Homeland Security Governance and Policy Diffusion: International Institutions in Multilateral Counter-Terrorist Cooperation

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Abstract:

How much can institutions change state behavior? This question has been at the centre of heated debates among IR scholars for the past five decades. This paper applies a framework for understanding institutional influence in a specific area of security affairs: counter-terrorism policy-making. This framework is utilized in order to conduct a comparative analysis of institutional diffusion effects on states’ counter-terrorism behavior in the case of the human rights reform of the UN counter-terrorism sanctions regime.

The paper uses counter-terrorism policy-making as a laboratory, and convergence of policy outputs at member state level as both a visible symptom of international cooperation in counter-terrorism and an empirical indicator of socialization within international institutions. This contribution recasts extant outcome-oriented and norm-driven explanations of institutional influence and sets forth a ‘pragmatic constructivist’ approach, which posits that IOs have limited agency in counter-terrorism policy-making via second order socialization effects, namely social influence, where concerns for image act as a soft condition on state action.

The study identifies as the main obstacle to institutional explanations the influence of domestic frameworks, organizational cultures and strategic threat assessment calculations. This analysis draws on extensive primary source material, including interviews with high-ranking policy-makers across three countries (United States, United Kingdom and Italy) and two international organizations (UN and EU).
This paper shows empirically how multilateral cooperation in formal international institutions affects states’ decision-making in the field of counter-terrorism. The analysis focuses on the reform of the counter-terrorism sanctions regime established pursuant to UNSC Resolution 1267 (1999) and targeted against individuals and entities associated with Al Qaeda and the Taliban. It traces the regime’s evolution as well as the reactions, decisions and implementation patterns of UN, EU and selected member states’ stakeholders in the process of reform of the regime’s listing and delisting procedures. The paper concentrates on one specific issue area: the inclusion of human rights safeguards within the original framework of Resolution 1267. According to some scholars, this gradual incorporation shows that a certain level of embeddedness of human rights norms, namely guarantees of fair trial and effective remedy, exists within the setting of the UN.¹ In the case of the 1267 regime, this resilience plays characteristically against the peculiar combination of ‘leadership and resistance’ that has defined Western P5 members’ human rights behaviour vis-à-vis counter-terrorist action over the course of the past decade.²

This problematic attitude of UN institutions and member states’ foreign ministries towards human rights safeguards within the framework of the 1267 regime is treated here as a touchstone of both the ambivalence with which the issue has been addressed at Council level and the residual power of IGO bodies to effect change in the capacity-building orientated Chapter VII resolutions. In this respect, the paper’s central finding is that institutional effects on state counter-terrorism behaviour manifest themselves via a revised notion of social influence, i.e. partial socialisation to the norms and principles promoted by the multilateral institution, namely due to concerns for the preservation and maximisation of status markers and social praise, which occur along with interest-driven action.³ This finding softens both ‘hard rational choice’ explanations with their emphasis on cost-benefit analysis, and ‘hard’ constructivist studies of state behaviour, which assume that in order to speak of socialisation full internalisation should occur. Rather,

³ Alistair Iain Johnston, interview with author, April 24, 2012.
this paper employs a pragmatic constructivist approach, which postulates that actors can simultaneously choose on the basis of both material and non-material interests, following a logic of both consequences and appropriateness. When social influence is at play, states do not seek an instrumental maximisation of a reputational gain, but try to maximise the psychological pay-off associated with a possible loss of image with respect to their chosen reference group (in this case, ‘Western’ democratic countries). In other words, states might rationally appreciate the ‘strategic usefulness’ of certain norms when playing the ‘game of power’; at the same time, they will also feel compelled to live up to the image prescribed by a pre-defined social script to which they are required to adhere in relation to these same norms.

Referring to Keck and Sikkink’s analysis, the paper employs the image of ‘boomerang effect’ in order to describe the mechanisms through which social influence occurs: interest-driven policies originally devised at member-state level are exported globally via the interface of international institutions, which act as ‘facilitators’. Playing the game of naming and shaming, IGOs bodies, non-P5 member states and non-governmental institutions prompt norm-compliant reforms of the policies, de facto hijacking the policy-making process away from its original sponsors. In the case of the UN 1267 sanctions regime, this combined effort had the effect of bringing the ‘unwanted’ human rights safeguards back into the UN counter-terrorism equation.

In order to illustrate this process, the paper begins by reviewing the structure of the UN counter-terrorism sanctions regime. Then the paper examines the regime’s development and reform, highlighting the contribution of stakeholders within and without the Security Council system and the role of the United States in particular. The last section reviews this process from an analytical perspective, pitting the pragmatic constructivist approach against alternative explanations and clarifying the role of past legacies and rational choice-driven behaviour.

1. **Targeted sanctions in counter-terrorism: creating the 1267 regime**

The financial assets of governments and particular individuals were targeted by the Security Council seven times in the course of the 1990s: twice in the former Yugoslavia,
and once in Iraq, Libya, Haiti, Angola, and Afghanistan. Three times over the course of the same decade, the Council specifically imposed sanctions on states and groups accused of aiding or abetting terrorism: in response to the downing of Pan Am flight 103 and UTA flight 772, in March 1992; after the failure of the government of Sudan to extradite suspects in the attempted assassination of Egyptian President Hosni Mubarak, in 1996; and in October 1999, with Resolution 1267, which issued a third set of counter-terrorism sanctions against the Taliban regime in Afghanistan.

Resolution 1267 does not target states and their representatives but subjects to time-bound sanctions individuals not necessarily associated with state or non-state actors. Formally sponsored by Canada, the Netherlands, the Russian Federation, Slovenia, the United Kingdom and the United States and adopted under Chapter VII of the UN Charter, the document imposed an air embargo on the Taliban and froze ‘funds and other financial resources’ owned or controlled by the Taliban in order ‘that the Taliban turn over Usama bin Laden’. The resolution also commanded states to establish a Committee to monitor the implementation of the sanctions (known as the 1267 Committee) and to undertake periodic impact assessments of the sanctions on the population. In December 2000, facing the Taliban’s continued refusal to comply with Resolution 1267 and hand over bin Laden, the Council expanded the scope of the sanctions with Resolution 1333: bin Laden himself and any individual or entities associated with him were subject to an asset freeze, a travel ban and an arms embargo, while a special committee of the Security Council comprised of all Council members was mandated with the administration of the sanctions.

As the geographical scope of the sanctions widened, so did the scrutiny to which the international community subjected its most controversial tool: the Consolidated List. Resolution 1267 et seq. required states to freeze assets and exclude listed entities and individuals from their territories. According to the 1267 Committee Guidelines, listing

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6 These are also known as ‘smart sanctions’. See Uri Friedman, ‘Smart Sanctions: A Short History’, Foreign Policy, May/June 2012.
began with individual or joint submissions by member states for consideration by the Committee. States were ‘strongly encouraged’, but not required, to ‘seek additional information on an individual from the target’s state[s] of residence and/or nationality’ and were asked to include the basis for designation only ‘to the extent possible.’ As the sanctions were intended to be preventive in nature, domestic criminal charges or convictions were not a prerequisite for listing: evidence of association with the Taliban, Osama bin Laden and Al Qaeda was deemed a sufficient condition to submit an entry to the List. Individuals or entities could also be listed if evidence suggested that they supplied, sold, transferred material, recruited or supported in any way the Taliban and Al Qaeda. Because designations would often be based on sensitive information, states were reluctant to share the intelligence at the basis of their listings, even with other Committee members.

Starting in 2003, backing for the Al Qaeda sanctions began to wane in some countries. Listing, review and especially delisting procedures were also coming under increasing attack in the press, to the point that the Committee, who saw its role in purely administrative terms – with no executive or judicial power – lamented that the media had ‘on occasion…reported on [its] work…in conjunction with issues well beyond or not related to [its] mandate.’ In an attempt to assuage critics, in July 2005 the Council unanimously adopted resolution 1617, in order to ‘provide more clarity regarding the measures and their implementation’.

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9 Establishing the legal nature of the UN Al-Qaida sanctions is very problematic and crucial with a view to determining whether the Council acted ultra vires with respect to its Chapter VII powers. While the 1267 Committee tends to see the sanctions as administrative decisions, legal experts, in primis the former UN Special Rapporteur for Human Rights in Counter-Terrorism, Martin Scheinin, consider them quasi-judicial decisions. From this point of view, designation for listing is equivalent to a ‘criminal charge’; in the absence of a judicial mechanism for redress, delisting becomes a ‘political process affected by diplomatic representation’. See Lisa Ginsborg, ‘Procedural Standards in the Office of the 1267 Delisting Ombudsperson’, Paper Presented at the Seminar on ‘New Forms of International Regulation and Adjudication’, The Human Rights Working Group, European University Institute, Badia Fiesolana, June 18, 2012. United Nations Security Council, ‘Report of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities,’ 8 April 2004, UN Doc. S/2004/281, par. 61.
As the lack of due process in the Council's sanctions regime was providing more and more ‘fodder for criticism’, in September 2005 member states ‘call[ed] upon the Security Council with the support of the Secretary-General to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.’

Pursuant to this mandate, on 27 September 2005 the UN Office of Legal Affairs (OLA) commissioned a study of the legal implications of the 1267 sanctions regime’s listing and delisting procedures. The study attempted to provide an answer to one central question: was ‘the UN Security Council, by virtue of applicable rules of international law, in particular the United Nations Charter, obliged to ensure that rights of due process...[were] made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?’

The UN Office of the Legal Counsel answered in the affirmative. What follows offers an account of how the UN and its member states attempted to tackle this issue.

2. Reforming the sanctions regime

In this section, the paper traces the steps taken by Council members to grapple with a controversy that has become symptomatic of a complex relationship between dominant powers, norms and international institutions. This issue is identified as the problematic coexistence of interest-driven behaviour, as predicted by rationalist approaches that stress the utility-maximising effects of ideas, and norm-driven action that falls short of complete behavioural change and full internalisation as postulated by mainstream constructivist analyses. The paper introduces the concept of ‘pragmatic constructivism’ to account for this phenomenon. That the oughtness of the due process

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11 Baldo Fassbender, ‘Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter,’ Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006, p. 3.

12 Fassbender, ‘Targeted Sanctions and Due Process.’
norm was put into question, resisted, and then allowed back into the UN sanctions framework within certain restrictive parameters shows not only its resilience, but also the power of group image pressure on the behaviour of the members of the Council.

In order to illustrate this process, I adopt a chrono-thematic approach, which clusters the narrative of the reform process around three distinct periods: issue emergence (2001-2004), coalition building (2005-2006) and institutional reform (2007-2009). This is useful both to highlight how agency plays out within the international institution at various stages of a norm life-cycle, as well as to show how complex motivational mechanisms of state action coexist in the face of seemingly taken-for-granted normative expectations.¹³

2.1. Issue emergence (2001-2004)

The 1267 Committee authorised its first publicised delisting in 2004. On 23 December, Shadi Mohamed Mustafa Abdalla, a Jordanian national of Palestinian origin, was delisted while imprisoned in Germany after a conviction on charges of belonging to the extremist group al-Tawhid, an Al-Qaeda affiliate. Abdalla, formerly one of bin Laden’s bodyguards, had admitted his role in the plots against two Jewish restaurants in Dusseldorf and a Jewish community centre in Berlin, and was due to appear as a prosecution witness in the trials of two Moroccans accused of aiding the September 11 hijackers.¹⁴ Before Abdalla’s removal from the Consolidated List, Committee members had approved amendments mostly with a view to improving the identifying information of targeted individuals, exhorting states to provide additional details. In 2003, for example, ‘nine names were deleted from the list’, since ‘they had been identified as duplications of the names of other listed individuals.’¹⁵ At the time of Abdalla’s delisting,

¹³This approach to the analysis of the due process reform draws from IR literature on agenda setting in Transnational Advocacy Networks. See, for example, R. Charli Carpenter, ‘Setting the Advocacy Agenda: Theorizing Issue Emergence and Non-emergence in Transnational Advocacy Networks,’ *International Studies Quarterly*, vol. 51, issue 1, March 2007, pp. 99-120.
procedures for the removal of entries from the Consolidated List were as haphazard as the mechanisms that led to designation. As early as 2001, the BBC Kabul correspondent had remarked that ‘[t]he list include[d] [Taliban] ministers, governors and diplomats,’ but that ‘several of them ha[d] been given a wrong job title, one [was] dead, and another imprisoned.’ Eric Rosand, then a member of the US delegation in New York, noted that during the Committee’s ‘initial period of work, the creation of the list was based largely on political trust’. One Security Council diplomat reiterated this point, pointing out that ‘[at the time] there was enormous goodwill and a willingness to take on trust any name that the US submitted.’ Delisting was based entirely on political and diplomatic negotiations among states, since minimal standards for submission and removal would be introduced only in 2002.

Mostly at the initiative of the United States, the Committee added more than 200 entries to the List by November 2001, including the names of three Somali-born Swedish citizens allegedly associated with the international financing network Al Barakaat. Three days after their UN designation, the three were listed under European regulations, and Swedish financial institutions froze their assets. Amidst significant public outcry – as one of the listed individuals was running for public office in Sweden – the three turned to Swedish authorities, claiming they had no knowledge of Al Barakaat alleged links to terrorism, that they had not been notified of their listing (since as per Resolution 1267 et seq. the Committee was not required to notify designated individuals) and that they lacked any legal means of redress. The Swedish government took up the issue with the Council and the United States. After intense bilateral negotiations, the US agreed to support the request for delisting. On this point Jimmy Gurule, the then US Under-Secretary of the Treasury for Enforcement, admitted that Washington had agreed to remove the individuals after they pledged, in writing, to having ‘severed and disassociated themselves in every conceivable way from the Al Barakaat-related businesses.’

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16 ‘New UN sanctions against Taliban assets,’ BBC World Service, 30 January 2011.
Between the time of this high profile incident and Abdalla’s ‘routine’ delisting, it became apparent that the flaws in the listing and delisting procedures needed to be addressed, especially since an increasing number of states started reporting to the 1267 Committee that lawsuits against the sanctions were being filed before domestic courts. Rosand summed up these flaws, which he termed ‘imperfections’, as the lack of a ‘formal appeal and review mechanism and transparent evidentiary requirements for inclusion on or removal from the list.’ The adoption of the Committee guidelines in November 2002, however, did not fully clarify the matter of the Committee’s sanctions procedures. The listing and delisting mechanisms continued to suffer from serious shortcomings, and member states became reluctant to propose names for what the press was now calling the ‘terrorism blacklist’. The Monitoring Group was well aware of the problem and in its second report for 2003 highlighted that practical obstacles to implementation and political matters related to questionable listings topped member states’ list of concerns, while human rights and due process came only in third place.

Affected by the lawsuits, EU member states started to champion pro-actively the issue of the justiciability of the sanctions before the Council and the Committee in the course of 2003. They were joined initially by the representatives of Switzerland, Brazil and the Philippines, while P5 members remained silent. In July, for example, the Italian Ambassador at the UN, Marcello Spatafora, expressed the EU’s conviction that ‘every effort [should] be made to promote due process in the proceedings of the Committee.’ The Union called for ‘[s]anctions [to] be implemented on the basis of transparent technical criteria[,] in order to create maximum legal certainty in the matter.’ The German Permanent Representative, Gunther Pleuger, echoed Spatafora’s statement, suggesting that ‘some core elements of due process [should] be applied by the Security Council…For example…the possibility that a targeted individual might bring his case to the Committee for consideration.’ In November, Germany joined Sweden and the EU in co-sponsoring a seminar on ‘Terrorism and Targeted Sanctions’, where the Swedish delegation presented a nonpaper that criticised the Committee for ‘failing to accept the

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basic premise that those whom it stigmatizes as terrorists ought to be entitled to impartial or judicial scrutiny. Recalling the conclusions of this seminar before a public session of the Council in January 2004, the Irish Permanent Representative referred to the concrete proposals that were put forward by the sixty experts present and asked that legal basis be established for the sanctions’ restrictions. These should ‘contain clear criteria and definitions for the listings as well as for their scope.’ Individuals entered into the consolidated sanctions list should also ‘be informed about the listing as well as its reasons and consequences [and have] the right […] [to] be heard.’

These positions went much farther than what the Council was prepared to concede at the time. At the beginning of 2004, briefing the members on his last country visit to Europe, the newly elected Committee Chairman, the Chilean High Representative Heraldo Muñoz, referred to the due process violations only in passing, noting that EU member states had voiced very ‘serious reservations regarding such topics, and urging Council experts to take these concerns into account in preparing future resolutions.’ In the second half of 2003, Chile had indeed begun consultations with the United States and Russia on the draft of a new Resolution, 1526. In line with the preferences expressed by US negotiators, the Resolution’s wide-ranging text, approved at the beginning of 2004, included several provisions to track non-financial assets and strengthen the Committee’s implementation measures thanks to the institutionalization and revamping of the Monitoring Group. No mention was made of the need to establish fair and transparent procedures in the listing and delisting of the designated individuals. In February, however, partly giving in to European concerns, the Committee secretariat began to work on a list of ‘focal points’ to automatically inform the competent government officials of ‘amendments to the list immediately following their approval’. The list of contact points became operative at the end of 2004 and partially contributed to easing the legal situation of the designated individuals, who now at least knew which government administration they should petition in order to bring their claim before the Security Council.

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The Committee was increasingly aware, however, that these cosmetic improvements would not solve the persistant problems with the 1267 regime’s procedures. Pressure was mounting in European member states in the months leading to the ruling of the Court of First Instance on the Kadi case – expected at the beginning of 2005 – while the consensus that the Council’s counter-terrorism action had generally enjoyed in the ‘time of extraordinary politics’ that followed 9/11 was eroding. In March 2004, Council members assembled for an unusually charged two-day session to discuss the renewal of the mandate of the Counter-Terrorism Committee (CTC). Twenty-one non-Council members asked to be admitted to the proceedings and used their participation to voice their uneasiness with the Council’s hijacking of the counter-terrorism issue from the General Assembly, thus beginning to pave the way for the adoption of the Assembly’s own counter-terrorism strategy.26 In its first report after the adoption of Resolution 1526, the newly established Monitoring Team also showed signs that the group of experts had realised that the regime’s effectiveness depended on the provision of an adequate redress mechanism for the listed individuals. The Team’s coordinator, Richard Barrett, began to suggest, for example, that the Committee carefully reconsider the procedure by which a name may be removed from the List, ‘whether by a listing State, or as a result of appeal by the individual or entity concerned.’27 This point, if taken into consideration at the time, would have finally addressed the issue of those appeals of individuals or entities that had ‘difficulty in [petitioning the Council] through their governments’.28

In fact, by the end of 2004, three out of the four de-listings approved by the Committee had been at the insistence of Sweden, in the notorious incident that had involved its Somali-born nationals. The fourth, Abdalla’s, came in December as part of a reduction in the sentence accorded by the German Federal Crime Office under the state witness rule. At this point, Barrett did not go as far as recommending an automatic delisting mechanism, independent of the Council, but voiced clearly that the due process

issue was closely related to the overall credibility of the List. The Committee, however, did not heed his recommendations and, in its own list of recommendations to the Security Council issued at the end of 2004, just restated that the body should ‘continue to address concerns regarding the transparency of its work and the human rights implications of the sanctions measures.’ In a list that contained eighteen points, due process concerns came in seventeenth place, just before a friendly reminder that country visits by Committee members should continue.

This apparent lack of attention on the part of the 1267 Committee is all the more surprising, given that by 2004 due process concerns in counter-terrorism – while not yet dominating the Council’s agenda of reforms – had been attracting an increasing level of attention in the UN system at large for at least two years. Rosemary Foot has noted how the Council’s recognition of the central role that human rights had to play in the larger global fight against terrorism was a matter of slow realisation and combined pressure by NGOs, UN human rights bodies and middle-sized powers. Secretary General Kofi Annan, for example, had joined in the ranks of those that stressed the need to balance security concerns with human rights imperatives in early 2002, after having initially shared Greenstock’s objections that human rights were beyond the limits of the CTC mandate. The UN High Commissioners for Human Rights, Mary Robinson and her successor, Sergio Vieira de Mello, had started linking an effective response against international terrorism with measures that upheld human rights and the rule of law in their briefings to the Council between September 2001 and September 2002. These concerns were finally incorporated in Resolution 1456 of 2003, which stated that domestic provisions adopted in implementation of Resolution 1373 had to ensure the ‘respect for human rights, refugee and international humanitarian law’. In itself only a small reference added at the bottom of the sixth paragraph of Resolution 1456, this mention of human rights in counter-terrorism came as ‘somewhat of a miracle’ and

contributed to the establishment of a pattern of reform that would spill over onto the 1267 regime.  

A grouping of like-minded smaller powers – in this case guided by Mexico – would spearhead the adoption of the reform, raising the issue before the Council in formal and informal meetings. The country’s representatives at UN headquarters would then lobby similarly minded smaller-sized powers to shift the balance in favour of the incorporation of the given norm-driven safeguards within the Council’s future resolutions, stressing the inherent link with the effectiveness of the counter-terrorist measures. After this initial recognition, the human rights argument would pass its ‘tipping point’ within the UN 1373 regime, enjoying the benefits of a ‘cascade-like’ effect, and becoming a regular feature of subsequent 1373-related Council’s resolutions. In the case of the sanctions mechanism, however, the route to reform was going to be less straightforward.

In May 2004, Muñoz appeared before an enlarged session of the Council to give the first of a series of three 120-day oral assessments on the activity of the Committee and the Monitoring Team, as required by Resolution 1526. In mid-March, Council members had finally agreed to a revitalisation of the mandate of the CTC, now assisted in its work by an executive directorate (CTED), but could not yet come to terms with the fact that the 1267 provisions were failing to win the support of the larger community of UN member states. The months between January and May 2004 had seen a 30 percent increase in the report submission rate, but sixty-eight countries – significantly including Iraq, Sudan, Libya and, curiously, Costa Rica – had still failed to report to the Committee. Addressing the causes of non-reporting – mostly a combination of lack of

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33 In the case of Resolution 1456, Mexico’s lobbying succeeded after winning over European member states in 2003. The group was then joined by Brazil, Chile, Costa Rica, Croatia, the Czech Republic, Ecuador, Liechtenstein, New Zealand, Nigeria, Norway, and Switzerland, and several other governments indicated that they would co-sponsor the resolution just before the vote. A similar attempt, made in early 2002 at the UN Commission for Human Rights, had instead failed. Joanna Wechsler, interview with author; Edward J. Flynn, interview with author, 5 December 2009; Eric Rosand, Alistair Millar, Jason Ipe, The UN Security Council’s Counter-terrorism Program. What Lies Ahead?, Report of the International Peace Academy, October 2007, p. 5.  
financial, technical and administrative resources – thus became the main priority of the 1267 Committee during the remainder of the year 2004.36

References to due process concerns in de-listing procedures were omitted from the text of Muñoz’s address, but the conceptual link between human rights and counter-terrorism, which had become a constant feature of the 1373 regime resolutions, was included in the closing paragraph where the Chilean representative quoted Annan’s 2002 speech before the Council.37 In a statement that was echoed, almost verbatim, by the representatives of Algeria, France, the United Kingdom, the Philippines, and Pakistan, the 1267 Committee Chair recalled that the ‘United Nations ha[d] an indispensable role in ensuring that the vigour with which States pursue various counter-terrorism efforts does not infringe on human rights, the rule of law and related tenets of democratic governance.’38 It was left once again to the European Union to voice due process concerns directly, assisted by the Costa Rican representative, Maria Elena Chassoul, who reminded Council members that ‘in order to facilitate judicial and police cooperation, it [was] essential that there be sufficient substantiated evidence and open judicial investigations concerning each and every person who appears on the list’, and going further to note that the ‘Inter-American Commission on Human Rights’ had been seized of the matter.39

This was the first time the issue of the justiciability of the 1267 regime was put on the record in such detail in Council proceedings. Between January and May 2004, 1267 Committee members had met twelve times informally and twice formally. No public record exists of these meetings, but it is probably not too off-the-mark to assume that the lack of guarantees in the delisting procedures had been discussed in relation to concerns about the identification of the designated individuals. This is even more likely given the shift in the human rights discourse in counter-terrorism that had occurred at Council level in only five months. ‘Human rights’ and ‘due process’ were mentioned only six times

during the January Council meeting, four times in connection with a European country and once by the representatives of the Philippines and Brazil respectively. In May, Council members mentioned both terms twenty-three times, including the noteworthy reference in the speech of the 1267 Committee Chair. This increase can be considered symptomatic of a conceptual change, which was manifesting itself at rhetorical level and mirrored closely the developments brought about by the human rights reform of the 1373 regime. For the time being, however, the key stakeholders – the United States, Russia and China – remained silent on the matter.

This combined trend of leaps forward in the 1373 camp and timid progress in the 1267 regime continued steadily for the remainder of the year 2004. On the 1373 front, non-P5 members used the summer months to pressure the Council to strengthen the human rights guarantees introduced by Resolution 1456 (2003) and reinforced by Resolution 1535 (2004), which created the CTED, the CTC’s new right-hand body. Beginning in July, EU member states started lobbying the Council publicly to finalise the appointment of the human rights expert in the Counter-Terrorism Executive Directorate.40 They also asked the CTC to coordinate more closely with the UN Human Rights Commission in Geneva.41 In September, delivering his second 120-day assessment before the Council, Muñoz touched upon the key human rights issue of the 1267 regime only inciden tally, as advised by the first report of Barrett’s Monitoring Team.42 By that time, the conceptual link between the overall quality of the List, the Committee’s work in the area of delisting and exceptions, and states’ willingness to implement the sanctions had been made, leading to a characteristic overlapping of motivational incentives to action on the part of member states. An investigation of this combination of utility-driven and norm-driven state behaviour underlying both ‘the principle of effectiveness and respect for the rule of law’ – as the French representative Michel Duclos aptly put it – will be the focus of the analytical section of this paper.43

True to the pattern that had emerged over the course of the year, it was left again to the same European actors to ask the Council for more. European countries kept raising

the issue of the delisting guarantees with the Committee Chair during his country visits to the continent, while their demands became more vocal during the Council’s dedicated session in mid December. The clock of reform was ticking in Europe as the Court of First Instance was expected to pass judgment on several cases related to the Consolidated List in the early months of 2005.\textsuperscript{44} Additional pressure was also coming from the UN Secretariat, in the form of the conclusions of the report of the ‘High-level Panel on Threats, Challenges and Change’. Annan’s brainchild on the future of the United Nations had examined the impact of key UN legal principles on the counter-terrorism sanctions regime and found them wanting. Panel members had thus advised the Council to establish ‘procedures to review the cases of those claiming to have been incorrectly placed or retained on [the] lists.’\textsuperscript{45}

Thus, four and a half years after the Council’s unanimous vote on Resolution 1267, a relative consensus had formed in the UN system at large that due process guarantees should be added to Consolidated List’s mechanism, lest the targeted sanctions lose all credibility. It would take an additional two years, however, for the due process issue to become a regular feature of the Council’s negotiations on the 1267 regime and for member states to reach an agreement on its first meaningful reform. This came in the form of Resolution 1730 (2006), which established a focal point within the Secretariat where individual delisting requests could finally be addressed.\textsuperscript{46}

2.2. \textbf{Broadening coalitions of support (2005-2006)}

According to the information on litigation provided by member states to the Monitoring Team, in December 2004 thirteen cases challenging the implementation of the UN anti-terrorism sanctions were pending before domestic and regional courts worldwide. In the European Union, applicants Abdirisak Aden, Abdulazziz Ali, Ahmed

\textsuperscript{44}In particular see Statement by Mr. Gunter Pleuger, Permanent Representative of Germany to the United Nations, in United Nations Security Council, \textit{verbatim} record, 5104\textsuperscript{th} Meeting, 17 December 2004, New York.


Yusuf, Omar Mohamed Othman, Chafiq Ayadi, Faraj Hassan and Yassin Abdullah Kadi, along with the Al Barakaat International Foundation, argued that the Council and the Commission had exceeded their powers in issuing the regulations enforcing the UN sanctions, violated the EU Treaties’ principles of proportionality, subsidiarity and of peaceful enjoyment of property, family and private life, as well as disregarded the applicants’ fundamental rights to a fair and equitable hearing, effective remedy and judicial control. In Italy, Nasreddin Ahmed Idris and its company sued the government and the Economy and Finance Ministry claiming that their inclusion on the Consolidated List had violated the European Union Treaty, the European Convention on Human Rights and the Italian Constitution’s guarantees of a right to property and freedom of economic initiative. In Pakistan, the Al-Rashid Trust filed a petition with the High Court of the Southern Province of Sindh asking that the evidence in support of the listing be disclosed. In Turkey, Kadi, Nasreddin and his Holding challenged the government claiming that they had been designated incorrectly, for political reasons and in violation of their human rights. In the United States, two charities – the Benevolence International Foundation and the Global Relief Foundation – and two money remittance firms, Aaran Money Wire Service and Global Service International, claimed that their listing by the US Government violated their rights to due process, freedom of speech, association and religion. By the end of 2005 all of these challenges had been rejected or dismissed by courts of first instance, but some were still pending before courts of appeal.

The European Court of Justice (ECJ), in particular, was now expected to pass judgment on the Kadi/Al Barakaat case after the Saudi businessman had appealed the dismissal of his delisting claim by the EU Court of First Instance (CFI) in September 2005. The CFI had found that Regulation 881/2002 –implementing the Consolidated List in Europe– fell outside the scope of the Court’s power of judicial review, which could be

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derogated for reasons of international peace and security. According to the CFI, therefore, the EU had competence to order the freezing of Kadi’s funds and had not violated his fundamental rights.49 Similarly, Kadi’s petition to the U.S. Office of Foreign Assets Control (OFAC) for reconsideration of his placement on the Specially Designated Global Terrorist (SDGT) list had been denied in March 2004. His claim had also been dismissed by the Istanbul Criminal Court of Peace in 2001, and in appeal by the 10th Division of the Turkish Council of State in 2002. In December 2005, however, Swiss authorities, operating outside the EU framework, accepted Kadi’s delisting request. A few months later, in a landmark decision that put the first nail in the coffin of the 1267 regime’s original structure, the Turkish Council of State annulled the decree adopted by the Cabinet to implement the freezing of assets in the country, finding it unconstitutional.50 It is around this time that UN Security Council and 1267 Committee members began monitoring the Kadi issue closely, sensing the disruptive impact that an ECJ ruling in favor of the plaintiff could have on state compliance with the Consolidated List worldwide. The U.S. State and Treasury Departments, in particular, took greater interest in the pending lawsuits, after having initially treated them as internal matters. By 2007, meetings concerning the fate of the Saudi businessman’s claim would take place at the Under-Secretary Level, while U.S. diplomats’ analyses of the outcome of the litigation forecast ‘trouble ahead’ for the 1267 regime.51

Thus the Kadi case became the symbol of the human rights controversy surrounding the UN terrorist list, precisely at a time when the human rights cause was

gaining traction in the UN counter-terrorism system and the predominance of the Security Council in UN counter-terrorism action was coming under attack. In the fall of 2004, Costa Rica had started lobbying the Council to set up a central counter-terrorism office under the authority of the Secretary-General, which would assume the main responsibility for the fight against terrorism within the UN framework and return the leadership in counter-terrorist action to the General Assembly. Seconded by the Swiss representative, the proposal was promptly labeled as ‘thought-provoking’ by the then president of the Council, ambassador Thomson of Great Britain; nevertheless, it was never entirely dismissed, occasionally resurfacing in the debates concerning both the predominant role that the Security Council had enjoyed thus far in setting the counter-terrorist agenda, and the outstanding conflict between Council resolutions and international human rights law.\textsuperscript{52}

The year 2005 began on a positive note on both counts. The Secretary-General’s recommendation for a “‘pan-United Nations” strategy on terrorism’ – issued on the one-year anniversary of the Madrid bombings – met the approval of several Council members, including the two European P5s, while the slow but ongoing operationalization of CTED saw the inclusion of a human rights expert among the main advisers of the executive director. An expert from the Office of the High Commissioner for Human Rights was also present at the High-Level Seminar organised jointly by Paraguay and the CTC to analyse how national legislation on terrorism could be brought into conformity with the provisions of Resolution 1373 as well as with international humanitarian law. Likewise, the due process issue dominated the reform agenda of the 1267 regime, either explicitly or in association with attempts to improve the identification mechanisms of the Consolidated List.

In March, drafts of a new 1267-related resolution – to be adopted by the end of July – started circulating among Council members. Three positions emerged on the procedural issue: a minimalist stance, championed by the United States; a medium-level proposal, which was supported by the 1267 Committee Chair and called for an improvement of the rules regulating listing, delisting and notification of statements of

cases; and a maximalist option, sponsored by Denmark, Liechtenstein and Switzerland, which advocated the creation of a full-fledged review mechanism independent of the Security Council. The U.S. draft, presented by Nicholas Rostow in the July 2005 session of the Council, stressed the need to increase the ‘dialogue between States and the Committee to strengthen Member States' implementation of the sanctions measures, [and called] on States to implement the Financial Action Task Force's 40 recommendations and nine special recommendations on terrorist financing.’ These suggestions were incorporated in article 7 and in the Annex to Resolution 1617 (2005), adopted unanimously by the Council on July 29. The Danish proposal went unheeded, but was not forgotten. It would resurface during the 2009 debates that led to the first major overhaul of the 1267 regime in the wake of the ultimately adverse Kadi ruling by the ECJ: the creation of the Office of the Ombudsperson to oversee delisting requests by designated individuals.

Resolution 1617 did clarify the notion of ‘association with’ Al Qaeda and the Taliban, called on states to provide a statement of case when proposing names to the Consolidated List and requested states to inform listed individuals and entities of the measures imposed on them. It did not quell, however, outstanding concerns that even in this improved form the listing and delisting procedures would not survive the scrutiny of domestic and regional courts. Barrett had been very explicit on this point in his Third Report to the 1267 Committee. The Monitoring Team had advocated amendments to the 1267 Committee procedural guidelines that would not impinge on the Council’s authority for de-listing, but would show member states’ due diligence and good faith in dealing with petitions from listed individuals. The Team asked, for example, that the Committee reach a decision within a defined period from the receipt of a petition, or that states be required to automatically forward requests for delisting to the 1267 Committee, independent of national policies or sympathies.

As Resolution 1617 did not provide any solution that could withstand an adverse ruling by the ECJ, pro-reform member states closed ranks in the fall and intensified their

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pressure on the Council to increase the procedural transparency of the listing mechanism. Facing a parliamentary enquiry before the Swiss Federal Council on the legality of the 1267 measures, Switzerland joined forces with Germany and Sweden to promote the drafting and implementation of more ‘satisfactory provisions’ for listing and delisting. Liechtenstein made a request to the Committee that the list of countries having made notifications regarding humanitarian exemptions be made accessible to all member states, so as to be able to share best practices and improve national implementation standards. When the Committee denied the request, the country’s representative to the UN, ambassador Wenaweser, protested in an unusually vocal fashion in support of Liechtenstein’s position. Other non-P5 members followed suit, in what was to become a particularly charged joint session of the Security Council, the last of the year 2005. Even the Pakistani representative sided with the pro-reform front. The human rights issue was mentioned 63 times in the course of the meeting, by as many as eleven delegations, clearly signaling that the key stakeholders would need to concede more if they were to finally allay the concerns of non-P5 members and of the larger UN community alike.55

On the Secretariat’s, Human Rights Commission’s and General Assembly’s fronts, in fact, the human rights offensive had continued undeterred, picking up steam particularly toward the end of 2005. In March, the General Assembly issued the third in a series of resolutions asking Annan to submit a report on human rights protection in counter-terrorism to the Human Rights Commission, on the occasion of the Assembly’s September Plenary Meeting. In July, the High Commissioner in Geneva appointed a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: the Finnish law professor Martin Scheinin, who would become a key figure in exposing the faults of the 1267 regime. In September, the World Summit Outcome Document called once again upon the Security Council, with the support of the Secretary-General, to ‘ensure that fair and clear procedures exist for placing individuals and entities on sanctions list and removing them, as well as for granting humanitarian exemptions.’ Pursuant to that mandate, Annan commissioned the Office of Legal Affairs of the Secretariat to begin an interdepartmental process to

develop reform proposals and guidelines on the matter. In the meantime, however, he
could not help but notice with a tinge of disappointment that in contrast to the flurry of
activity on multiple UN fronts, the 1267 Committee had so far only managed to approve
a partial revision of its Guidelines.

Discussions of listing and de-listing dominated the Council’s counter-terrorism
agenda as well during the following year. Germany, Sweden and Switzerland took once
again the lead in pressing the Council for significant improvements. In March, the
Swedish Mission hosted a luncheon at the UN to mark the unveiling of the Watson
Institute’s report on the ‘Strengthening of Targeted Sanctions through Clear and Fair
Procedures’. Commissioned by the governments of the three European countries, the
study contributed to stirring up the waters at Council-level, underscoring the politicised –
or ‘hegemonic,’ in one scholar’s words – nature of the mechanisms for designation. The
report’s findings became a catalyst around which different positions on the 1267 reform
coaalesced within the UN-wide system. European countries, in particular Sweden,
Switzerland, Germany, Austria, Liechtenstein, and Greece, sided with the authors and the
United Nations High Commission for Refugees (UNHCR) in advocating more radical
redress mechanisms, ranging from the appointment of a UN administrative focal-point to
handle all delisting and exemptions requests to a full-fledged review mechanism
independent of the Council. Voicing the only dissenting opinion, the Russian
representative claimed that any such option would undermine the political authority of
the Security Council, delegating too much power to national courts. Significantly, the
remaining P5 members expressed no immediate views on the content of the Watson
recommendations. It was left to the US Mission at the UN to take the pulse of both the
larger UN constituency and the reform’s key stakeholders in subsequent bilateral
meetings. According to USUN records, Washington found the report’s recommendations
too extreme, believing that an eminently political process such as that of UN sanctions
designation should not be subject to legal overview.

Despite US Ambassador John Bolton’s best efforts at giving as little resonance as
possible to the report’s findings, negotiations resumed within the 1267 Committee on the

56 Jörg Friedrichs, ‘Defining the International Public Enemy: the Political Struggle behind the Legal Debate
requested further revisions of the listing and delisting guidelines. By May, discussions were still ongoing but a consensus had been reached on the primacy of the due process issue, which was taken up at great length by the Chair of the 1267 Committee and, finally, by all member states. Representatives of Germany, Sweden and Switzerland had been called to address the Committee in mid-May, while the pressure of the pro-reform front gradually increased over the summer months. By June, after the Secretary-General had appealed to the sanctions committee to review its practices, the Security Council finally released a statement on its members’ commitment to reform the List. US representatives had the upper hand in what the Committee Chair labeled a ‘complex negotiation process’, proposing a package of recommendations that favored the minimalist focal point option, which was ultimately incorporated in Resolution 1730 of December 19. Shortly afterwards, several reform recommendations advanced in the Watson report were adopted in Resolution 1735. In particular, the document set ‘minimal standards for statements of case, created a provision for the public release of information, and established a procedure to improve deficiencies in notification, [providing] [t]argets […] with a redacted statement of case indicating the basis for listing.”\footnote{Thomas J. Biersteker, Sue E. Eckert, ‘Addressing Challenges to Targeted Sanctions. An update of the “Watson report”’, The Watson Institute for International Studies, October 2009, p. 12-14.} The Resolution also extended ‘the No Objections Procedure timeframe from 48 hours to 5 working days […], allowing more time in capitals for a serious review of the case.’\footnote{\textit{Ibid.}, p. 14.} When Council members assembled for the final open discussion of the year on counter-terrorism, on December 20, only Cuba, Iran and Syria failed to refer to the justiciability issue and related human rights safeguards as one of the key concerns of Council action against terrorism.

Representatives of the United States, Russia and China had finally agreed to the pro-reform, human rights compliant narrative of the more active European members, albeit with caution. Passing its tipping point within the 1267 regime reform process, the human rights issue had become a ‘moral imperative’, in the words of the new Committee Chair, Ambassador Mayoral of Argentina, albeit an imperative whose safekeeping closely depended on the effectiveness of the overall sanctions mechanism. As a result, while the coalition supporting the reform front had indeed broadened to the point of
including the Council’s major stakeholders, the option ultimately favored was a ‘modest and weak attempt’ at providing a functioning redress mechanism for the listed individuals. Negotiations on more comprehensive institutional changes would occupy the Committee’s deliberations for another two years.\(^{59}\)

2.3. **Reforming the institutional structure (2007-2009)**\(^{60}\)

The focal point became operational in March 2007 and contributed to the improvement of the overall accessibility of the Committee Secretariat for the listed individuals.\(^{61}\) It did not, however, have the authority to handle delisting requests, provide further information and notify designees, as the authors of the Watson report had suggested. In the course of 2007, doubts concerning its effectiveness thus became the new constant feature of the criticism levelled against the UN Consolidated List. An October 2007 Report of the International Peace Academy suggested that little could be expected of the new mechanism, since the ultimate decision to delist still rested with the key 1267 Committee members. The Monitoring Team appeared to be fully aware of the issue, and Barrett recognized in his reports to the Council that despite the reform the regime was carrying on ‘with limited support’, while the challenges before domestic courts continued.\(^{62}\) USUN records from this time show that the P5’s main concern was, in particular, the impact that an unfavourable ruling by the ECJ in the Kadi case could have on the implementation of the sanctions in European Union member states, especially since some prominent European listees, such as Nasreddin, had profited from the window of opportunity offered by Resolution 1730 to secure removal from the List in November


\(^{60}\) It should be noted that after 2006 there are no open records available for the periodical reports of the Council’s counter-terrorism bodies’ Chairs. What follows draws from semi-structured interviews with key stakeholders, US embassy cables, Monitoring Team reports, policy documents and press releases.

\(^{61}\) For a review of Focal Point statistics and performance see the updated Watson Report, p. 13.

The ECJ ruling, expected for the end of 2008, thus dictated the tone of negotiations within the 1267 Committee, featuring all too familiar patterns.

On one side, US representatives – fully aware of the impossibility of influencing the Kadi ruling – lobbied UN and European officials to agree on a least common denominator for reform that would safeguard the effectiveness of the sanctions and render them foolproof enough in their human rights standards to withstand an adverse judgement by the ECJ. On the other side, countries that had championed the regime reform since its very early stages closed ranks to press for a more comprehensive overhaul of the existing procedures, in particular asking for an external review mechanism modelled after the World Bank inspection panels that would ensure fairness through independence. In May 2008, Denmark, Germany, Liechtenstein, the Netherlands, Switzerland, and Sweden came together to form the group of ‘like-minded states’ and advanced the external review mechanism proposal in anticipation of the Council’s June vote on a new resolution extending the mandate of the Monitoring Team. Resolution 1822 (2008) as usual received consensual approval, but attracted the lone criticism of the Costa Rican representative for failing to send a ‘stronger message […] with regard to the need to improve the current procedures.’ This somewhat restrained statement hid a stand off with the US mission at the UN, which had fiercely opposed Costa Rica’s requests to ‘amended operative paragraph 28 [of Resolution 1822] to suggest that the Committee’s procedures for listing [were] not in fact fair and clear,’ thus providing ‘further fodder for the criticism about the lack of “due process” in the Council’s sanctions regimes, while taking the focus away from the significant improvements to the Committee’s procedures.’ Resolution 1822 did contain new requirements that had the potential to drastically improve the 1267 sanctions procedures. It requested, in particular,

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64 Belgium and Costa Rica associated with the group in 2009.


that all states conduct a review of all the names on the Consolidated List – including those of allegedly deceased individuals – within two years and then on a three-year basis, and that narrative summaries for all the listings be made accessible on the Committee’s website.

The review started in late 2008 after lengthy negotiations on the establishment of common standards, but turned out to be a ‘serious, thorough and laborious process’ for which considerable effort [was] expended by the committee members, staff, member states, and national governments. By October 2009 the process had been initiated for 422 of the 488 names, while the removal of eight individuals and four entities from the Consolidated List could directly be associated with improvements introduced by Resolution 1822. In October 2008, however, the Kadi ruling came as a reminder that the sanctions mechanism still did not satisfy the right to an effective remedy according to domestic judicial standards. The ECJ declared both Common Position 2002/402/CFSP and Council Regulation (EC) No. 881/2002 – which implemented the UN sanctions framework at EU level – in noncompliance with the Union’s basic human rights and due process requirements. Shortly before the ruling, the human rights rapporteur in counter-terrorism called for a new and more aggressive reform to the regime in line with the suggestions of the group of like-minded states, asking for the introduction of a review body composed of independent experts that were to be part of the Security Council’s decision-making procedure. An even more radical option entailed the abolition of both the 1267 Committee and the list of Al-Qaida/Taliban terrorists, to be followed by a transfer of jurisdiction to the Counter-Terrorism Committee’s on the basis of Resolution 1373 (2001). According to this proposal, the burden of decision in the listing and delisting cases would shift to member states’ internal judicial systems, thus avoiding legal obstacles for effective remedy, while the United Nations would provide expertise in identifying potential listees.

67 Updated Watson report, p. 16.
In the fall of 2008, negotiations on a more drastic reform of the 1267 regime thus resumed once more, going hand in hand with what was to be perceived in New York as a paradigmatic shift in the position of the US administration on the topic. In the course of an event sponsored by Liechtenstein at NYU in November, a representative of the US Office of Foreign Assets Control finally publicly acknowledged international concerns about the lack of transparency and due process associated with the 1267 list, while stating that sufficient mechanisms for review were available domestically. According to a senior UN human rights expert, US attitudes as regards the UN sanctions list had evolved from the lack of interest on the subject that had characterized the first eight years following 9/11 to the more proactive stance that would mark the first months of the Obama administration. The State Department in particular came to realize that in order to salvage the sanctions tool the country would have needed to change its perspective on how it viewed and used it, thus partially accepting to agree with the more radical pro-reform front that had formed within the Security Council.

The months that separated the Kadi ruling from the adoption of the first structural reform of the 1267 regime, voted in December 2009, were therefore animated by the usual struggle between the supporters of a truly independent review mechanism, as suggested by Scheinin and the coalition of like-minded countries, and a more moderate option that would preserve the primacy and the decision-making autonomy of the Security Council. The solution that was ultimately favored – the establishment of an Office of the Ombudsperson to assist the 1267 Committee in evaluating requests for the delisting – was clearly a compromise. According to a table of options for reform that Biersteker and Eckert circulated at the time, the Ombudsperson idea received a good score in terms of the overall potential trade-off between human rights and effectiveness. Compared to a full-fledged judicial review system consisting of a new subsidiary body

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created by the Security Council and with delegated authority, however, the option lacked both investigative and executive powers, and could not alone grant relief.\textsuperscript{72} The Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights similarly released a report calling for the introduction of a genuinely ‘independent judicial or quasi-judicial complaint mechanism, a clear listing and de-listing process, and strict time-limits for listing decisions.’\textsuperscript{73} Like-minded states aligned themselves with those positions while P5 members, in particular the United States, were still reluctant to excessively dilute the authority of the Council. It is not surprising, therefore, that on the eve of the vote Council members were unsure as to the outcome.

During the fall of 2009, rumors circulated at UN headquarters that the calls for heightened transparency would not lead to a significant reform.\textsuperscript{74} At the beginning of December 2009 Mexico, the country that had championed the pro-human rights shift in the 1373 regime, sat again on the Security Council and organized an off-the-record ‘Arria formula briefing’ to discuss the 2009 Eminent Jurists Panel Report. Not only was the turnout unprecedentedly high for this type of event – which normally does not attract as many officials – but ‘up to 12 members made statements, and the meeting lasted for more than two hours, signaling an increased level of attention’ for the issue on the part of the larger community of UN member states.\textsuperscript{75} Hailed as a significant step forward by members of the 1267 regime, such as Barrett, Resolution 1904 was then adopted unanimously by the Council on December 17, showing both apparent widespread consensus among Council members and the room for action left to some of its smaller-sized powers. The draft of the resolution was submitted by Austria, Burkina Faso, Croatia, France, Japan, Mexico, Turkey, the United Kingdom, and the United States, and redacted by the United States.\textsuperscript{76} On the day of its adoption the US Ambassador to the UN, Susan Rice, noted how this marked a real and unprecedented success for all members of the Council, which had cooperated to solve a ‘very complex and difficult issue’ and had

\textsuperscript{72} Updated Watson report, p. 29.
\textsuperscript{74} Senior legal expert, Permanent Representation of Mexico to the United Nations, interview with author, 22 October 2009.
\textsuperscript{75} Senior human rights activist, interview with author. Senior UN human rights expert, interview with author, both December 5, 2009.
\textsuperscript{76} United Nations, Security Council, 6247\textsuperscript{th} meeting, 17 December 2009.
reinvigorated the 1267 sanctions regime. During the Council’s meeting the United States was praised by the Austrian representative and 1267 Committee Chair, Mayr-Harting, for its leadership in the sponsorship of the document.

In the following and final section of the paper, while analyzing the motivations underlying the participation in the reform process on the part of the actors involved, I will contend that US sponsorship of Resolution 1904, rather than being an indication of a more proactive commitment on the part of the country to the due process guarantees in the 1267 regime, is the visual sign of the cumulative effect of group-induced and image-related pressures, i.e. the phenomenon I labeled ‘social influence’, and cost-benefit calculations related to utility maximization.

3. Analytical implications of the reform process

The 1267 sanctions regime has proven to be a relatively malleable tool in the hands of P5 Council members, showing a degree of institutional adaptability and potential for change, as the preceding section of this paper has demonstrated. Despite its numerous and ongoing shortcomings, what began as a vaguely drafted resolution at the end of the 1990s evolved into one of the most sophisticated and procedurally advanced sanctions mechanism in the UN system, with codified operational routines, a highly professional staff and active involvement on the part of member states. For analytical purposes, the case of the reform process of the 1267 sanctions regime is also important theoretically, as it allows us to shed light on state preference formation patterns within international institutions. In particular, the presence of human rights related issues at the core of the negotiation process permits us to unpack the notion of social influence as originally theorized by Johnston and Checkel, and analyze in-depth the dynamic relations between concerns for image and/or reputation, i.e. concerns for principled action and/or cost-benefit calculation behind state action. Looking specifically at the negotiating behaviour of the United States, United Kingdom, and Italy in the context of the reform process, I posit that the two motivational drivers to action are indivisible and that what could pass for less than pristine variable selection is a repeated pattern in the interaction between these states and the international institution. The social influence concept as
defined at the beginning of this paper, i.e. pro-norm behaviour elicited by fear of shaming or in search of approval, applies to these cases only insofar as it is capable of capturing the dynamics of back-patting and opprobrium inherent in the social interaction within the institution, whereby actors are concerned about the benefits that are incurred from being seen as a co-operator or an active pro-social member of the group – in this case the pro-reform camp – and the related social cost of possible denial of ‘the actor’s identity as one deserving of back-patting,’ linked to the stigma of opposing inherently good human-rights related reforms. The institution as social environment acts as a magnifying glass: there is still opportunity for free riding but the scrutiny each player is subject to is ‘more intense’ and in a sense proportional to its relative power status within the institution.

U.S. involvement in the reform process is, to this end, emblematic. Resolution 1390, which gave the 1267 sanctions regime its current form, was in fact the brainchild of the United States, or, as remarked by senior human rights expert Joanna Wechsler, an extension of presidential Executive Order 13224 of September 23, 2001, which introduced domestic sanctions against terrorists and their supporters.77 In the country, the designation and asset freezing procedure is seen as an administrative process, and the standard of evidence is different than what is required in criminal proceedings as it can include classified information reviewable by a judge ex parte and in camera. An interagency group, the Terrorism Finance Policy Coordination Committee, decides on how to proceed in terrorism cases and submits designations to the Office of Foreign Asset Control (OFAC), which keeps an administrative record of the classified and unclassified evidence. The procedure offers domestic guarantees and a redress mechanism for the designated individuals. ‘Before designation the administrative record is reviewed by lawyers at OFAC and the U.S. Department of Justice (USDOJ) to ensure legal sufficiency, […] a public statement is made giving the reason for designation and […] a statement of the case is presented to the 1267 Committee and G7 members.’ Due process in designations is also maintained by the Administrative Procedures Act, which ‘allows

for an administrative and judicial appeal process.’ Listees can apply to OFAC for de-listing, ‘which leads to an administrative review’.\textsuperscript{78} If OFAC denies de-listing, the designation can be challenged through a judicial review in a U.S. Federal District Court. These two characteristics – administrative nature of the sanctions and domestic redress mechanism – were grafted into the 1267 regime, which was, not unlike Resolution 1373 with its capacity-building focus, an attempt made by the Bush administration to exploit the window of opportunity offered by the 9/11 attacks to harmonize counter-terrorism legislation and action worldwide under the cover of a legally-binding Chapter VII resolution.

The narrative of the human rights orientated reform process that both regimes have undergone since 2001 shows several similarities and one major, but significant, difference. As Greenstock admitted, human rights were excluded in the first drafts, as P5 members perceived that such concerns should not be addressed by the Council and would find more appropriate loci of discussion in other UN subsidiary bodies. Both resolutions were essentially seen as effectiveness-orientated tools whose success was to be measured by the level of compliance elicited across member states’ capitals. For instance, countries proved eager to boast about the number of submissions they made to the UN list, but were much less so in detailing the number of individuals they de-listed or the procedures adopted to review their cases. Human rights-compliant guarantees were introduced in 1373-related resolutions starting in 2003, thanks to the entrepreneurial role of the Mexican representative in New York, but widespread recognition of the necessity to tackle the issue in the 1267 camp came only as late as 2006, albeit following a similar pattern: Policy entrepreneurship rested with P5 members and in particular the United States and the United Kingdom. International institutions, such as the UN, acted as ‘policy export facilitators’, contributing to the diffusion of the regime or related practice exported by the policy-setting countries. Once the policy became ‘property’ of the international body, however, it started living a life of its own, becoming subject to the normative agency of smaller-sized powers, non-state actors, and UN bodies, which introduced change, defied resistance to reform, institutionalized the practice and the

\textsuperscript{78} ‘Treasure Officials Meet With Belgian and EU Officials On Terrorism Finance’, Embassy Brussels, 30 March 2006, REF. 06BRUSSELS1022.
safeguards against normative violation (of due process guarantees in this case), and ‘sold’ the whole process thanks to a voting system, that of consensus, that by exercising pressure toward conformity made it inherently difficult for reluctant or simply uninterested states to defect. Defection would have elicited opprobrium and the consequent denial of one’s identity as a human rights abiding country (the boomerang effect).

The reform of the 1373 regime was a win-win situation, as the inclusion of human rights compliant references greatly enhanced the legitimacy of the regime in the eyes of the larger UN constituency while practically leaving its structure unaltered, and thus only marginally affecting the regime’s effectiveness; on the contrary, a modification of 1267 procedures was far from an optimal outcome for a country like the United States, as USUN and Council meeting records show. As customary in all 1267 related resolutions, Washington sponsored each draft but was not necessarily behind the reform initiation process, unless this was, as in the case of resolution 1617 (2005), oriented toward effectiveness. Rostow’s statement before the Council during the July session that saw the adoption of Resolution 1617 summarizes quite clearly the position of the country up to that point: domestic guarantees were in place that allowed designated individuals access to appropriate administrative procedures and a judicial redress mechanism; Council members should not, therefore, permit that ‘sound, lawful counter-terrorism measures’ be undermined ‘with specious arguments about their collateral impact’, i.e. the infringement upon the rights of those added to the Consolidated List that a coalition of like-minded states in its embryonic stage was trying to safeguard. US negotiators maintained this position until the eve of the 2009 vote on Resolution 1904, but gradually began to adopt a cautious pro-reform stance in their public statements after the release of the Watson report in the spring of 2006, culminating in their first public acknowledgment of the justiciability issue before an open session of the Security Council the following December. At the time, Washington was acting on two fronts, trying to shift the opinion

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79 A human rights expert, Edward Flynn, was added to the CTED and a rapporteur, Scheinin, appointed in 2005, but the basic tenets of the resolution did not change and up to 2007, Preliminary Implementation Assessment (PIAs) matrices did not require inspectors to verify the human-rights compliance of the countries visited. In 2009, the human rights expert had to be invited by local authorities in order to be able to join the country visits team.

80 5229th Meeting, 20 July 2005.
of the report’s authors to the minimalist reform option camp on the one hand, and giving in publicly to the pressures mounting within the Council, the Assembly and the Secretariat on the other hand. The US Mission at the UN, guided by Bolton, was also trying to contain the reputational damage that such a public release of the Watson report’s findings had inflicted on the 1267 regime, suggesting that ‘upcoming events that could potentially surface the issue of due process’ – including the publication of the more moderate Fassbender report commissioned by the OLA – should henceforth occur with ‘minimal fanfare’ and without an official UN release, so as not to give the impression of having the organization’s ‘imprimatur’. Council members should on the contrary address the public knowledge gap surrounding the existence of appropriate domestic redress mechanisms within member states. The US DOS was thus managing the due process issue as it would have a public relations crisis.

Analysis of US-EU discussions on the matter within the U.S.-EU Terrorist Financing Troika further help reinforce this point. In 2007, US negotiators increasingly approached EU officials to gauge the possible impact that a likely adverse ruling by the ECJ in the Kadi case would have had on the implementation of the sanctions on the other side of the Atlantic, as it was perceived that loss of full European participation in the regime would have negatively affected the sanctions worldwide. Later on, the signature and entry into force of the Lisbon Treaty, which strengthened the political authority of the European Parliament, added one extra piece to the mosaic of possible sources of European aversion to the sanctions regime. To assuage the Court and provide evidence that US designation procedures adequately protected individual rights, the US and the EU jointly released a statement in June 2007 on ‘Fair and Clear Procedures in Targeted Sanctions to Combat Terrorist Financing’. Washington also promoted U.S.-EU terrorist financing practitioner workshops in order to ‘educate[…] a cadre of experts on [US] procedural protections,’ so as to demonstrate ‘attention to protecting designees’ procedural rights,’ and ‘sway designation-wary states.’ Shortly before the adoption of Resolution 1904, the US Mission in Brussels suggested that US and EU terrorist financing experts draft an updated public outreach statement and make it a practice to ‘incorporate certain standard phrases extracted from such statement into [their]

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81 Ibid.
designation notification demarches.'

Similar attempts at clarifying the procedural fairness of US designations and of its related support of the status quo in the UN 1267 regime were conducted on a bilateral basis in several European capitals, as shown by US State Department records.

These same records give weight to the perception, widespread at UN headquarters on the eve of the 2009 adoption of Resolution 1904, that the positive outcome of the vote was not pre-determined. During the spring and summer of 2009 US negotiators in Brussels and New York fought against the proposal of an independent review mechanism, as advanced by the group of like-minded states, the human rights rapporteur and the Watson Institute, which released an updated version of its famous 2006 report in May 2009. The upcoming July-December Swedish Presidency of the European Union, one of the founding members of the like-minded states coalition, gave US officials sufficient reason to expect that the issue would have been pressed forward for the duration of 2009. Publicly, DOS representatives at the UN were ‘voicing enthusiasm in taking on a new role in the 1267 Committee as “coordinator[s] of the transparency and media outreach working group”’.

In camera, US officials worried about EU insistent proposals for a more radical overhauling of the regime. While debates were still ongoing in the EU’s foreign affairs terrorism working group (COTER), US diplomats voiced concern that public conferences on the continent routinely featured ‘European officials who question[ed] the legitimacy of the UN process,’ referring inter alia to the checks and balances mechanisms that some smaller EU member states had advocated for the UN in San Francisco in 1945. The US Deputy Chief of Mission in Brussels, Christopher Murray, suggested to Washington that the US should champion a concerted ‘public diplomacy campaign by the UN’, in order to influence the public and the courts to better understand [the] improvements to UN sanctions procedures’ brought about by Resolution 1822 (2008).’ This point should also be raised, he said, summer during the G8 Lyon-Rome meetings, where Foggy Bottom officials were expecting to receive the support of at least the British and French delegations, traditionally the guardians of ‘UNSC

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prerogatives in EU venues.’

The UK position, in particular, had been consistent to that point with US expectations. British representatives had shared US preoccupations with preserving the authority of the Council in the 1373 regime, and had cautiously adhered to the pro-human rights discourse in the 1267 Committee meetings only when put on the spot as spokesperson for the European Union, during London’s 2005 presidential stint at the EU Council. In 2007, HMG had sided more closely with the United States after a rift had opened with France and Russia on a FCO request for a blanket exemption to humanitarian exceptions, which the Council had previously granted to Washington in 2003. Similarly pressured by the supporters of the independent review mechanism option, FCO officials spent the spring and summer of 2009 conducting a ‘cost-benefit’ evaluation of the effectiveness of the sanctions mechanism, as reformed by Resolution 1822, versus both its capacity to withstand an adverse court ruling in a new Kadi case pending before the European Court of First Instance and the practical feasibility of creating an independent review mechanism within the Council. In the end, there is reason to believe that London acted as a mediator between the minimalist and the maximalist positions, pitching the Ombudsperson solution to the United States and allowing Washington to claim ownership of the draft as at the time the ‘US had a bad reputation’ as regards the due process issue. In November, US Deputy Head of Mission to the UN, Ambassador Alejandro Wolff, thus announced that the Council would begin negotiations on a new resolution to back-up the 1267 mechanism, noting that Washington believed that there was ‘room to improve the way in which the 1267 Committee decide[d] to list individuals and how it considere[d] requests from those seeking to be removed from the list.’ Consequently, the new resolution was going to ‘take additional steps to ensure that the process for listing and delisting individuals [was] as fair and transparent as possible.’ During the Arria formula briefing that preceded the December vote, Ambassador

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84 EU Terrorism Sanctions: Trouble Continues’.
85 ‘UK Studying Range of Options for 1267 Sanctions Review’.
86 Christopher Michaelsen, former Human Rights Officer (Anti-Terrorism) at the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) interview with author, EUI, Florence, 18 June 2012.
Benjamin, the newly appointed head of counter-terrorism for the State Department, further stressed the point that the United States wanted to reform the 1267 procedures and had taken the lead in drafting the new resolution.88

Stepping back for a moment from the narrative of events and going back to the paper’s original claims about social influence, one needs to probe whether the evidence is then compelling enough to refute the current ‘state of the art’ theorization of the concept. The main puzzle, then, is why the United States (and the United Kingdom, as well as Italy) joined the pro-reform camp and devoted efforts to be seen as pro-active in sponsoring the reform and asserting compliance with the due process standards. Key to understanding the complex nature of institutional influence is the issue of whether one would have detected the same outcome in the absence of interaction with the organization and the related peer-pressure mechanisms. Would the United States have agreed to a reform that imposed material costs, limited the regime’s effectiveness and the US freedom of action in designating entries to the list in the absence of the psychological pressure exercised by the institutional environment?

There is no evidence that the country pushed for or accepted pro-human rights changes to the 1267 regime (and, similarly, to the 1373 mechanism and the overall ‘balance of power’ in counter-terrorism between the Assembly and the Council) in the absence of external pressures. It is clear from US statements, both public and private, that the country did not take any initiative at reform initiation unless otherwise solicited by the larger UN constituency of member states and public opinion. It is not that US representatives did not believe the claim to be intrinsically good – which would justify a diagnosis of normative social persuasion – but that they were convinced that the criticism did not apply given that redress mechanisms were in place domestically, as shown above, and that the strictly non-judicial nature of the sanctions did not justify such adverse reactions. In May 2009, Deputy Permanent Representative DiCarlo thus reminded the Council that its members ‘must remember that while the decision to impose [1267] sanctions [was] taken very seriously, […] it [was] not a judicial process,’ but rather, in Timothy Crawford’s words, an inherently political one, to which the norms and

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88 Incidentally, officials at the Under-Secretary level, such as Ambassador Benjamin, would not normally attend informal Arria formula briefings. Diego Arria Salicetti, interview with author, 26 March 2010.
procedures of judicial processes did not apply. The language of Resolution 1904 and of Rice’s statement after the vote, which significantly does not mention due process at all, reinforce this point.89

These findings fit very well with what scholars of US exceptionalism describe as the country’s ambivalent attitude of the country toward human rights in general, and international legal human rights standards in particular.90 Assumed as inherent in American values, constituent parts of America’s innermost conception of its own identity, human rights are nonetheless an aspect of official behaviour and as such subject to what Sarah Sewall describes as an underlying ‘utilitarianism streak’, often used to justify inconsistent action.91 As to the nature of this inconsistent behaviour – all too clearly witnessed in the case of the 1267 reform process – it resonates well with Sewall’s additional claim about the divorce between clear normative expectations and the nebulous nature of norm compliance that surrounds a norm life cycle. US representatives, as well as 1267 Committee and Monitoring Team members, were fully aware that extending due process guarantees was the ‘right thing to do’; however, the oughtness of the norm did not translate into action as they perceived their human-rights abiding countries to be in compliance with the principle, even though concretely they were not. These assertions hold in the cases of the other two countries that are the focus of this analysis, the United Kingdom and Italy. In a sense, their capitulation before the pro-reform camp is an inverse function of their relative power status within the Council, that more or less sheltered them from the moral spotlight that like-minded states and the NGO community put on the United States. Thus, Britain would have not acted independently had it not been for the exogenous pressure of European member states, which increased exponentially when the country assumed the Presidency of the Union, while Italy’s proactive stance in favor of a truly independent review mechanism, of which further will be said shortly, does not seem to find other justification than a concern for image in the

year of its G8 Presidency, after the country’s all but lethargic participation in the Council’s deliberations during its two-year stint.

Conversely, evidence in support of the social influence claim is abundant. Acceptance of the pro-norm reforms within the 1373 regime and of the Global Counter-Terrorism Strategy, which irremediably diluted the Council’s authority in counter-terrorism matters, cannot be explained with considerations for cost-benefit maximization of any other utility but that of the countries’ projection of their own perceived identity onto the international stage, that is their image. Analyzing voting records within the UNGA Assembly, Johnston found that for a novice often subject to naming and shaming, such as China, abstention is a far more appealing and face-saving option than an outright negative vote, especially when an overwhelming majority of Assembly members support a given motion.

Voting in the case of the reform processes analyzed in this paper happened under very similar circumstances. However, the countries under examination were not novices, but established members of the liberal democratic community of states, for whom human rights and multilateralism were defining principles of their foreign policy and national identity. That identity was jeopardized by the combined weight of public opinion, effective coalition building on the part of smaller-sized powers, a voting system that by employing the silent procedure in fact discouraged dissent, and the exposure that any issue related to counter-terrorism and human rights received, both under the Bush administration and later after the transition to the supposedly more pro-UN Obama White House. Hence the need for the DOS to educate foreign officials to the due process guarantees in place in the US, to contain bad press and subscribe to a general pro-due process narrative in public statements. Interviews with key actors, such as the Deputy UN Secretary General, Robert Orr, the UN’s special rapporteur Scheinin, UK cabinet members, Italian foreign ministry officials, and State Department diplomats also substantiate this point. In particular, this claim finds additional confirmation in these domestic officials’ need to actively justify a behaviour that was fundamentally at odds with their understanding of their own identity as human-rights abiding countries.

Evidentiary support also comes from Italy’s approach to the reform issue. While the country is not recognized as having played any propositional role as regards the call
for reform of the system, it did act more forcefully in the months leading to the June 2009 G8 summit, when it circulated among G8 members a draft proposal for the establishment of an independent judicial review mechanism. This belated interest in the justiciability issue can only be associated with the international exposure that the country was receiving at the time on the occasion of the G8 summit in l’Aquila. In the Nasreddin and Nada cases – two of the main legal challenges that brought the 1267 regime to the attention of the Italian courts and of the opposition parties in the Parliament – exchanges between the Italian MFA and the US Embassy in Rome show that Ministry officials were concerned for the public relations backlash that would follow should the country oppose a de-listing, as recommended by the public prosecution. In 2007, Italian officials worried about the blame and thus asked US colleagues in the capital to oppose the delisting on their behalf, as it would be counterproductive for Italy, from an image perspective, to do so on its own. US officials refused on the same grounds.

In the explanation of institutional effects, however, there is one last hypothesis to consider that does not conform to social influence claims. That is, that the actors initiated or agreed to the changes because the effectiveness of the regime was at stake. This claim would falsify the social influence hypothesis, giving support to analyses that look at ‘reputational benefits for immediate exchange relationships acquired from cooperation’. In other words, giving leverage to rationalist explanations that would see in the pro-reform behaviour the ‘most useful thing to do’ to achieve a specific goal. There is a lot of evidentiary support for this hypothesis in the USUN records that comment on the reform process. For example, Rice’s cable to the State Department in the months leading to the 17 December 2009 vote clearly gives leverage to an interpretation that would see the US bowing its head to the ECJ in order to save the regime, albeit accepting a slight reduction in its effectiveness. Sections of the ambassador’s analysis are worth quoting in their entirety:

92 Security Council, verbatim record, 5928th meeting, 30 June 2008; Fausto Zuccarelli, Anti Mafia Division, Ministry of Justice, Rome, interview with author, April 19, 2009; Armando Spataro, Deputy Chief Prosecutor for Counter-Terrorism, Court of Justice, Milan, interview with author, April 22, 2009.
94 Johnston, Social States, p. 112.
‘Would this package of proposed enhancements satisfy international courts, especially in Europe? Would it stop the slow erosion of this tool's perceived legitimacy? The answers are unknown. These measures, however, combined with a redoubling of U.S. efforts to scrub the 1267 List of inappropriate entries, would go far toward restoring confidence in the regime and heading off more radical and dangerous proposals. Although the lack of independent review will remain a concern for many, these enhancements are forward-leaning enough to impress many critics and courts, even if they do not satisfy all.

But salvaging this tool will require something of a paradigm shift in how the United States views and uses it. New safeguards will probably make it harder to designate and/or retain on the list some individuals whom the United States believes are linked to al-Qaeda. This will be particularly true in cases where we lack recent and convincing declassified information to justify a designation. The 1267 List will likely be pared down from the five hundred or so names now on the List. Instead of viewing this consolidation as a failure to designate terrorists, the United States should welcome the emergence of a smaller -- but much more credible and better implemented -- List. The preservation of the tool, and the global consensus it represents, is far more important than the designation of a handful of marginal figures whom we can always still target through our domestic sanctioning authorities.

If we fail to accept this shift, then the 1267 sanctions regime will remain mired in critical debate, fail to evolve in pace with the threat and gradually atrophy as states shy away from using and defending a discredited regime. If we successfully adjust, however, the al-Qaeda/Taliban sanctions regime can endure for yet another decade and the United States can renew and
fortify its commitment to using the United Nations and other multilateral tools to respond to terrorism.\textsuperscript{95}

This statement gives weight to rationalist analyses that postulate the strategic usefulness of certain norms. The end goal for action is neither the country’s image nor its reputation as a reliable co-operator, but rather the rational gain that can be achieved through the pro-cooperative behaviour. Johnston’s claim that there is no social influence if states are pursuing a utility-maximizing goal related to reputational concerns, however, does not adequately account for the dynamics at play in these cases, nor for the partial – but nonetheless present – effect that the institutional environment has on state preference formation. Concerns for image act as a ‘soft condition’: states’ motivational triggers straddle the rationalist/constructivist divide, giving support to this paper’s original claim that the character of the constraint on their agency is affected both by the social interaction within the institution and the strategic calculation regarding other actors and a state’s own needs.\textsuperscript{96} Concepts that are captured by the notion of pragmatic constructivism.

4. Conclusion

This paper examined the reform process that led to the inclusion of human rights and procedural safeguards within the UN counter-terrorism framework. Highlighting the role of key stakeholders in the process, the analysis demonstrated that the institutional environment acted as a fundamental tool in triggering a change in countries’ pro-reform preferences. The paper detailed this process, underscoring the role of coalition formation and peer-pressure dynamics on key actors in the Security Council, while showing that both considerations for logic of consequences and appropriateness apply when analyzing the institutional effect on this segment of state behaviour. This observation relates to the

\textsuperscript{95}‘Saving the Al-Qaeda/Taliban Sanctions Regime,’ USUN New York, September 4, 2009, Ref. 09USUNNEWYORK818.

broader inquiry into the preference formation mechanism for state action as a result of the influence of international institutions.