

## **What's in a Name? Comparing Terrorist Listing / Delisting Procedures in the US, EU and UN**

**April 17, 2013**

**Conference Call Operator:** Ladies and Gentlemen, thank you for standing by. Welcome to the “What’s in a Name?” conference call. At this time, all participants are in a listen-only mode. Later, there will be an opportunity for live questions and comments; instructions will be given at that time. As a reminder, this call is being recorded. I would now like to turn the conference call over to our host, Kay Guinane, Director of Charity and Security Network. Kay, please go ahead.

**Kay Guinane:** Hello. Thank you, everyone, for calling in. This is Kay Guinane of the Charity and Security Network in Washington, DC. I’m very pleased to welcome you all to this event and to welcome our speakers from London, New York and Washington. We’re pleased to have such a diverse and large audience, indicating a very high level of concern about the topic at hand. The issues relating to sanctions programs, how people, organizations, charities and companies get onto lists, what the consequences are, and how they can or cannot get off lists, is becoming increasingly concerning. The consequences of being listed are quasi criminal, but the process has no criminal law-like protections. Security considerations often mean there is little or no due process or transparency. This has raised fundamental human rights concerns, and in the US, at least, serious constitutional concerns, as well. Differences in the outcomes in the same cases in the US and the EU contributed significant uncertainty in the past few years, creation of the UN’s Office of the Ombudsperson. This has proved to be a success in improving the processes at the UN level. CSN, with the cooperation of the American Bar Association’s International [Human Rights] Committee, Subcommittee on the Middle East, is pleased to bring these world-class experts to you today to discuss listing processes in three contexts. I won’t read their bios – and you have links to those, but we have for you three preeminent experts. First, the UN ombudsperson, Canadian judge Kimberly Prost, British barrister, Maya Lester and American law professor, David Cole, of Georgetown University Law Center. So they will speak each eight to ten minutes and then Bassel Korkor from the American Bar Association’s International [Human Rights] Committee will offer a few minutes of comments and then we will open it up to question and answer. So, we will start with Ombudsperson Kimberly Prost.

**Kimberly Prost:** Thank you very much, and it’s a pleasure to be here today to join in this discussion. In my allotted time, I’m going to give you a brief overview of the role of the ombudsperson in the context of the al-Qaeda Sanctions Committee of the Security Council, which is the only mandate for the UN Ombudsperson in this sanctions area, to date. And just by way of context, obviously, the Security Council uses sanctions quite regularly. We read about them every day. Primarily, it uses its sanction power with reference to states. However, in the last two decades, this Council has also used what are referred to as “targeted” or “smart” sanctions to try and reduce the impact of statewide sanctions, and those sanctions are directed at, sometimes, political factions, but often at individuals. The use of the targeted sanctions has raised, however, very significant concerns in terms of the protection of individual rights, and the most problematic regime has been that associated to al-Qaeda, because, of course, it represents a regime where the sanctions are used for non-state actors, given the nature of al-Qaeda and the fact that it is not individual to any particular state.

So, the Committee for which I'm attached and for which I have a mandate, is often referred to as the 12-67 Committee. It's a reference to the number of the original resolution, and it's had several following resolutions, which have brought it up to date 'till today. It has created a Committee of the Security Council which is empowered to identify and list individuals or entities who are associated to al-Qaeda, and that term "association" has been defined by the Security Council, in essence, to be a member or to provide any form of support or participation in the activities of al-Qaeda. These measures are specifically stated not to be criminal in nature, to be preventative, and in order to change the conduct of the individuals involved.

Three measures are imposed on those who are listed by the Committee: an asset freeze, internationally, a travel ban, internationally, and a weapons prohibition. While, originally, this list, which in its first version related both to the Taliban and al-Qaeda, was quite small. After the events of 9-11, hundreds of names went onto the list and thereby creating a very significant crisis in terms of the protections for individual rights. In essence, individuals could wake up one day, find out when they went down to the bank that all of their assets were frozen internationally, they couldn't move, and there was essentially no notice, no reasons, no recourse or avenue to challenge. So, pretty well, a complete absence of any procedural protections. Now that obviously caused a significant amount of criticism almost immediately from observers of the UN process and from states, themselves, who were implementing the sanctions. And, over the years, the Security Council endeavored to make some changes by way of reasons or notice, notice to the individuals going on the list. They even created a focal point, so that individuals could submit a request to be delisted. But, still, the process fell very short of providing those fundamentals of fairness, of knowing the case against you, having a chance to answer it, and having a recourse, in essence.

In 2008, all of the various criticisms, which had been mounting, came to a head, if you will, when the European Court of Justice in the case of Yassin Abdullah Kadi struck down the implementing legislation of the European Union for these UN sanctions and that set off quite a shock wave here in New York. And, as a result, my office, the Office of the Ombudsperson, was created by Security Council resolution in December of 2009, and I took it up in July 2010.

My role is not one of judicial review. It's, rather, I look at the case from the perspective of whether the individual or entity who comes to me to ask me to consider their case, whether there is sufficient information today, presently, to support the continued listing of that individual. So they now have a recourse through my office. They come to me directly. I usually receive the petitions by way of email. About half of them have counsel and half do not. And there's really no great formality to the process. I simply require them to explain, taking into account the reasons the Council has provided – there are now reasons for all the listings – why they are seeking delisting.

Once I'm satisfied with that, which is usually in, well, so far, in all of the cases, I begin a three-phase process. First, information gathering, so I circulate the request to all the relevant states asking them to produce information, and that includes the state that put the individual or entity on the list – the designating state – the state of nationality, residence, whoever might have, whichever state might have information. As you can imagine, that's one of the most difficult parts of the process, because, often, the information involves classified material. One I have gathered, though, as much information as I can – and that's, that's over a four-month period, which I can extend once for two months – I proceed into the second phase, which is the dialogue phase, perhaps the most interesting part of this process, in which the Council has encouraged me to meet, face-to-face, as many of the petitioners as possible. So, I meet with them and I use that meeting in order to provide all of the information I can, subject to any confidentiality restrictions, to the petitioners and then allow them to respond to that, so those fundamental principles of knowing the case and being able to respond to it. I then take all of the information and I put it into a comprehensive report, which goes before the Security Council's Committee for a decision in the case. The test, which I basically had to establish, because there was no particular standard, is whether there is sufficient information to provide a reasonable and credible basis for the listing today.

Interestingly, when I first took up this job in 2010, I could not make any recommendations in my report – I simply made observations – but in quite a dramatic change when the mandate was renewed in 2011, June, I was given a recommendation power, and even more significantly, now, if I recommend delisting, sixty days later the person or entity will come off the list unless all fifteen members of the Committee object or the matter is referred to the Security Council for a vote. Neither of those two things has happened, so to date, in the cases, all of my recommendations have been upheld.

Just briefly on the numbers, before I'll turn it back over for the next speaker, I have had forty-three applications to date. Twenty-six cases have been concluded. Twenty-two individuals have been delisted and twenty-four entities, because some of these are combined listings, and in one instance, there was a withdrawal of the petition before it was decided upon. Two cases have been denied, although one of them was then a repeat case and was ultimately delisted. And, recently, there were two cases where the Committee made its own decision to delist prior to the completion of the petition before me, so it became moot. And there are presently fifteen active cases at various stages of the process. So that, in very short order, is the Ombudsperson process here at the United Nations, and I'll be interested to hear from the others and take any questions or comments. Thank you very much.

**Kay Guinane:** Thank you very much, Ms. Prost. And, now, Maya Lester, barrister from Brick Court [Chambers] in the UK.

**Maya Lester:** Thank you, Kay, and thank you, Kim. So that was an introduction by Kim to the United Nations sanctions. I'm going to talk about European Union sanctions. Just to start with, so, the UN Security Council imposes sanctions for a number of

different reasons, sanctions, as Kim has said, meaning largely asset-freezing measures. The European Union does two things. First of all, it implements those sanctions that the United Nations imposes, and Kadi's case is an example of an EU implementation of a sanction imposed by the United Nations. But it also has its own powers now under the Lisbon Treaty to impose sanctions, both in the context of counterterrorist sanctions, like those Kim was talking about, but also sanctions for a number of different policy aims that the European Union has. The EU has its own foreign policy, known as the Common Foreign and Security Policy, and so it has its own, what have become known as its own autonomous powers to impose sanctions. And by "sanctions" we mean lists of names of people and of companies who, by and large, have their assets frozen within the European Union, because that's as far as the EU's powers go, and whose travel, usually, is also prevented within the European Union, so within the member states.

Different sanctions regimes imposed by the EU have very different aims, although they all take, now, the same legal form. So these are all decisions and regulations taken by the European Council, which is the body of all of the different foreign ministers of EU member states. So they're all decisions and regulations. They are all generally asset freezes and travel bans, but their aims are very different. So, first of all, counterterrorist sanctions aim, obviously, at preventing the funding of terrorism by freezing assets that might be used for terrorist purposes. Secondly, Iranian and North Korean nuclear proliferation sanctions aimed to prevent the funding of nuclear proliferation and to impose pressure on the governments of those regimes not to further their proliferation program. Thirdly, there are sanctions against repressive regimes, so these are regimes like Zimbabwe and Burma that the EU wishes to have change its policy to stop repressing the people and violating human rights. Another kind of EU sanction is sanctions imposed on Arab Spring...in Arab Spring countries, so Egypt, Tunisia, Syria. Particularly in Egypt and Tunisia, these have, again, a very different aim which is to return to Egypt and to Tunisia, funds which have been misappropriated by the former regime. So, these are not sanctions against the current regime, but against Ben Ali in Tunisia and his associates, and Mubarak in Egypt and his associates.

So, what about the process of getting on and being removed from the list in the EU? Well, generally speaking, European sanctions works by proposals being put forward by member states to the European Union Council, proposals for particular people and companies to be added to the list, and the decision-maker is then the European Council, who discusses the proposals put forward by member states and decides who to list and who not to list, and there has been a list published in the official journal, which is the European Union's publication of its legislation. So the due process problems arise because as soon as you have people and companies chosen, selected to be put on lists of this kind, you immediately have people who want to bring legal cases if they can, and who have fundamental right who want to know whether they can challenge their designations. And the European Union court has been very active in [pause] hearing the cases of people and companies on lists. And the EU process for hearing cases is relatively free and easy, compared with the US system – and it will be interesting to compare once David has given a summary of what happens in the US with what happens

in the EU. In the EU, as soon as a new list is published, you have two months to get to the European Court. In a process that is a judicial review process, you ask the court to review the fairness, the due process of your designation, and this is a process open, equally, to EU citizens and non-EU citizens, so your constitutional rights in the EU don't depend upon your citizenship, as they do to some extent in the US. Most people on these lists, by definition, are not EU citizens; they're non-EU citizens, and they can go to the European Court and complain about violations of their rights. And there are exceptions to their frozen accounts to pay lawyers, so people like me have a job because we're allowed to be paid by the people who are on the list and challenging their designations.

So, very briefly, what has the European Court said about listing processes? Well, it has been generally very due process friendly, if you like, and what has been said is that when the EU selects people to go on lists, it must, first of all, give them specific reasons why it thinks that they should be listed, which are specific enough to enable them to respond meaningfully. Secondly, there must be evidence supporting the reasons for them being on the list, so unsupported allegations are regarded as insufficient. Thirdly, the Court must exercise sufficient, adequate, effective judicial review, so the Court has to look at the basis for the listing. Fourthly, the Council, the Court has said, must undertake a proper assessment of the evidence, including the relevance and accuracy of the evidence that has been put before it before deciding who's put on a list. And, lastly, disproportionate listings, which disproportionately violate fundamental rights, will not be upheld.

Now, that all sounds great, but how has it been applied in practice? Well, in the early cases, one of which Kim mentioned, the *Kadi* case, and in the cases concerning the People's Mujahedin of Iran, which is called the "MEK" in the US, in those cases, which were about terrorist asset freezing, the Court laid down those principles that I've just gone through and found that they had been violated, because in the case of both the PMOI and Mr. Kadi, the original listings gave no reason, because that was at a time before the European Council had been told that they have to give reasons for designations. So, now, the process is, some reasons are given, and the cases before the Court now – and there are a very large number of them – are generally concerned not so much with terrorist lists as the other kinds of sanctions I mentioned against Iran, Egypt, Tunisia, Zimbabwe, Syria, and so on.

And I'll just end by saying there are many issues which are still being worked out by the Court, so that the list of principles I gave is still being worked out in these cases. So, for example, the standard of review, the approach the Court should take to looking at these delisting cases, is still very much up for debate in the case law. In particular, "Should the Court take the same approach when it's looking at a UN listing of the kind that Kim has talked about, or an EU autonomous listing, and should it take the same approach where someone's on the list because they're allegedly a terrorist, as opposed to they're on the list because they're an associate of Robert Mugabe?" for example. Secondly, are there any limits on the competence of the Council to add people to the list, so can they add non-state actors to the list, are there limits on who can be added for political reasons?

Thirdly, what happens if the evidence being relied on by member states or by third countries like the United States is classified? What if the country says, “We don’t want to share this evidence,” should the Court uphold the listing, or not, should there be some kind of procedure permitting the Court to look at evidence that is classified? And I will leave it at that and perhaps come back once David has said something about the US procedures.

**Kay Guinane:** Yeah, and, and now we’ll hear about the US process from Professor David Cole from Georgetown.

**David Cole:** Thanks. So I have been involved in litigating these issues in the US context for more than a decade now going back actually before 9-11, but they have been much more acute since 9-11, and my own view is that much of the problems that arise, at least under US constitutional law, arise largely because of a shift, made before 9-11, but exacerbated after 9-11, from a regime of sanctions that targeted countries as a tool of nation-to-nation diplomacy, and only targeted organizations and individuals as citizens of those countries, or nationals of those countries, to a regime, today, which targets individuals and organizations irrespective of nationality, largely based on their conduct and on political assessments about how our government views their conduct. And I think the legal scheme that we have in the United States was created with the notion that if, for example, the United States is imposing a sanction on a foreign country as a part of nation-to-nation diplomacy, like prohibiting economic transactions with Cuba or Iran, there’s not much role that the courts are likely to have to play there. The decision to target Iran is a foreign policy decision that’s not likely to be subject to judicial review and the entities that are affected are those who are nationals of Iran. It’s not that complicated to discuss whether someone’s a national of Iran.

But when you start to take that tool and use it against individuals and groups, it raises two distinct constitutional concerns. The first is a First Amendment speech and association concern. So if we, as we have long have done, imposed restrictions on transactions with Cuba, for example, that has an incidental effect on speech and association rights; it doesn’t target speech or association as such. But, by contrast, the regulations that target terrorist organizations in the United States, which impose freezes on assets and then bans on any transaction with a named entity, explicitly reach and specifically reach speech. They make it a crime to engage in training or to provide expert advice to any designated entity or to speak on a designated entity’s behalf, regardless of whether that training or that advice or that speech has anything to do with any kind of illegal conduct, much less terrorist conduct. And so there, unlike with the nation-to-nation sanctions, these “smart” sanctions – so called – target speech directly, and I think raise very serious First Amendment concerns, but also raise First Amendment association concerns, because they essentially penalize association with a proscribed group. So if I... For example, in the United States, the PKK, the Kurdistan Workers’ Party, is a proscribed group on the list of organizations you can’t deal with. The PLO is not a proscribed group. So if I want to write an op-ed on behalf of the PLO, I am perfectly free to do so. If I want to write an op-ed on behalf of the PKK, I am subject to a fifteen-year prison sentence for doing so.

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I've done the exact same thing; the only difference is that I've associated in one setting with a group that the government doesn't like and in another setting with a group that the government has chosen not to put on the list. So that's the First Amendment set of issues and I litigated that in the federal courts for many years, and for many years, the courts, the lower courts here, agreed that that was a First Amendment problem as applied to speech. But two years ago, the Supreme Court disagreed, and that's where we stand, unless there are legislative reforms.

The second set of issues are due process issues, that is, the fairness of putting someone on a list. And, again, here, it seems to me, the big shift is the shift from nation-to-nation diplomacy to individually targeted sanctions based on evidence of conduct specific to an individual or a group. If you're just saying, "Well, you're an Iranian national. There's just not that much for a court to review." If you're saying, "You're on a list because you engaged in terrorism or you provided material support to terrorism or you are associated with someone who provided material support to terrorism," or the like, that's an allegation, individualized, that could be, and should be, subject to review and challenge.

So what is the process in the United States with respect to listings and challenging listings? The answer is, there's very little process. The regulations provide that an entity that has due process rights – and, here, there's a distinction between the US and EU – entities that have, or individuals, have due process rights vis-à-vis this, these listing regimes, only if they are US nationals or US residents or have some property in the United States that is affected by the listing. Otherwise, they have no due process rights. So, the process that the US Government provides to any entity that has due process rights, is they allow the, they provide to the individual or organization that has been listed or provisionally listed, the unclassified information, evidence, upon which they are resting their decision. And, so, you know, you might get a sheaf of paper of a hundred documents or something like that. What they don't provide is anything with respect to the classified record upon which they rely, and in almost every instance, they rely heavily – very heavily – on classified information. In addition, they don't provide any statement of reasons or allegations as to why the entity has been listed. So I've represented a number of groups where, you know, they send me a hundred pages of documents and I have to guess as to what relevance those documents might have to any possible designation criteria because they don't say, "You're being designated because of 'x,'" they just provide the documents. And in several of the cases I've been involved in, I'd say seventy-five to eighty percent of the documents don't even name the organization that has been designated and so you have to guess. "Well, here's a document about some other organization. What possible link could the government think our organization has to this organization that caused them to put in this document?" because, again, there's no statement of the charges.

We have challenged that process in the courts and, thus far, a number of federal courts have held that this process violates the constitutional guarantee of due process for two reasons. One, they have said the government has to provide a sufficiently specific set of charges to give the organization notice of what it's being designated for, so that it can

respond. You do have a right to respond in writing, to this declass...to the unclassified record, but the courts have said – several courts have said –you have to, the government not only has to give the evidence over, but they also have to say what the charges are, so that the organization or individual have an opportunity to respond to those charges. And then the second thing they’ve said is that where – as is virtually always the case – the government relies on classified evidence, it must “consider” either providing an unclassified summary of the classified evidence or access to cleared counsel, so that the cleared counsel can see the classified evidence. It must consider that as a way of providing the designated entity a better opportunity to challenge its designation. All the courts have said is that the government must “consider” that. They have never actually held that the government must do that [pause] for a variety of technical reasons that are not, that I don’t have time to go into right now. But... So what the... So what a number of recent judicial decisions have said is, “You do have to have a specific set of charges, and with respect to classified information, the government has to, at least, consider whether it can provide an unclassified summary and/or provide access to cleared counsel.” But that set of rules, again, only applies to those entities and individuals who have due process rights by virtue of being in the United States or being US citizens and the vast, vast majority of organizations and individuals who are on the US terrorism list are foreign entities and foreign individuals who don’t have any significant property in the United States and therefore have no due process rights.

The final thing I’ll say before I close is that despite these rulings, that the current process violates the Constitution with respect to people who, and entities that have due process rights, the government has made no effort to amend its procedures, to, for example, require a statement of reasons, or require consideration of an unclassified summary or require provision of cleared counsel. And I think the reason it has failed to do that is, in part, a sense that it would look odd if they provided that process only to US entities and not to all the other entities, and the courts are only requiring them to apply it to US entities, and so they don’t want to change their regulations across-the-board. And, secondly, the Obama Administration has not designated any US entities, at least under the terrorist sanctions regime since it’s come into office. It has defended some designations that preceded it, but it hasn’t designated any further US entities, so it hasn’t had to confront the question of what process should be due. And I will close there.

**Kay Guinane:** Thank you very much, David. Okay, Bassel Korkor, may I now ask you to take a few minutes to comment, and then we’ll open it up to question and answer.

**Bassel Korkor:** Yes, thank you, Kay. And I really just want to, on behalf of the American Bar Association, the Middle East Committee, and the International Human Rights Committee of the Section of International Law, thank you, Kay, and the speakers for covering this topic and opening it up to our members. Obviously, it’s important both from a public policy perspective and from the day-to-day transactional issue for the private sector as well.

I’ll comment shortly because of the work I’ve done with some of the Syrian opposition groups and the humanitarian groups here in the US, on the sanctions issues that have

come up from time to time there. Mostly before we get to delisting and delisting, we've been at the stage where we've encountered a lot of licensing issues. So, in this case, I'm actually talking not about a designation... a negative designation by the US Government, but a positive one. So there were pre-existing sanctions against Syria, in general. Since then, the US has embraced some elements of opposition groups. In particular, I'll focus on humanitarian opposition groups that are working in areas that the government at the United Nations can't legally reach right now, and so they've issued a series of general licenses and, in some cases, specific licenses, but it still has had a, you know, it's been difficult to implement with financial institutions, as well as had somewhat of a chilling effect on contributions coming in. I think the next big phase will be something, hopefully after transition, that will involve listing on a massive more, maybe political process of delisting Syria altogether, but maintaining the individual designations that have been made, for instance, for elements of the regime that we continue not to want to support or allow to be supported. So there is some legislation in the House and Senate right now on that issue. We obviously can't depend on that passing, and I don't think that that's required for implementation anyway, but it is an issue that, that I see coming around... around the bend and I look forward to hearing the questions you guys have, and more comments from our speakers. So, thanks again, Kay.

**Kay Guinane:** Thank you. Okay, and, and now I'd like to pass it back to the Operator, who can give instructions on questions.

**Conference Call Operator:** Absolutely. If you'd like to ask a question or have a comment, please press star-one on your telephone keypad. This will place your question in the order it was received. Again, if you'd like to ask a question or have a comment, please press star-one on your telephone keypad now. All right. And we'll go ahead and take our first question in the queue. Caller, please go ahead.

**Peter Jeydel:** Hi, this is Peter Jeydel from the Steptoe Law Firm. I have a question for Professor Cole. I'd be curious to know how effective the FOIA process has been in obtaining any, at least, unclassified information regarding the listings and if you have any other tools that you've brought to bear to get whatever little information you can in the process of your litigation of these matters. Thank you.

**David Cole:** Sure. Well, I have not had to go the FOIA – the FOIA is, for those of you who are not from the United States, is the Freedom of Information Act, a statute that requires the government to disclose documents, that are not otherwise justifiably confidential, upon request from citizens. That is a route that one could go with respect, if one were designating a foreign entity that has no – or individual – that has no due process rights in the United States. If you have due process rights in the United States – if you're a US entity or a US person – then under the due process decisions that have been issued, the agency has to provide, with or without a full FOIA request, it has to provide the unclassified evidence that it is considering in its decision-making process. And what it doesn't have to provide is the classified information, but under, you wouldn't get that under FOIA either, obviously, because there's an exemption under FOIA for classified

information. So I haven't had to use FOIA, but I imagine that lawyers who have represented entities that don't have presence here may well have used FOIA because that would be another way of getting that same information, that being the unclassified evidence in the record.

**Maya Lester:** I've heard, Peter, anecdotally, that people have been quite successful in the US with using FOIA for designed people and entities.

**David Cole:** If the information is unclassified, it would seem that they would not have a justifiable reason not to turn it over under FOIA. FOIA can sometimes take a very long time, but it is a fairly effective tool unless it runs up against the classification problem.

**Peter Jeydel:** Great. Thank you very much. Appreciate it.

**Conference Call Operator:** Great. And we'll go ahead and go on to our next question in the queue. Caller, please go ahead.

**Christopher Vaughn:** Hi, this is Christopher Vaughn from Catholic Relief Services. The fellow from the ABA, is there, is there a copy of what's circulating on the Hill regarding Syria?

**Bassel Korkor:** Yes, there are two bills and they cover, I should say, a broader spectrum of what they call, "support for the transition in Syria," but among them is the sanctions reform. They're the... I believe that the legislation in the House is called the "Free Syria Act." It was introduced by three original cosponsors, Eliot Engel, I want to say Mike Rogers, and I'm sorry, the third is escaping me right now. But, but the Senate legislation I believe is called the "Syria Transition and Democracy Act," and that was introduced, co-sponsorship by Senator Casey from Pennsylvania and Senator Rubio from Florida.

**Christopher Vaughn:** Great. Thanks.

**Conference Call Operator:** All right. I'm moving on to the next question. Please go ahead.

**Sophia:** Um, hello, Sophia. I'm calling from London. I have a question mainly for Kimberly Prost about the delistings at the moment. You made it very clear at the beginning that you're focusing on the al-Qaeda sanctions list since it's been separated from the Taliban one, but I was wondering if you could maybe say a few words on the Taliban delisting process. And then, maybe, a more overarching question which is that the lifting of entities and individuals, of terrorist groups or organizations, is very much an administrative kind of approach that ends up having consequences on people's lives, right, and I guess what the *Kadi* case highlighted, and a number of other cases at the European level, was that the issue with the UN listing was that there isn't a global judicial body equivalent that can oversee really delisting and that whole process like in the EU, you know, with the European Court of Justice, et cetera. And, so, would you say, to a certain

extent, that what we're seeing now are kind of these short-term fixes, but, in the longer term, because there isn't really this judicial balance or oversight, that there is a kind of more fundamental challenge with the listing process at the UN level? Thank you.

**Kimberly Prost:** Thanks very much. On the question of the Taliban, the split between the al-Qaeda and Taliban regimes took place in June 2011, and it was done because of the, in fact, to a great extent, because of the political process in the Taliban context and, also, because to try and increase the powers given to the Office of the Ombudsperson for the regime, which was easier to do with al-Qaeda than with the Taliban. And, interestingly enough, in the year that I did originally cover the Taliban, as well, I had no requests from the Taliban for delisting and, partially, that's because there is in place quite a vigorous political mechanism by which individuals can come off the Taliban list, and that has been quite successful since the separation of the two regimes. So I think it was, in totality, a compromise that probably worked very effectively for both listings.

Moving to your second question, of course the issue remains whether the introduction of the Office of the Ombudsperson is providing a sufficient, fair process in the international context. And I think the important thing to recall is that this is all very contextual. I should say this is an administrative measure, albeit with significant impact on individual rights, but the question becomes, "What is sufficient, fair process given the very specific context of the Security Council?" And the jury, if you will, is still out on that, and I don't comment on whether I think the process, overall, is sufficient. What I can say is that in the cases I have dealt with to date, I am satisfied that each of the petitioners has had fair process in the sense of the fundamental principles of knowing the case and answering the case and having a reasoned decision. But I'm not necessarily of the view that the solution would lie in a regime for judicial review. There are some benefits to this system **over** judicial review, in my opinion, but the most significant point is, it is probably politically impossible to get much more without changing the charter here in New York. So the question becomes whether this is, this is a sufficient system for fair process or not, and only time's going to tell us that.

**Maya Lester:** Could I add two brief comments to what Kim has said? First of all, it's very interesting that Kim's office, the Office of Ombudsperson, really came about because of pressure in the UN to enact resolutions, which are really pretty radical in UN terms, having an ombudsperson reviewing listings. But, at least in part, if not entirely, that came about because of Kadi's case and the European Court, which is a pretty amazing thing that because the EU criticized the UN's due process and indicated a willingness to start reviewing implementing measures, that such a major change had come about at the UN level. But it's also true to say that because, you know, the ombudsperson's remit only applies to the al-Qaeda list, it's not only the Taliban list that Kim is not able to review, but, of course, all the other UN listings. So if you're on a UN Liberia list, there is no equivalent to the ombudsperson.

And my second comment is that judicial review at the EU level, although it has been robust, and some would say too robust, is not secure. So there, there are a number of

cases now coming, going on appeal to the Court of Justice, particularly against Iranian sanctions cases, and who knows whether the ECJ will start rowing back on the robust judicial review by the First Instance Court in Europe. And, secondly, the latest turn of the *Kadi* story is that the latest Advocate General's opinion in the second round of *Kadi* litigation, is indicating his own view that judicial review in Europe has gone too far, at least as regards listings that derive from UN Security Council resolutions, and we have yet to see what the Court of Justice will make of that. So it's by no means in the bag that this will continue.

**Sophia:** Thank you very much.

**Conference Call Operator:** Okay, and we'll go ahead and move on to our next question then.

**Caller:** I am representing a law firm based in London. My question is to Ms. Prost. She has very helpfully set out the procedure which applies in case of an entity which is listed on the al-Qaeda list. Can she also clarify whether this procedure applies for entities listed under the Iranian United Nations sanctions? Thank you.

**Kimberly Prost:** Yeah, thanks. No, for the moment, the mandate of the Ombudsperson is strictly on the Security Council's al-Qaeda sanctions regime, so while there are, as mentioned, several other lists including, of course, the Iran sanctions list, at the moment the Security Council has only authorized the Ombudsperson mandate for this one regime. And there's obvious reasons why they've done that, because it was a very distinctive, as I mentioned at the beginning, insofar as the al-Qaeda regime isn't attached to any particular state. There's always discussion ongoing about whether or not the mechanism could be exported to other regimes, but that's a matter at the moment for states and for the Security Council. Thanks.

**Caller:** Thank you.

**Conference Call Operator:** All right, and next question, please.

**Jon Binns:** Hi, my name's Jon Binns. I'm a solicitor at BCL Burton Copeland in London. We're focusing, understandably, on the judicial side of things, and if I can offer a very brief comment on the European judicial process, although, comparatively, it sounds as if it is doing good things and standing up for due process, it's beset by problems, and most notably delay. I've had a client who had to wait two years for a hearing in the General Courts and, of course, that's First Instance – it's bound to be appealed and it'll take even longer. But the other point that I'd like to ask about is the legislative side of things. We're dealing with powers, called briefly, of executives here, which need to be checked by judicial processes, but, also, wonder whether in terms of the legislation that they are acting under, the powers that they have, whether they are sufficiently precise. I'm thinking, again, particularly the European example, is it clear enough for people who might be affected whether the executive can put them on the list or not and what is the

conduct that can be proscribed by them?

**Maya Lester:** Jon, I mean, no, I don't think it is very clear. I mean the process at the EU level is not very transparent both in terms of the – I mean in principle, it is, in the sense that the criteria for listing, as you know, are set out. But if you are a person living your life in Syria or in Zimbabwe or in any country subject to sanctions, my own view is it's very unclear what kind of evidence, what's the sort of information will be that leads the EU to put you on a list, what the standards of evidentiary analysis will be that the EU will accept, and what kind of analysis is performed, who the relevant decision-makers are within the European Union – all of that is, as you know, is not set out, and to my mind, it's not sufficiently transparent.

**David Cole:** That's true. In the US, the sort of overarching authority that gives the President the authority to create these lists, in the first place, is called the "International Emergency Economic Powers Act," and it basically gives the President very broad authority to declare a national emergency and then to impose economic sanctions of a wide range on, you know, those countries or individuals or groups that are associated with the emergency in some way. And, so, that, that gives people, you know, that gives the President essentially a blank check. National emergencies are declared and they virtually never go out of exist...they're never undeclared, and the legislation itself doesn't define a national emergency, doesn't define any conduct that would give rise to a national emergency or give rise to listing. What then happens is the President issues an executive order in which he says, "I find there's a national emergency," for example, as a result of the attacks of, you know, September 11<sup>th</sup>, "and I am therefore going to designate the following groups and entities." And he doesn't say why, he doesn't say how, what conduct, he, and he lists them. There, after 9-11, he listed twenty-seven groups and even though some of them were obvious, al-Qaeda, Osama bin Laden, but others were far from obvious, but they're just there, no reasons given whatsoever. And then he delegates to the Treasury Department the power to designate others based on their links, essentially, to anyone else on the list, so, and the link is, you know, it can be providing material support, which, itself, is extremely broadly defined. Originally it was, even could include "otherwise associated with." And then once someone's put on the list, then anyone who is, provides material support to that entity can be put on the list, so it can go, you know, in a kind of six degrees of separation, you can quickly get a very, very broad group of individuals and organizations who are listed, essentially, by virtue of their association. We challenged, early on, we challenged the vagueness, the lack of specificity of the "in association with," other...or the "otherwise associated" provision of one of these executive orders, and the, or a court, held that it was unconstitutional because it was too open-ended and too broad, and the Treasury Department amended it for purposes of that particular regulation to narrow it. But the statute itself gives the Executive Branch very, very broad leeway.

**Conference Call Moderator:** Okay, well, we'll go ahead and go on to our next question then.

**Caller:** Yes, I'm calling from New York. I'm interested, Professor Cole, are there leading, is there a leading case you have in mind with respect to both the proposition that OFAC has to set forth sufficient specificity with respect to charges, and, secondarily, with respect to the government must at minimum consider whether to allow cleared counsel's access to classified information?

**David Cole:** Ah, yeah, there are two cases. The first is called *al-Haramain Islamic Foundation v. Department of the Treasury*, and it's, there's a Ninth Circuit unanimous decision from a year or so ago that sets that forth. And then there's a case called *KindHearts for Charitable and Educational Development v. Geithner* – Timothy Geithner, who was the, who was the Secretary of the Treasury – which is from the Northern District of Ohio, and they basically set forth the same, you know, roughly the same, the same standards. There are, there are, in addition, there's some DC Circuit law that suggest...from early... Oh, the *KindHearts'* case is from maybe three years ago. The government settled the *KindHearts'* case after the court issued that ruling, and the *al-Haramain* case is still going on in administrative proceedings. But there are some earlier DC circuit cases that say that all due process requires is that the entity or individual be given the unclassified record, and not, and they did not say that there has to be a statement of reasons, nor did they say you have to have a summary of classified, an unclassified summary, or access to cleared counsel, but they didn't, they didn't reject that argument, either. The argument just wasn't squarely made to the DC Circuit.

So the more, the recent cases have said, you know, that there's no reason why the government shouldn't have to give notice of what the grounds are for its actions to the entity in question. There's no good reason for that. The government obviously has to have grounds and there's no reason to hide the ball in terms of giving those grounds. And with respect to classified information, if you can provide an unclassified summary, there's no good reason not to provide an unclassified summary because, by definition, an unclassified summary consists of unclassified information and, therefore, disclosing it would not undermine national security and, similarly, if you can provide access to cleared counsel who have security clearances, again, by definition, that doesn't pose a threat to national security because they're people who've been determined to be trustworthy enough to see the information and to, and not to disclose it further. So, that's the reasoning, which I think is, you know, pretty, pretty, pretty strong reasoning. But, as I said, there are relatively few cases in which individuals, US individuals, US organizations or a foreign organization with US property are on the list and so the government has avoided amending its regulations to bring them, you know, bring them into line with what due process requires as, according to these courts.

**Conference Call Moderator:** All right. We'll move on to our next question then.

**Steven Schneebaum:** This is Steven Schneebaum calling. I represent the MEK and have represented the MEK in the litigation before the DC Circuit, which, I think, suggests a slightly more optimistic spin than the one that Professor Cole was urging a moment ago. There are, of course, two different lists, differently administered, in the United States.

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There is the “Foreign Terrorist Organization” list and there is the so-called, “Specially Designated Global Terrorist” list. The latter is administered by the Department of the Treasury, OFAC, to which David just alluded, but the former is statutory, not deriving from the International Emergency Economic Powers Act, but deriving from the Antiterrorism and Effective Death Penalty Act of 1996. That statute does lay out specific criteria that must be demonstrated if an organization is to be listed. The MEK, my client, filed a petition in the closing days of the Bush Administration to be removed from the list, the first petition ever filed to be removed from the list once an organization was on it, and we were rejected by the Administration. We went to the DC Circuit, and the DC Circuit reversed, and it reversed specifically on due process grounds and directed the Department of State to give us an opportunity to see the evidence against us, or to have the Department assert that it was entirely classified and for that reason we couldn’t see it. The Court was skeptical about whether purely classified information would be a sufficient basis. In any case, they ordered due process. We went back to the State Department and the State Department did nothing for two years, at which point we brought a suit from a writ of mandamus against the Secretary to compel her to act. And, finally, in response to that mandamus, which was granted, the Secretary did act and the MEK was taken off the list. So, at least on the FTO side, at least on the criminalization of political speech side, the prospects for due process are, perhaps, a little bit rosier than David Cole was suggesting.

**David Cole:** And, and, Steve, first of all, congratulations on that case. But I don’t think that that really shows that the prospects for due process are any stronger. The DC Circuit, you know, the DC Circuit’s rule on due process is what I said before. All you get is the unclassified record, nothing else. You don’t have to have a statement of reasons; you don’t have to have an unclassified summary; you don’t have to have access to cleared counsel. They’ve never ruled that. They didn’t rule that in your, in your case. And what ultimately happened in the MEK case was the politics of the situation shifted sufficiently that the State Department chose to delist the MEK – no court ordered its delisting – and it’s still the case that no court in the United States has ordered the delisting of any, of any organization. I think that there are things one can do, and one can certainly use litigation as a way to put pressure on the State Department. You know, the MEK writ did bring litigation, but it also hired, you know, many people from the, from the very high up in the Bush Administration and, just to be spokespersons for it, and engage in a very sophisticated and expensive political campaign, which I think was ultimately what, what brought their delisting, not a, not a court order.

**Conference Call Moderator:** We’ll go ahead and go on to our next question then.

**Mona Khalil:** This is Mona Khalil from New York, in a personal capacity. The judicial developments in both the national and the regional courts have a tremendous impact as far as we in the UN are concerned in terms of sort of advancing the momentum for enhancement to the, to the sanctions regions and the sanctions mechanisms, but one problem that persists for us both on the legal and the operational side is the specter that hangs over humanitarian actors, both within the UN and those that partner with us in

various field activities, and are subjected to the risk, if not the actual threat, of being listed themselves, because under, you know, fundamental international humanitarian principles, they are providing assistance without regard to, you know, political affiliations or criminal affiliations or, or, or, in this case, designations. And because of the way the national and regional evolution of the legislation has occurred, they, themselves, are at high risk of coming within the, you know, the scope of the potential violators of the sanctions regime and are, therefore, subject to listing themselves. What progress has been made or can be made in regard to protecting the humanitarian actors within the, in accordance with the expected impartiality and neutrality that they're expected to operate in the field?

**Maya Lester:** In the EU and in the US systems, as you well know, in principle, there are licenses and exceptions for humanitarian aid. You know, Iran sanctions are not supposed to cover medicine and food. My understanding is that it's really, it's the practical application of those exceptions that causes a real problem, so that, you know, you try to get aid to Syria or Iran and you find massive delays in the prices of implementing the licenses, so I don't have a very satisfactory answer, but my guess is it's not a legal problem, it's a, it's an administrative problem at the level of the decision-makers who don't have much incentive to help people when it comes to exceptions to Iran and Syria sanctions in particular.

**David Cole:** In, in the US, it is a legal problem, because of the, the definition of material support is so expansive under both [pause] the Specially Designated Global Terrorists program and under the material support statute that Steve Schneebaum referred to. Material support is defined without regard to whether it's used for good or bad purposes, and whether, who, without regard to whether it's intended to be used for good or bad purposes, or, in fact, used for good or bad purposes, with the government making a very broad argument that any support to a proscribed organization either frees up other resources that that organization can then put to bad ends or, as the Supreme Court ruled in the *Holder v. Humanitarian Law Project* case, even if it doesn't free up any single resource that the organization might use for bad ends, it [pause] it might, it might give that group legitimacy to do something with the group that's, you know, that's good, for good purposes, that's not illegal, might legitimate the organization and then that will, in turn, be, give the organization a greater ability to gain resources that can be used for nefarious ends. Very, very broad justifications, which have led to, essentially, a prohibition on humanitarian aid, on peacemaking.

The case that I brought in the, in the Supreme Court was the case of a humanitarian law group here in the United States that wanted to provide training in human rights and how to bring a human rights claim before the, before the human rights' bodies in Geneva, and wanted to provide assistance in peacemaking overtures to the Kurdistan Workers' Party in Turkey, with respect to their disputes with the Turkish government, and that, even that, the Supreme Court said, could be proscribed because it might legitimate the organization and, therefore, might ultimately let the PKK do more bad acts. And, so, I think that, you know, the solution has to be either a legislative or executive fix, either through some sort

of exemption or licensing regime that permits aid that I think most members of Congress, anyway, would think should be provided, even though they wrote the statute so broadly that it's, that it's proscribed.

**Bassel Korkor:** And if I may touch on one, touch on one other thing that we've been kind of in regard to Syria, again, is we've been talking mostly about the financial sanctions that, through OFAC and Treasury mostly issue with some input from the State Department. There's another regime in place in the US law, which is the Bureau of Industry and Security within the Department of Commerce, and that's a sanction regime, a regime against export or re-export of certain items of US origin or that contain items, parts of US origin of a certain percentage, to embargoed countries. Now there, there is no general license equivalent when you're talking about an embargoed country within that, in, in the BIS context, in the export of goods context. So, even though there is a general category called EAR99, which allows, generally, exports of non, you know, permitted supplies like food and medicine – food and medicine's the one we talk about most – it still requires a license if you're going to an embargoed country. So in a country like Syria, where there's a humanitarian disaster, you have to go through the licensing process in order to actually ship export goods into Syria, that are human... even if they are EAR99 food and medicine and blankets and that kind of thing. And it's a very burdensome task because you can't reuse a license for a product, unlike in OFAC, where they'll issue a license, even a specific license that can be used for a series of transactions or services. In the BIS regime, you will need to get a new license every time you're exporting a new good, so even though you may have, you know, a number of CAT scan machines or ambulances – those are two examples from Syria – that you have a license for and you send them out, if you raise the funds and can afford another ambulance, another CAT scan machine or some other radiography equipment, then you're going to need a new license for that, and that only, not only slows down the process, but it also drains some of the resources of the charitable organizations that are seeking to make those exports.

**Kay Guinane:** Thank you. This is Kay Guinane, again, and with that, I'd like to bring it to a close, and point out this very issue is, and the focus of these topics, is what the Charity and Security Network exists to address, and I invite you all to visit our website at [www.charityandsecurity.org](http://www.charityandsecurity.org) in order to learn more. And you will be able, also, to access this telebriefing. Again, online, we will be posting the recording on our website, eventually, along with a transcript, so that you will be able to come back and get details, and also to let your friends and colleagues know it's up, if you'd like to share the information. So, again, I'd like to thank our speakers, again, very much for sharing their time and their expertise on this important topic. It's one that I'm very glad there's such a broad level of interest in, and one that I hope we'll be able to do telebriefing again in a year or so and report some changes and progress in the law. And thank you all very much.

