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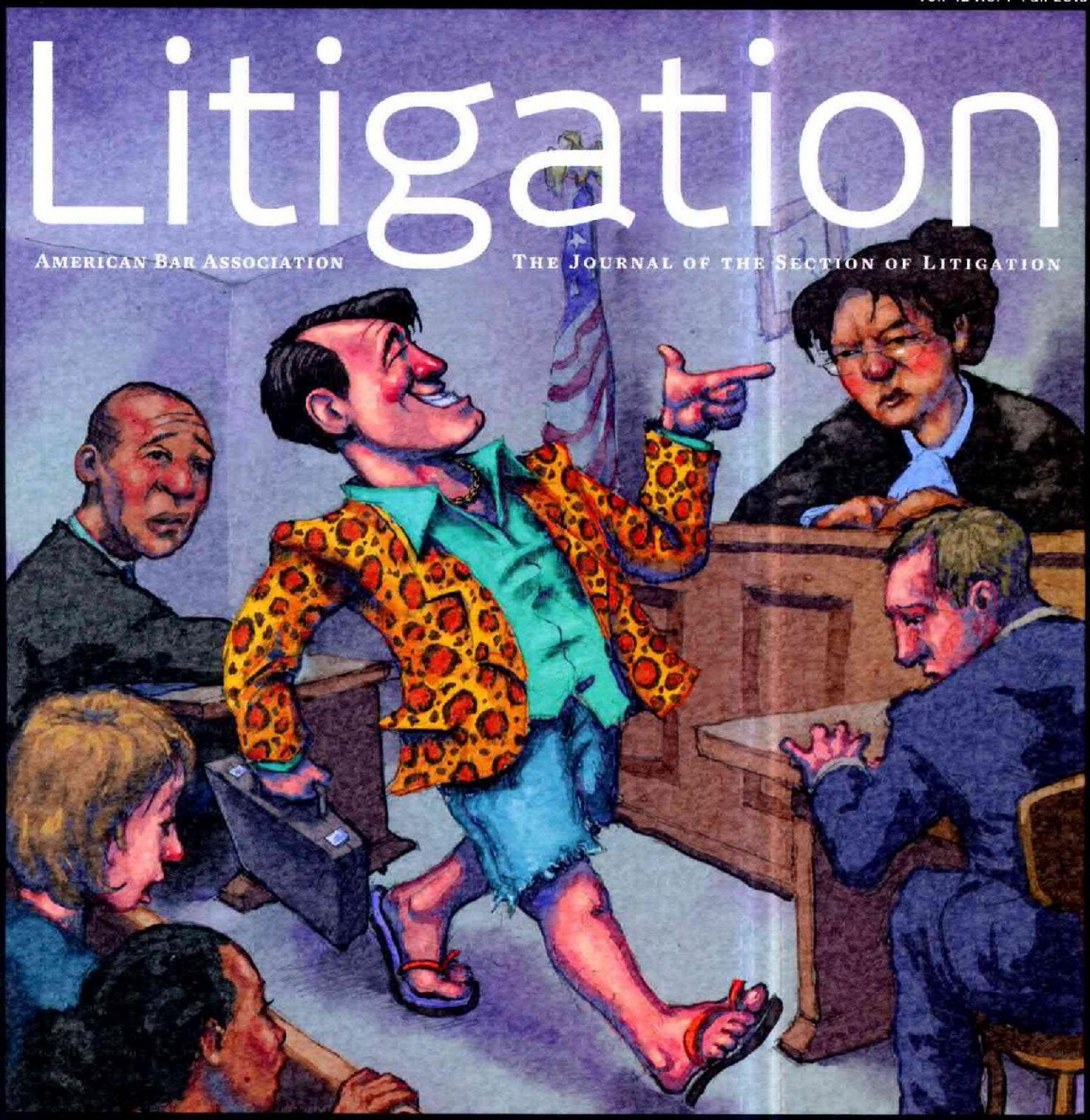

Judgment

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Global Litigator

DUE PROCESS FOR THOSE MALIGNED IN UNITED NATIONS REPORTS

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Imagine that you are the CEO of a multinational company. Competition is a constant and, in an ideal world, fair; unfortunately, this is not always the case. What recourse do you have if your competition resorts to falsifying facts—for instance, by convincing others to make untrue allegations or by forging documents in an attempt to make it appear that you are an accomplice to terrorism? What if these lies result in you being wrongly identified in a United Nations (UN) report? This would be catastrophic for your personal reputation, as the CEO, and devastating to your company. Business deals and banking support are likely to evaporate, the government of the countries in which you operate may ostracize you, and your personal and business life could be destroyed. Now imagine your horror when you find there is no available legal recourse within the existing framework of the UN to clear your name from fraudulent allegations.

We became aware of this deficiency in the UN sanctions regime by representing an industrialist in Africa in precisely this quandary. Having been negatively mentioned in a UN report, but not listed for sanctions, he had no way to defend his reputation. Initial efforts to address this lamentable lacuna in the UN's due process regime were met with blank stares and the bewildered rejection of our entreaties for a hearing.

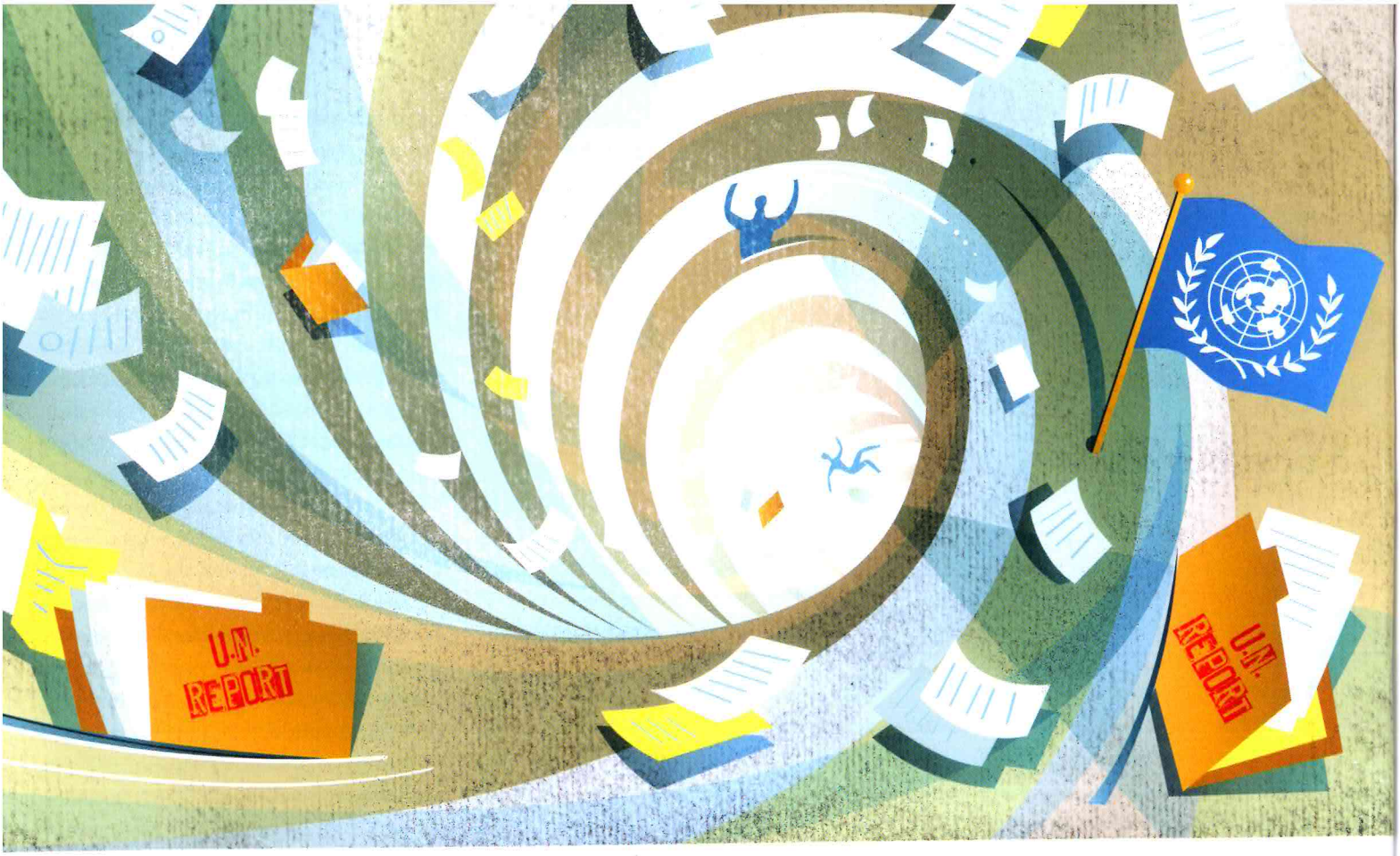
After two years of trying, we were finally permitted to present our case, which ultimately resulted in official recognition that our client had been wrongly identified in the report. But the lack of a simpler, established process to address the problem made the battle to be heard very time-consuming, expensive, and difficult. The experience highlighted the pressing need for a remedy to this loophole.

UN Sanctions

UN sanctions are an essential tool in maintaining international peace and security. Historically, sanctions have been used as a trade weapon against a combative state, as a means to compel an enemy to surrender, often in combination with military action, or as a general strategy of economic warfare. Today UN sanctions are applicable against not only states but also individuals and non-state entities whose actions are found to have violated fundamental international norms and principles, such as peace and human rights. Sanctions can be used to change or correct the behavior of these parties to repair damage already done, or they can be employed as a preventive or punitive measure.

The basis for UN sanctions can be found in Chapter VII of the UN Charter, Article 41. The current sanctions process incorporates five main categories: conflict resolution, nonproliferation, counterterrorism, democratization, and the protection of civilians. The UN Security Council may issue sanctions against individuals and entities who have been identified as violators of international laws and conventions through resolutions of the Security Council.

The Security Council does not act on its own behalf—almost every authorizing resolution includes a sanctions committee and a panel (a so-called group of experts) or monitoring group. Sanctions committees, each of which are specific to a certain geographic area, are subsidiary organs of the Security Council. While they lack formal authority to make binding sanctions decisions, they perform the significant tasks of monitoring, reporting, and managing exemptions and designation lists. With help from other panels and monitoring groups, sanctions committees are charged with investigating and gathering all relevant information relating to an individual or entity suspected of participating in activities that threaten international peace and security. In theory, these groups of experts operate independently from the influence of the Security Council. In practice, however, council members sometimes lobby



for the appointment of their nationals in the groups of experts, thus compromising the integrity of the panels.

When targeted sanctions are applied effectively, they can—and are intended to—take a disastrous toll on the economic and financial situation of the target. Travel bans, asset freezes, commodity interdiction, and the like are all substantial measures designed to stop violations of international codes of conduct. They can affect people in the same way as penalties imposed in criminal proceedings—and, as in criminal proceedings, a damaged reputation might be the most fundamental and longest-lasting injury of all.

While the UN has made fair and clear due process procedures available, they extend only to those actually listed for sanctions. Understanding the due process available in the listing and delisting procedures will highlight the fairness gap between those who are sanctioned and those who are merely mentioned.

The evolution from broad sanctions against states to targeted sanctions against individuals and non-state entities has entailed changes in the criteria under which parties are designated for listing. Human rights organizations and UN member states have long criticized the lack of transparency and due process in listing and delisting procedures, and in 2006, the Security Council took action and asked a committee of the Security Council consisting of all members charged with implementing listing and delisting procedures to improve the applicable guidelines.

This committee then established new standards for listing, requiring designating countries to provide detailed information about individuals' and non-state entities' eligibility. The new standards required specific information that demonstrated the activities in question, as well as available supporting evidence and documents. In 2009, UN Resolution 1904 stipulated that member states had to provide as much relevant, additional, and identifying information for listings as possible.

Typically, listing occurs when a member state proposes the candidate to the sanctions committee and no committee member objects within a specified time frame. The target has no opportunity to preemptively oppose listing before the sanctions committee, though it may initiate a delisting request afterward.

In theory, targets are supposed to be notified of their listing by the permanent mission to the UN of the country of their citizenship (or location, for entities). If the party receives this indirect notification and can access the review procedures, all should be well. In practice, however, targets sometimes fail to receive notice and so remain unaware of the need to start the review procedure. How can rights and reputation be defended if notice of listing is not provided?

The Current System

The current system—in which many sanctioned parties can only challenge the listing after the fact—brings to mind

Illustration by Dave Klug

the Alice in Wonderland judicial process: sentence first . . . then a trial. In the absence of any review procedure, the identification of an individual or nongovernmental entity for sanctions constitutes a clear breach of rights under Article 10 of the Universal Declaration of Human Rights (December 10, 1948), Article 14 of the International Covenant on Civil and Political Rights (December 19, 1966), and Article 6 of the European Convention on Human Rights (September 3, 1953). These articles all express the same basic legal principle: Everyone whose interests are affected by governmental action has the right to a fair and public hearing by an independent and impartial judicial authority.

The corollary to the listing procedure is a delisting procedure, yet the only available opportunity for recourse is not without its own shortcomings. Security Council Resolution 1904 (December 17, 2009) established the Office of the Ombudsperson, and within it a Focal Point for Delisting, to review delisting requests related to al-Qaeda. The ombudsperson, appointed by the UN secretary-general, must be "an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions." S.C. Res. 1904, U.N. Doc. S/RES/9825, annex II (Dec. 17, 2009) . The creation of the Office of the Ombudsperson and the subsequent expansion of its powers in 2011 represents a step toward improving due process and demonstrates the willingness of the Security Council to address growing criticism concerning the lack of transparency and due process in delisting procedures.

There are different ways for a petitioner to start a delisting procedure depending on whether the petitioner's name is inscribed on the al-Qaeda Sanctions List or a different sanctions list. Only petitioners who are listed for sanctions may submit a delisting request. For petitioners on a list other than the al-Qaeda Sanctions List, requests for delisting can be addressed to the appropriate sanctions committee by member states or the petitioner's state of nationality or residency, or to the Focal Point for Delisting by the individual or entity itself, according to the process outlined in Security Council Resolution 1730.

The current system brings to mind the Alice in Wonderland judicial process: sentence first . . . then a trial.

Sanctions committee delisting decisions are final. Petitioners whose names are inscribed on the al-Qaeda Sanctions List, however, are subject to a different procedure: The ombudsperson first gathers pertinent information and interacts with the petitioner and with relevant states and UN organizations; then he makes a recommendation to the sanctions committee. The committee can agree or refer the decision to the Security Council, which will make the ultimate decision. The two possible delisting procedures differ in the level of judicial review. In the case of the non-al-Qaeda process, all the decision-making is located within the sanctions committee. This decision is binding, thus rendering it a final review.

Returning to the case of our client working in Africa, what happens when someone isn't sanctioned but is simply mentioned? Unlike the targets of sanctions, people who are merely mentioned have no way to clear their names. The outside world will connect the person to the words of the UN report, whether or not sanctions ensue. Some review mechanism is required, and we propose three possible solutions:

1. A separate process for individuals and non-state entities who are only negatively mentioned in UN reports but not sanctioned afterward. This procedure must be fair and clear, enabling parties to defend their interests in order to ensure compliance with Article 6 of the European Convention on Human Rights, Article 10 of the Universal Declaration of Human Rights, and Article 14 of the International Covenant on Civil and Political Rights.

2. Extension of the delisting procedure to those who are merely named in UN reports. This streamlined resolution could be accomplished with little difficulty and does not require a new procedure.

3. The creation of a new focal point to specifically deal with parties mentioned but not sanctioned. This focal point could have at least the same powers as the Office of the Ombudsperson and so could perform de facto judicial review with either binding or advisory decisions. If binding reviews are issued, no formal judicial review by the Security Council would be required.

In the end, there is no justification for denying recourse to parties whose interests and reputation are placed at risk by being negatively mentioned, but not listed for sanctions, in UN reports. Because the mere appearance in a report can have disastrous consequences, some review mechanism is essential. The UN should examine the problem and devise a solution that balances the protection of individual rights with members' need for security. ▪