

SYMPOSIUM ON UNILATERAL TARGETED SANCTIONS

DUE PROCESS IS IN THE DETAILS: U.S. TARGETED ECONOMIC SANCTIONS AND INTERNATIONAL HUMAN RIGHTS LAW

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The United States has employed targeted sanctions—economic and travel restrictions imposed directly on natural and legal persons—in a wide range of policy areas in the past two decades. This includes counterterrorism, nonproliferation, and cyber, as well as sanctions regimes aimed at changing the behavior of various governments. A substantial literature has considered the compatibility with international human rights law of the targeted sanctions practices of other actors, particularly the UN Security Council and the European Union. But relatively few scholars have examined U.S. targeted sanctions practices from that perspective. This essay argues that in principle, current U.S. designation practices can be reconciled with international standards. However, a more robust conclusion about the practices' compatibility with international human rights law would require more information on the application of designation procedures in individual cases.

International Human Rights Law and Targeted Sanctions

The targeted sanctions practices of states, transnational organizations, and the UN Security Council raise a plethora of international human rights law questions that this essay cannot fully address. Thus, I provide only a thumbnail sketch of the dominant approach that has emerged from judicial and other assessments of targeted sanctions at the international and transnational level.

Targeted sanctions against natural or legal persons implicate several substantive rights under international human rights law—principally, the right to freedom of movement and the right to property. Designated persons have successfully asserted other rights as well, such as the right to reputation.¹

The right to freedom of movement is enshrined in Article 13 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Civil and Political Rights (ICCPR).² Both instruments protect the freedom of movement within a state. They also protect a person's right to leave any state, including her own, and to return to her state. However, ICCPR Article 12(3) recognizes that these rights may be restricted if necessary to protect a range of public interests, including national security.

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¹ Also relevant is the right not to be subjected to inhumane or degrading treatment through denial of access to basic needs and legal representation.

² [G.A. Res. 217 \(III\) A](#), Universal Declaration of Human Rights (Dec. 10, 1949); [International Covenant on Civil and Political Rights](#), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368, 999 UNTS 171 (1967).

The right to property is enshrined in UDHR Article 17, which provides that “[n]o one shall be arbitrarily deprived of his property.”³ Treatment of the right to property in the main international human rights instruments varies. The ICCPR did not incorporate the UDHR’s language on property.

Without delving into debates about the scope of these rights under international law, suffice it to say that the right to freedom of movement, the right to property, and other pertinent rights can in principle be reconciled with the practice of targeted sanctions. The right to freedom of movement is not absolute. It is guaranteed only within the borders of each state. It does not prevent states from regulating the entry of foreign nationals into their territory. Limitations on exiting a state could also be reconciled with international human rights law if they meet the requirements reflected in ICCPR Article 12(3): a public purpose, necessity, and proportionality.

Likewise, the right to property is not absolute. UDHR Article 17 only prohibits *arbitrary* deprivation of property. A national security asset freeze that meets the legal requirements of necessity, proportionality, and due process does not constitute an arbitrary deprivation of property. The same applies to the right to reputation under ICCPR Article 17. Regional instruments similarly allow restriction of the right to property for the public interest. International and transnational courts and bodies that have reviewed targeted sanctions have not disputed that the right to property may be restricted in furtherance of national security.

While judicial and quasijudicial review of targeted sanctions has at times identified violations of substantive human rights, it has largely focused on compliance with due process. For example, in *Nada v. Switzerland*, the Grand Chamber of the European Court of Human Rights held that a travel ban imposed on Youssef Nada by Switzerland pursuant to a Security Council listing violated the right to an effective remedy under Article 13 of the European Convention of Human Rights (ECHR). The court concluded that Nada did not have any effective means to overturn his travel ban, but rejected most of his claims involving substantive ECHR rights.⁴

Subsequently, in *Al-Dulimi v. Switzerland*,⁵ the Grand Chamber again considered a case brought by applicants designated by Switzerland pursuant to a Security Council listing. The court held that Switzerland violated the applicants’ right to meaningful judicial review of their designation under ECHR Article 6(1), the Security Council listing notwithstanding. The court clarified that judicial review should aim to prevent arbitrary designations, striking “a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.” To facilitate such review, the reviewing court must have access to “sufficiently precise information,” “if need be by a procedure ensuring an appropriate level of confidentiality.”⁶

In addition, the United Nations Human Rights Committee (HRC) addressed targeted sanctions in *Sayadi v. Belgium*. The HRC considered a complaint from a Belgian couple listed by the Security Council at Belgium’s initiative, and subsequently designated by Belgium. The couple argued that their rights to due process, freedom of movement, and reputation had been violated. Since Belgium eventually dropped its criminal proceedings against the couple, and even requested their delisting at the Security Council, the HRC found that they did not pose any threat to national security. Therefore, the designation failed to satisfy ICCPR Article 12(3) and violated the couple’s right to freedom of movement.⁷ The HRC further found a violation of the couple’s right to reputation. It rejected the remaining claims.

The Court of Justice of the European Union (CJEU) has developed the most extensive body of sanctions case law. While the *Kadi* litigation received much of the attention, the EU courts have adjudicated hundreds of targeted

³ G.A. Res. 217 (III) A, *supra* note 2, art. 17(2).

⁴ *Nada v. Switz.*, App. No. 10593/08, EUR. CT. H.R. (2012).

⁵ *Al-Dulimi & Mont. Mgmt. Inc. v. Switz.*, App. No. 5809/08, EUR. CT. H.R. (2016).

⁶ *Id.* at paras. 146-47.

⁷ *Sayadi v. Belg.*, Comm. No. 1472/2006, at para. 10.8, CCPR/C/94/D/1472/2006 (2008).

sanctions cases. The courts primarily assessed compliance with due process requirements derived from the EU fundamental rights of defense and effective judicial protection: notice, a statement of reasons, a hearing, and adequate evidence. The courts have invalidated dozens of sanctions on these grounds, while largely rejecting challenges to the proportionality of sanctions or the legality of designation criteria. The courts have consistently held that the EU Council enjoys broad discretion in the foreign and security realm. Notably, the CJEU recognized in *Kadi II* that the European Union may rely on classified information for designations, but required the disclosure of a summary if necessary to substantiate them. In 2015, new rules came into force to allow consideration of classified material by the EU courts.⁸

In sum, international bodies have identified sanctions-related violations of substantive human rights in cases that presented unique circumstances, while mostly focusing on monitoring compliance with due process. Due process in this context has been interpreted to include: adequate notification stating the reasons for a designation; sufficient evidence (without clear evidentiary standards); a hearing; and access to review by an impartial tribunal. Several decisions, including *Kadi II* and *Al-Dulimi*, have recognized that designations may rely on undisclosed classified material. With this in mind, let us assess U.S. practice.

U.S. Targeted Sanctions

A number of statutes serve as the basis for U.S. targeted sanctions: the National Emergencies Act (1976), the International Emergency Economic Powers Act (IEEPA) (1977), the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and others, such as the 2017 Countering America's Adversaries Through Sanctions Act. Targeted sanctions imposed under these statutes typically involve the blocking of assets of the designated person or entity within U.S. jurisdiction and related restrictions. In addition, the United States has imposed travel bans on individuals. Here I focus on economic targeted sanctions.

IEEPA—the primary targeted sanctions statute—grants the President broad authority to take extensive economic measures in response to an “unusual and extraordinary” threat with a foreign element to the national security, foreign policy, or economy of the United States, if he declares a state of emergency with respect to that threat.⁹ This includes the blocking of property of natural and legal persons. Individual sanctions under IEEPA and other statutes are typically imposed by executive orders, which outline designation criteria and process. The Treasury Department's Office of Foreign Assets Control (OFAC) administers most sanctions programs.

AEDPA provides for a smaller subset of sanctions. It governs designations of Foreign Terrorist Organizations (FTOs) and the implications of those designations. Under AEDPA, the Secretary of State may designate a group as an FTO if it meets certain criteria.¹⁰ The statute spells out the designation process and provides for judicial review before the D.C. Circuit.

OFAC's designation process depends on the particular authority it relies upon in each case. Generally, OFAC draws on information from multiple sources—including U.S. agencies, foreign governments, UN expert panels, and open-source reporting—and compiles an evidentiary memorandum.¹¹ A proposed designation is then subjected to interagency review and review for legal sufficiency. Once the government finalizes a designation, OFAC normally issues a release with a brief statement of reasons, and a notice appears in the Federal Register.

⁸ See Elena Chachko, *Foreign Affairs in Court: Lessons from CJEU Targeted Sanctions Jurisprudence*, 44 YALE J. INT'L L. 1, 12-18 (2019).

⁹ 50 U.S.C. § 1701 *et seq.*

¹⁰ 8 U.S.C. § 1189(a)(1).

¹¹ *Filing a Petition for Removal from an OFAC List*, U.S. DEPT. OF TREASURY.

OFAC regulations allow designated persons and entities to seek administrative reconsideration.¹² A blocked person may submit arguments or evidence to contest the basis for his designation, or propose “remedial steps.” The blocked person may also request a meeting with OFAC, which OFAC may decline. After completing its review, OFAC provides a written decision to the blocked person. According to OFAC, it removes hundreds of designated persons from the Specially Designated Nationals list—the main consolidated OFAC list—each year.

Judicial Review

To date, the U.S. Supreme Court has not reviewed an IEEPA or FTO designation directly.¹³ Moreover, there have been relatively few individual sanctions cases in lower courts, considering the volume of designations in the past two decades. Targeted sanctions cases have either been terrorism- or narcotics-related. They focused on compliance with U.S. law without recourse to international law, and the courts have largely deferred to the government.

Judicial review of sanctions imposed under IEEPA is governed by the Administrative Procedure Act (APA). Under the general APA standard of review, a designation would be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁴ In applying this standard, courts have focused on ascertaining whether designations were supported by substantial evidence. AEDPA’s standard of review for FTO designations is similar to the APA standard.¹⁵ Only designated persons with sufficient ties to the United States may challenge their designation on constitutional grounds in addition to statutory claims under the APA, AEDPA, and other applicable statutes. In adjudicating targeted sanctions cases, federal courts can and do review classified material *ex parte*, *in camera*.

The D.C. Circuit has dismissed most challenges from FTOs designated under AEDPA.¹⁶ When it intervened in favor of an FTO, it did so on constitutional rather than statutory grounds. In *National Council of Resistance of Iran (NCRI) v. Department of State*,¹⁷ the court concluded that the designated FTOs had sufficient ties to the United States to assert constitutional due process rights under the Fifth Amendment. It held that the Secretary of State must give a designated FTO adequate notice and a meaningful opportunity to be heard prior to its designation. The court has allowed the State Department to rely on classified material without disclosing it to the designated FTO, but has also implied that a designation “relying critically on undisclosed classified material” might conflict with due process.¹⁸

Judicial treatment of OFAC designations has generally been deferential as well. The D.C. Circuit has dismissed challenges from two Muslim charities to their designation as Specially Designated Global Terrorists (SDGTs). The D.C. District Court has similarly dismissed an action brought by a Saudi national, as well as one brought by alleged terrorism financier Yassin Kadi—the same Kadi who prevailed twice at the CJEU.¹⁹ This case provides insight

¹² 31 C.F.R. § 501.807.

¹³ *But see Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

¹⁴ 5 U.S.C. § 706(2)(A).

¹⁵ 8 U.S.C. § 1189(c).

¹⁶ *See, e.g., People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 613 F.3d 220, 222 (D.C. Cir. 2010) [hereinafter *PMOI III*].

¹⁷ 251 F.3d 192 (D.C. Cir. 2001).

¹⁸ *PMOI III*, 613 F.3d 231.

¹⁹ *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007), *cert. denied* 552 U.S. 816; *Al-Aqeel v. Paulson*, 568 F. Supp. 2d 64 (D.D.C. 2008); *Kadi v. Geithner*, 42 F. Supp. 3d 1 (D.D.C. 2012); *see also Global Relief Found. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002), *cert. denied*, 540 U.S. 1003 (2003); *Fares v. Smith*, 901 F.3d 315 (D.C. Cir. 2018).

into OFAC's administrative review process. It describes extensive back-and-forth between the parties, including a twenty-page statement of reasons that Kadi received upon denial of his reconsideration request.²⁰

At the same time, several courts have upheld challenges to OFAC designations. In *Al Haramain Islamic Federation v. U.S. Department of Treasury*,²¹ the Ninth Circuit reviewed OFAC's designation of the Oregon branch of an international nonprofit as an SDGT. While the court concluded that the designation was not arbitrary and capricious, it identified due process violations under the Fifth Amendment. The court held that although OFAC could designate Al Haramain based on undisclosed classified material, the agency should have disclosed a summary of the classified evidence or offered another mitigating measure. The court further concluded that OFAC violated the Fifth Amendment by failing to give Al Haramain adequate notice. In addition, the court held that OFAC violated Al Haramain's Fourth Amendment rights by failing to obtain a warrant before blocking its assets, and that the ban on coordinated advocacy with Al Haramain due to its designation violated the First Amendment.

Similarly, in *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*,²² an Ohio nonprofit challenged its provisional SDGT designation. The District Court for the Northern District of Ohio held that the designation violated the Fourth Amendment, and that the notice OFAC had provided violated the Fifth Amendment. The court further held that OFAC's restriction of funds necessary to pay KindHearts' legal fees was arbitrary and capricious.

It is important to emphasize that the designated entities in *NCRI*, *Al Haramain*, and *KindHearts* were afforded the protection of the U.S. Constitution because of their ties to the United States. The constitutional claims that were available to them are not available to the majority of those designated by the United States—foreigners who lack U.S. ties. While aliens may still seek judicial review in U.S. federal courts under the APA, AEDPA, or other statutes, review of statutory claims has been less stringent than constitutional claims.

U.S. Practice Through the Lens of International Human Rights Law

Evaluating the consistency of U.S. targeted sanctions practices with international human rights law would require a much more extensive examination. I offer a few general observations and identify issues for further consideration.

A preliminary note is in order. The United States ratified the ICCPR in 1992, but has long maintained that the treaty does not apply extraterritorially, and it signed but has not ratified the American Convention on Human Rights. Thus, under the U.S. approach, the United States is not legally bound by these treaties when it acts against foreign nationals abroad, as it often does in applying targeted sanctions. It is only bound by the customary core of international human rights law. Nevertheless, I consider U.S. practice against the emerging international human rights standards concerning targeted sanctions.

In the abstract, U.S. administrative procedures for imposing targeted sanctions appear to be on par with international standards. FTO designations require notice and reasons grounded in substantial evidence, and designated FTOs have a statutory right to both administrative and judicial review. The State Department may withhold classified material from designated FTOs, but is required to share it with the reviewing court. Both international and supranational courts have recognized that national security may justify nondisclosure of classified material, and special procedures for the consideration of confidential evidence by courts have been deemed permissible. This applies to OFAC designations as well.

²⁰ *Kadi*, 42 F. Supp. 3d at 6-7, 11-13, 29; see also Rachel Barnes, *United States Sanctions: Delisting Applications, Judicial Review and Secret Evidence*, in *ECONOMIC SANCTIONS AND INTERNATIONAL LAW* 197, 205-06 (Matthew Happold & Paul Eden eds., 2016).

²¹ 686 F.3d 965 (9th Cir. 2012).

²² 647 F. Supp. 2d 857 (N.D. Ohio 2009).

While OFAC's designation procedures also seem to be in line with international standards in principle, there is ambiguity with respect to their specifics and how they are applied in individual cases. This ambiguity is due in part to the dearth of case law and up-to-date information, as well as the fact that the few terrorism designation cases in which courts have intervened involved entities that could assert constitutional rights.

As a general matter, OFAC issues public notices and short statements of reasons for all new designations. The fact that notices are typically advertised in conjunction with designations can be reconciled with due process as applied in the sanctions context. The CJEU has recognized that notice and reasons can be provided simultaneously with a designation to ensure its effectiveness.

In addition, the agency's administrative reconsideration procedure provides designated persons with an opportunity to be heard, and to receive access to the evidence that formed the basis for their designation. Judging by OFAC's extensive engagement with Kadi, this process appears to offer a meaningful hearing. The fact that hundreds of individuals are removed from OFAC's SDN list each year suggests that the process is not a rubber stamp. Furthermore, IEEPA and OFAC regulations contain humanitarian exemptions,²³ and the agency has licensing procedures in place that allow designated persons to apply for access to blocked assets. There is also a licensing scheme in place for legal fees.²⁴

Finally, all persons designated under OFAC programs may seek judicial review, although those who lack sufficient ties to the United States are only able to bring claims under the APA or other applicable statutes. A less-searching standard of judicial review does not, in itself, conflict with human rights. As *Al-Dulimi* suggests, review for arbitrariness could suffice in the sanctions context. Moreover, it is difficult to argue that international human rights law entitles designated foreigners to the full protection of the U.S. Constitution.

That being said, a number of potential human rights issues arise with respect to the implementation of these procedures in individual cases. First, it is not clear whether OFAC provides notices and sufficiently detailed reasons directly to all designated persons, including foreign nationals without ties to the United States. Second, it is not clear whether all designated persons receive adequate access to relevant evidence upon their designation or during the process of applying for administrative reconsideration. In other words, it is far from certain that all designated persons receive the treatment Kadi received. Third, OFAC has been criticized for significant delays in responding to delisting petitions and license requests while designated persons remain subject to an asset freeze. There have been complaints of unduly restrictive licensing policies. More transparency and case-specific information are necessary to adequately assess the compliance of OFAC's targeted sanctions procedures with international human rights law in light of these issues.

Conclusion

Many would argue that the practice of designating individuals without prior notice or hearing based on a vague evidentiary standard in the name of national security is fundamentally inconsistent with due process. These designations severely restrict freedom of movement and even basic financial transactions. They force their subjects to secure legal representation and engage in prolonged litigation—often in a foreign jurisdiction—while being denied access to a substantial part of the administrative record. Yet, as a matter of *lex lata*, U.S. targeted sanctions practices appear in principle to be in line with current international standards. Whether this is the case in practice would require more information about the application of OFAC's administrative procedures in individual cases.

²³ See [50 U.S.C. § 1702\(b\)](#); see also, e.g., [31 C.F.R. § 595.507](#).

²⁴ See, e.g., [31 C.F.R. § 595.506](#).