INTRODUCTORY NOTE

In the World Summit Outcome Document (UN General Assembly Res. 60/1, para. 109) of 16 September 2005, the Heads of State and Government of the UN 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, and in accordance with a decision of the Policy Committee of 27 September 2005 (see also the Report of the Secretary-General, “Implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General”, UN Doc. A/60/430 of 25 October 2005, para. 20), the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Nicholas Michel, commissioned a study of the legal implications of the issue. A draft of the study was discussed in an expert seminar, convoked by the Legal Counsel, on 27 February 2006 at UN Headquarters. A final version of the study was submitted by its author on 20 March 2006, and made public by the Office of Legal Affairs in July 2006. It is verbatim reproduced below; only the bibliography (part E) and the texts of relevant provisions of universal and regional human rights treaties and constitutions of UN Member States (part F) were omitted.

In June 2006, the UN Secretary-General addressed a letter to the presidency of the Security Council. Annexed to the letter was a non-paper in which the Secretary-General set out his views concerning the listing and delisting of individuals and entities on sanctions lists. While the non-paper is confidential, the UN Legal Counsel disseminated its principal contents in his statement to the Security Council of 22 June 2006 (which, in relevant parts, is also reproduced below). Accordingly, the minimum standards required to ensure that the procedures for listing and delisting are fair and transparent would include four
basic elements, namely (1) the right of a person against whom measures have been taken to be informed, (2) the right of such a person to be heard, (3) the right to review by an effective review mechanism, and (4) a periodical review of targeted sanctions by the Security Council. The Secretary-General also indicated that those elements would apply mutatis mutandis in respect of “entities”.

By and large, these views and recommendations of the Secretary-General follow the findings of the study (see part C, para. 12, and part D, sec. 12). The Secretary-General also adopted the notion of “minimum standards” to be observed by the Security Council. By clearly speaking of a “right to be informed”, a “right to be heard … by the relevant decision-making body”, and a “right to review”, the Secretary-General endorsed the view expressed in the study that a person (and an “entity”, respectively) against whom measures have been taken by the Council can rely on subjective rights vis-à-vis the United Nations that derive from the UN Charter. As regards the – crucial – right to review, the statement of the Secretary-General remains behind the conclusions of the study. While the latter speaks of a “right to an effective remedy before an impartial institution or body previously established”, the Secretary-General introduces the more limited notion of a “right to review by an effective review mechanism”, the impartiality of which is relegated to being a feature of the mechanism’s effectiveness.

However, in the Presidential Statement of 22 June 2006 (UN Doc. S/PRST/2006/28, in relevant parts reproduced below), the Security Council confined itself to reiterating its commitment to “fair and clear procedures” for the listing and delisting of individuals and entities in abstractu. The Council did not specify the requirements of such procedures, as outlined in the study and the non-paper of the Secretary-General, and simply repeated the statement of the World Summit Outcome Document.

It is no secret that the United States and the United Kingdom, in particular, do not support changes to the present situation that would call into question the ultimate decision-making authority of the Security Council with respect to sanctions imposed against individuals and “entities”. Both governments therefore reject the establishment of any form of independent review mechanism the decisions of which would be binding on the Security Council, and at least dislike the idea of a body or person with only recommendatory powers whose recommendations would compel the Council to explain and justify its decisions (see, e.g., the proposal of Denmark to establish “an independent review mechanism, in the form of an ombudsman, which could accept petitions directly from listed parties who claim they were unjustly included in the List and unable to get de-listed, … and make a recommendation for action to the Committee”;

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IOLR 2006