persons are prevented from using, receiving or accessing any form of property, funds or economic resources unless expressly permitted to do so by the state.

2. Kadi Case[50]

The EU listing was subject to a complaint before the European Court of Justice in the case of Kadi/Al Barakaat. Kadi/Al Barakaat challenged their listings before ECJ on the grounds that their right to be heard and their right to legal remedy had been violated. The Court of First Instance initially rejected their applications as it felt not competent to rule on a matter imposed by the UN on the EU. However, in September 2008, the European Court of Justice quashed the Court of First Instance's decision and declared EC Regulation No. 881/2002 as null and void insofar as it concerned Kadi and Al Barakaat.[51] In reaction to this decision, in November 2008, the Commission amended the EC Regulation[52] in order to keep freezing orders in place. It thus informed Kadi and Al Barakaat of a summary of the reasons of the listing decision. At the level of the UN, the Kadi case triggered the UN Sanctions Committee to install the ombudsperson's office in order to have in place some kind of review procedure.

Notwithstanding the Commission's notification, in September 2009, following a further complaint by Kadi and Al Barakaat, the Court of First Instance declared the respective EC Regulation again as null and void.[53] Subsequently, the Commission, the Council and the UK, challenged this decision.

By judgment of July 18th, 2013, the European Court of Justice eventually rejected these remedies once more.[54] It stressed that both the Court and the listed persons must be informed of the reasons for their listing in a more comprehensive manner, including confidential information. On September 30th, 2010, the EU General Court once again ruled in favor of Kadi, noting that the UN procedure, despite improvements in the establishment of an Ombudsman Office to make recommendations on delisting requests, lacks fundamental due process protections, including sufficient notice of the charges and denying most minimal access to the evidence against him. It said: "In essence the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing […] decisions taken by the Sanctions Committee."

V. Practical Implications

In the following, only a few of the many potential practical implications a listing may have on the concerned individual or entity will be summarized. It is crucial to note that not only the persons directly targeted by the sanction are affected, but also anybody else.

1. Effects on listed persons

The different listing systems vary in their impacts and intensity. While in some cases, there are exceptions that allow certain specific use of one's funds, such as those to cover basic human needs[55] or legal fees,[56] or those to comply with contractual obligations entered into prior the listing,[57] in other cases there may not be such exceptions. In the absence of such exceptions (which generally require an authorization by the competent authority and will only be granted upon request), the freezing of assets and economic resources may impede the listed person from carrying out any economic transaction. This means that the listed person has no access to bank accounts, but it also can mean that he/she cannot make use of non-monetary assets (e.g. renting out of an apartment). For businesses, this can mean that they cannot comply with their contractual obligations (e.g. paying salaries, paying for bought goods, handing out paid products), nor can they enter into any new contracts. Listed NGOs cannot use funds to reimburse their interns their housing costs.

[50] A critical comment on this case is provided by *Kühne*, ZRP 2013, 243.
[51] ECJ, Decision of September 3rd, 2008 – C-402/05 P, C-415/05 P.
[52] EC Regulation 1190/2008.
[53] ECJ (First Instance), Judgment of September 30th, 2010 – T-85/09.
[54] ECJ, Judgment of 18 July 2013 – C-584/10 P, C-593/10 P and C-595/10 P.
[55] Cf. EC Council Regulation 2580/2001, Art. 5 (2) (1), UN S.C. Resolution 1452/2002.
[56] Art. 2a of EC Regulation 561/2003.
[57] Cf. EC Council Regulation 2580/2001, Art. 5 (2) (3).

Depending on the duration and the scope of the respective sanction, it can mean

- severe reputational damage
- up to bankruptcy/ dissolution of the entity,
- with all consequences to all, directly or indirectly involved individuals.

2. Effects on everybody else

The economic effects the sanctions can have on the global fields have reached a new dimension with the sanctions taken by the USA and the EU against Russia in the context of the Ukraine crisis. In reactions to these sanctions, Putin has threatened to cut off the gas supply to the EU. Moreover, Russia has blocked the import of agricultural products coming from the EU, the United States and other countries. It is expected that airlines will lose the rights to fly over the Russian Federation, which means detours of about 4.000 km.[58] Moreover, the Russian Federation recently threatened to lodge civil claims against the German supplier of army technology, Rheinmetall AG, because the German Government had stopped Rheinmetall's delivery of arms based on the sanctions adopted by the EU against Russia.[59]

Moreover, making available funds/economic resources to listed persons is a criminal offence, which means that it is prohibited to provide to a listed person any advantages the recipient may use to obtain money, products or services. This puts especially defence attorneys at high risk. Their legal support to a listed person can easily have criminal law consequences for them, depending, of course, on the specific regulations and the practice of the respective country.[60] However, it also causes a variety of problems for businesses. It means that you have to check regularly, in relation to any economic transfer, any business dealings, national and abroad,

- all your clients and business partners
- your employees and your employer
- any intermediary or end recipients of funds, donations, boni, gifts, goods, invitations to dinner etc.

You have to check whether they appear on one of these lists (UN-list, EU-list, but also any national list of a country to which they have business dealings), and you have to do this at all relevant departments of a company. Obviously, in finance and accounting it is necessary to control to whom money can be paid out (customers, employees). In the sales department as well as in the purchasing unit, you have to know your business partners and check whether they appear on one of these lists. In services, you have to check whom you can engage for warranty or maintenance works. In human resources, you must check not only the employees and managers but also temporary workers like interns.[61] Moreover, you have to take into account that the lists are regularly updated. It is an open question how often you need to check in order to be compliant. Under these circumstances, for specific business sectors (e.g. the financing and the arms industry), it may be factually close to impossible to comply with these vast legal checking obligations.[62] Moreover, data protection issues may impede you from checking in certain situations. Are you allowed to check on your employee/business partner without any concrete indication for a suspicion or does this amount to another criminal offence, e.g. false accusation (cf. Section 164 of the German Criminal Code)?[63] Furthermore, there is legal uncertainty what is understood by providing funds „indirectly" (esp. financing business, or providing to a company who has a listed shareholder).[64] In practice, geopolitical circumstances will have to be taken into account. In countries of social and political unrest, the possibility that business partners are blacklisted is significantly higher than in less problematic regions.

To facilitate these checking procedures, software has been developed to help businesses in carrying out these checking procedures. However, the software may also cause problems, e.g. in the case of coincidental name identity. For example, it is reported that a certain person called "Penny Ray" was listed. This meant that the software gave alarm with any business connection with the German discounter "Penny market".[65] This shows that the checking is not only time-consuming and costly, but that the potential for erroneous hits can easily jeopardize important business relations.

VI. Consequences for Radicalization

In view of its devastating economic consequences and restrictions of the freedom of movement, *Dick Marty*, a Swiss parliamentarian in the Parliamentary Assembly of the Council of Europe and former chairman of the Legal Affairs and Human Rights Committee of the Council of Europe, described the listing regime as a "civil death penalty". Similarly, the UN Special Rapporteur on human rights and counter-terrorism, *Martin Scheinin*, is of the opinion that "the maintenance of a permanent global terrorist list now goes beyond the powers of

[58] *Hans*, Süddeutsche Zeitung of August 7th, 2014, p. 4 (see also p. 1 and 7).
[59] *Sloat*, Wall Street Journal, August 7th, 2014, http://online.wsj.com/articles/germanys-rheinmetall-under-pressure-after-russian-contract-nixed-1407396108?tesla=y&mg=reno64-wsj&url=http://online.wsj.com/article/SB10001424052702304070304580076692659103032.html; *Eddy*, New York Times, August 4th, 2014, http://www.nytimes.com/2014/08/05/world/europe/germany-blocks-delivery-of-military-parts-to-russia.html?_r=0.
[60] In the European regulations, legal fees are exempted from the freezing orders. However, outside of Europe it is well imaginable that legal support to a listed person may quickly put the lawyer himself under suspicion of terrorism. The clampdown on human rights lawyers in Istanbul in the context of the KCK trial illustrates this, cf. http://www.advocatenvooradvocaten.nl/fr/9007/turkey-nine-lawyers-released-from-provisional-detention-in-kck-trial/.
[61] See also *Hehlmann/Sachs*, EZW 2012, 527.
[62] See also *Merz*, in: Hauschka (ed.), Corporate Compliance, 2nd ed. 2010, p. 871 (891), with regards to US sanctions.
[63] *Hehlmann/Sachs*, EZW 2012, 527.
[64] *Hehlmann/Sachs*, EZW 2012, 527.
[65] *Pergande*, Frankfurter Allgemeine Zeitung, February 23rd, 2009.

the Security Council".[66] *Scheinin* cites *Kafka* (The Trial) in his introductory note to the ECCHR's report: "Someone must have been telling lies about Josef K., he knew he had done nothing wrong but, one morning, he was arrested." The lists really started out as *kafka*esk. Although they have slightly improved, due to the harsh criticism they received, they still do not comply with basic human rights standards. The sanctions available under the listing regimes go far beyond any fine under domestic criminal law. Stigmatization persists as delisted individuals and entities are still being published. It is clear that listed persons are completely isolated from society.

To connect again to the topic of this conference, which is to explore the causes for radicalisation, there are two possibilities. Either the listed person or entity indeed had strong links to Al-Qaida, or he/she/it did not. If they were indeed radical terrorists, the listing will have the effect that they will stick even closer to their group, as they will depend entirely on the group's support now in order to go on with their life. This can only increase their radicalisation. However, if they were not terrorists in the first place, but simply became victims of an erroneous listing procedure, they will definitely lose all faith in the rule of law. Will they not, like *Michael Kohlhaas*, eventually radicalise due to this devastating experience?

[66] *Sullivan/Hayes* (Fn. 23), foreword.