

DUE PROCESS AND TARGETED SANCTIONS:

AN UPDATE OF THE “WATSON
REPORT”



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Due Process and Targeted Sanctions

An Update of the “Watson Report”

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INTRODUCTION¹

Targeted sanctions remain an indispensable tool of the United Nations in maintaining international peace and security. With the objective of changing behavior, constraining proscribed activities, or signaling/stigmatizing targets in support of international norms, UN targeted sanctions are increasingly utilized by the international community to address a broad range of international threats.²

In the 2009 “Watson Report,” we recommended reforms to ensure the UN system of sanctions designations be made more fair and transparent, in particular arguing for the establishment of a review mechanism at the UN level to address the legal and political challenges to targeted sanctions. In the three years since the last Watson Report, significant reforms have transformed the Al Qaida sanctions (“1267 Committee”) regime.³ The Security Council’s establishment of the Office of the Ombudsperson and subsequent appointment of Judge Kimberly Prost – with her notable record of completing 22 cases resulting in the delisting of 19 individuals and 24 entities - - constitutes an unprecedented step by the Council to create an effective process at the UN level whereby individuals may challenge for their removal from the 1267 list.

Even with these important reforms, criticism of the regime and the general perception of unfairness in the application of UN targeted sanctions persist, generating opposition and concern, especially from human rights advocates and national and regional courts. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, (“Special Rapporteur”) concluded in his report to the General Assembly on 2 November, that the Ombudsperson’s mandate fell short of international minimum standards of due process and urged the Council to bring the Al-Qaida sanctions regime into conformity with international human rights norms.⁴ He called on the Council to strengthen the Ombudsperson by making her recommendations binding and public, and by extending the length of her mandate. Emmerson also recommended that the Security Council reconsider a sunset clause that would impose time limits on the duration of all designations. The group of

¹ The report builds upon and updates previous Watson reports in 2006 and 2009, and is intended to be read in conjunction with them. See *Strengthening Targeted Sanctions Through Fair and Clear Procedures*, March 2006, at: http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf and *Addressing Challenges to Targeted Sanctions An Update of the “Watson Report,”* October 2009, at: http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf

² This typology of multiple purposes of UN sanctions is discussed in *Designing United Nations Targeted Sanctions: Initial Findings of the Targeted Sanctions Consortium (TSC) Evaluating Impacts and Effectiveness of UN Targeted Sanctions*, August 2012, at: http://graduateinstitute.ch/webdav/site/internationalgovernance/shared/PSIG_images/Sanctions/Designing%20UN%20Targeted%20Sanctions.pdf

³ The United Nation’s Al Qaida Sanctions Committee, established pursuant to UNSCR 1267 (referred to as the “1267 Committee”) originally included both Al Qaida (and associated individuals/entities) and the Taliban, but the regime was split in June 2011, after which UNSCR 1989 applied to Al Qaida and UNSCR 1988 sanctioned the Taliban. See <http://www.un.org/sc/committees/1267/>.

⁴ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/67/396 (“Special Rapporteur report”), 26 September 2012, at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/522/54/PDF/N1252254.pdf?OpenElement>. See also UN press release GA/SHC/4049 on the SR presentation to the General Assembly on 2 November 2012 at: <http://www.un.org/News/Press/docs/2012/gashc4049.doc.htm>

“like minded states”⁵ has also suggested additional reforms of the Ombudsperson system. The Security Council will consider the Ombudsperson’s mandate and decide whether to extend it by the end of 2012.

It is useful to recall the context within which this unique Ombudsperson mechanism functions. Targeted sanctions are political measures imposed by a political body, the United Nations Security Council. They are preventative measures, rather than punitive ones, intended to address threats to international peace and security – in the case of the 1267 committee, international terrorism. Decisions to list individuals or entities are not legal determinations *per se*, but rather political findings of association with Al Qaeda. Designations are intended to be temporary, at least in theory. As such, they do not require the same evidentiary standards associated with criminal prosecutions. Nonetheless, the open-ended nature of UN sanctions have had serious punitive effects on those designated, leading courts to find violations of due process.

The pace of litigation has slowed and the number of cases related to 1267 has diminished. At the time of the 2009 Watson report, more than thirty legal challenges to UN Security Council targeted sanctions listings had been pursued in courts worldwide regarding designations made either by the UN’s 1267 Committee or in the context of the implementation of UNSCR 1373. Many cases were dropped after individuals were delisted by the 1267 Committee, but several are pending or remain under appeal.

The most consequential challenge currently pending is the appeal of the 2010 judgment of the General Court (formerly the Court of First Instance) in the Kadi case.⁶ Judgment was rendered prior to the enhancement of Ombudsperson’s authorities, so the case (expected early in 2013) presents the opportunity for the European Court of Justice to rule on how the Ombudsperson mechanism, as amended by UNSCR 1989, comports with requirements of an effective review procedure. Although Kadi was delisted by the 1267 Committee on 5 October 2012, the court decision will likely have important precedential significance. The other prominent case concerning Youssef Nada, decided 12 September 2012 by the European Court of Human Rights, likewise focused on national implementation of UN sanctions, rather than challenging sanctions at the UN level, and did not evaluate the current Ombudsperson process.

In 2009, we challenged the characterization of these due process issues as solely a “European problem;” rather, the predominant number of European cases signaled a broader problem for sanctions at the UN level. In the meantime, a new challenge has developed that has a distinctive European dimension. A review of current sanctions litigation reveals a growing number of challenges and annulments of EU autonomous sanctions by European courts. It appears that the new frontier in sanctions litigation is indeed a European phenomenon. The current trend portends growing controversy and potential harm to the instrument of targeted sanctions should policy reforms not occur. The symbolic significance of persistent litigation should not be underestimated; public opinion may not differentiate between collective UN sanctions and EU

⁵ The “like minded states” include Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.

⁶ In March 2012, the United States District Court for the District of Columbia ruled against Kadi’s challenge to his listing in the US.

autonomous sanctions and can damage the instrument of targeted sanctions overall, as well as the reputation of the EU and UN Security Council.

Just as there has been dissatisfaction among human rights advocates with the current system, many national policy-makers are frustrated with what is perceived to be a preoccupation with due process concerns. Without diminishing the importance of advancing fair and clear procedures, the extraordinary resources dedicated to the 1822 and subsequent reviews of the list and procedural changes to enhance due process, has distracted attention of the 1267 Committee from the core preventive aspects of the counterterrorism sanctions, and sanctions reform in general. Concerted initiatives to strengthen implementation by Member States, build national capacity to counter terrorism, and adapt policies to the ever-changing threat from Al-Qaida have been limited. A disproportionate share of attention focuses on procedural issues at the expense of enhancing the effectiveness of counterterrorism measures and developing new approaches to address the Al-Qaida threat.

The purpose of this report is to provide an update of the significant due process reforms within the 1267 committee over the past three years, in particular by assessing the operational experience of the Office of the Ombudsperson; survey the legal landscape and current trends; and discuss opportunities for the Security Council's consideration of the renewal of the 1267 Committee and the Office of the Ombudsperson as it continues efforts to improve and strengthen UN sanctions against Al-Qaida.

SECTION ONE: UPDATE OF DEVELOPMENTS SINCE 2009

The three years since the last *Watson Report* has witnessed significant due process reforms. For a decade, the 1267 regime has continuously demonstrated impressive procedural innovation (see Table I), yet it is the creation and enhancement of the Ombudsperson mechanism that represents “the most innovative and daring” of reforms adopted by the UN Security Council.⁷ This section summarizes the major developments within the UN system to address legal and political challenges to targeted sanctions since October 2009.⁸

UNSCR 1904 – Establishment of the Ombudsperson Mechanism

On 17 December 2009, the Security Council adopted UNSCR 1904, instituting reforms to streamline the process for listing individuals and entities, calling on Member States to provide as much relevant identifying information for listings as possible, and directed the Committee to make accessible narrative summaries of reasons for listing.

The most significant reform authorized in UNSCR 1904, however, was the establishment of the Office of the Ombudsperson for an initial period of 18 months to assist the Sanctions Committee in its consideration of delisting requests. Appointed by the Secretary-General, the Ombudsperson was to 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.”⁹

Annex II of the resolution delineated specific functions of the Ombudsperson - to investigate delisting requests, gather and compile new information to present to the Sanctions Committee, engage in dialogue and questioning of the petitioner, and draft a comprehensive report for the Committee based on personal observations, which was to include a summary of the principal arguments concerning the delisting request, following the investigation and dialogue. The mandate did not ask the Ombudsperson to make recommendations, but rather to review delisting requests and to make 'observations' on the case. Heralded as a “significant step forward in the fairness and transparency of the sanctions regime, thus improving its effectiveness and legitimacy,” the creation of the Ombudsperson demonstrated willingness by the Security Council to modify its procedures to respond to perceived shortcomings in due process.¹⁰

On 3 June 2010, the first Ombudsperson was appointed by the Secretary General — Kimberly Prost, a former judge on the International Tribunal for the Former Yugoslavia with more than 20 years’ experience as a federal prosecutor in Canada.¹¹ A detailed discussion and assessment of the Office of the Ombudsperson follows in Section Two.

⁷ 1267 Monitoring Team 13th Report, S/AC.37/2012/MT/O.C.234, 31 October 2012, para 10.

⁸ A discussion of legal developments since 2009 is the focus of Section Two, and not addressed here.

⁹ UNSCR 1904; the full list of responsibilities of the Ombudsperson’s Office is set out in Annex II of the UNSCR 1904, at: [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904\(2009\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1904(2009))

¹⁰ UN Press release, 17 December 2009, at: <http://www.un.org/News/Press/docs/2009/sc9825.doc.htm>

¹¹ Press Conference to Present Ombudsperson of Security Council’s 1267 Committee, 15 July 2010, at: http://www.un.org/News/briefings/docs/2010/100715_1267.doc.htm.

UNSCR 1989 – Enhanced Ombudsperson Mandate

The renewal of the 1267 Committee mandate in June 2011 resulted in the separation of sanctions against Al-Qaida and associated groups from those focused on the Taliban, and a new regime targeting violent extremists in Afghanistan was created with UNSCR 1988. Under the concurrently adopted UNSCR 1989, the 1267 Committee was renamed (*the Security Council Committee Pursuant to Resolutions 1267 (1999) and 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities*) and further changes were adopted to enhance fairness and transparency of the sanctions. A designating state trigger, reversing the consensus requirement for delisting decisions in the Committee, provides for automatic removal of names proposed by the designating state at any time.¹²

In part responding to continuing critiques that the Ombudsperson process failed to satisfy legal standards guaranteeing listed individuals due process (especially concerning independence and providing effective remedy)¹³, UNSCR 1989 expanded the mandate of the Ombudsperson to require that the Ombudsperson make formal recommendations to the Committee whether to accept or reject a delisting request.

The most far-reaching reform in 2011, however, strengthened the Ombudsperson recommendations by making them final and automatic in 60 days, unless overturned unanimously by the Committee or a vote by the Security Council. If the Ombudsperson recommends against retaining a listing, then that individual or entity is delisted in 60 days unless the Committee decides unanimously to retain it, or the question is referred to the Security Council. The effect of the 1989 reforms reversing the consensus requirement, according to the Special Rapporteur, is “to create a strong presumption that the Ombudsperson’s recommendation to delist will be honored by the Committee.”¹⁴ “Essentially, the Ombudsperson for the 1267 sanctions regime is now the first and only independent body that the Security Council has given its consent to review specific decisions of the Council.”¹⁵ Collectively, the reforms adopted in UNSCR 1989 represent an unprecedented step by the Security Council to provide fairer and clearer procedures when applying sanctions to individuals.

¹² The recommendation to accord privileged status to designating states for delisting requests was proposed to address structural constraints with the 1267 committee inhibiting or delaying progress on delisting decisions. See Watson Report 2009, pg. 25.

¹³ See among others, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, Grant L. Willis, University of Leiden, 2010 at: http://works.bepress.com/grant_willis/1/; Ana María Salinas de Frias, Katja L. H. Samuel and Nigel D. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012), chap. 16.

¹⁴ Special Rapporteur report

¹⁵ Willis.

Table I: Procedural Changes in UNSCR 1267 Regime

Procedural Changes in UNSCR 1267 Regime			
Date	Listing	Delisting	Procedural
10/1999	UNSCR 1267 imposes financial sanctions on Taliban		
02/2000			Committee approves exemptions on flight ban for the Hajj
12/2000	UNSCR 1333 imposes financial sanctions on Usama bin Laden and associates (including al Qaida)		UNSCR 1333 appoints committee of experts
01/2001	Committee issues first list pursuant to UNSCR 1267 and 1333		Committee approves procedures for humanitarian aid exemptions
02/2001			Committee approves procedures for humanitarian aid exemptions
01/2002	UNSCR 1390 expands listing of Usama bin Laden, Al Qaida, the Taliban and other groups undertakings or entities associated with them		UNSCR 1390 introduces travel ban and exemptions contained therein; expansion of financial sanctions to cover “economic resources”
08/2002		Committee announces delisting procedures	
11/2002	Committee issues Guidelines 9 Nov 2002	Committee issues guidelines	
12/2002			UNSCR 1452 introduces exemptions to financial sanctions; notification with 48 hrs. NOP for basic expenses; approval process for extraordinary expenses
01/2003	UNSCR 1455 emphasizes importance of identifying information		UNSCR 1455 requires Committee to communicate list to MS every three months
04/2003			Committee revises Guidelines; includes new section on updating lists

01/2004	UNSCR 1526 requires MS to include detailed identifying information and background information		UNSCR 1526 calls for appointment of Analytical Support & Sanctions Monitoring Team (MT)
07/2005	UNSCR 1617 requires detailed statements of case; articulates what should be contained within them; clarifies those subject to targeted sanctions		UNSCR 1617 requires MS to inform target; permits release of information about listing
12/2005	Committee revises Guidelines, makes technical changes to listing procedures	Committee revises Guidelines, making technical changes to delisting procedures	Committee revises Guidelines; includes new section on exemptions
12/2006	UNSCR 1735 elaborates substantive content for statements of case, allows public release of that information, and creates a procedure to improve deficiencies in notification		UNSCR 1735 extends NOP from 48 hours to 3 working days
06/2008	UNSCR 1822 makes further improvements to notification process, calls for a full review of all previous designations, and makes recommendations for improving the transparency of the process, releasing information to the targets and the public about the reasons for imposing targeted measures	Reviews process to consider whether listings remain appropriate, annual review of individuals reported to be deceased; all names to be reviewed every 3 years	Requires mandatory statements of case, narrative summaries for all listed individuals/entities, and notification of listing & delisting
12/2008		Standards and criteria for delisting promulgated in the Guidelines, including for deceased persons	Committee issues extensive and detailed new guidelines, including changes to exemption procedures
12/2009		UNSCR 1904 requires annual consideration of	UNSCR 1904 creates the Office of the

		names lacking identifiers for potential delisting; emphasizes need to proactively remove deceased individuals; pressures Committee members that object to delisting without explanation; creates the Office of the Ombudsperson to facilitate and review cases for delisting	Ombudsperson to facilitate and review cases for delisting; recognizes exemption procedure is in need of overhaul
06/2011		UNSCR 1989 shortens interval for review of annual circulation of names lacking identifiers for potential delisting to 6 months; emphasizes need to proactively remove defunct entities; gives Designating State power to decide a delisting unless overridden by entire Committee or Security Council; gives Ombudsperson power to make binding recommendation on delisting decisions unless overridden by entire Committee or Security Council	UNSCR 1989 recognizes exemption procedure is in need of overhaul; allows Chairman of the Committee to decide frequency of oral briefings; gives Designating State power to decide a delisting unless overridden by entire Committee or Security Council; gives Ombudsperson power to make binding recommendation on delisting decisions unless overridden by entire Committee or Security Council

Other Procedural improvements – UNSCR 1822 and Subsequent Reviews of List

As noted in the 2009 Watson report, the Security Council has devoted considerable attention to ensuring that the 1267 list reflects current threats through regular review of the names on the list. Most notably, UNSCR 1822 called for a comprehensive review, commenced in 2008 and concluded in July 2010, which examined all 488 names on the list at the time, and began an ongoing annual review thereafter to ensure that every designation is reviewed at least every three years (the “triennial review”) and that no name remains on the list without review in perpetuity. Though extremely laborious, the 1822 review procedures resulted in significant improvements to the 1267 list: 35 Al-Qaida names were removed, 26 deceased individuals and defunct organizations were delisted, and

more detailed information concerning those remaining on the list in the form of narrative summaries have become available on the website making the regime more transparent.¹⁶

Subsequently, the Committee has undertaken three specialized reviews, as set out in UNSCR 1989. Review of reportedly deceased individuals or defunct entities has resulted in 12 delistings and 24 amendments to the list. In addition, the Committee reviewed 70 entries lacking identifying information necessary for effective implementation. The Committee also completed its first round of the triennial review, in which 18 names were considered to determine whether continued listing remains appropriate. As of 6 December 2012, 295 names remained on the Al-Qaida Sanctions List -- 232 individuals and 63 entities, down from the peak in 2009 of 371 names.¹⁷ Since the list was created in 2001, the Committee has removed 137 Al-Qaida names, 74 individuals and 63 entities, and has merged two entries.¹⁸

*Like Minded States Initiatives*¹⁹

Both in May 2011²⁰ and November 2012,²¹ the group of countries known as the “Like Minded States” (LMS) presented recommendations to the 1267 Committee to address due process concerns. Acknowledging the significant steps taken by the Security Council to enhance fair and clear procedures, especially the creation and strengthening of the Ombudsperson mechanism, the LMS suggest additional reforms. In particular, the LMS recommend strengthening the Ombudsperson process through the codification of certain practices, the increased transparency of the delisting process through the publication of a summary of the Ombudsperson report, the extension of the Ombudsperson mandate without limitation, enhanced cooperation of States with the Ombudsperson in information gathering, providing the Ombudsperson with adequate resources and enlarging the scope of the Ombudsperson’s mandate. Proposals to introduce time limits for all listings (reinforcing the temporary and preventative nature of the sanctions) and to extend the Ombudsperson process to other sanctions regimes have also been advanced.

Human Rights Concerns

On 2 November 2012, Special Rapporteur Ben Emmerson presented his report to the General Assembly evaluating the Office of the Ombudsperson.²² In reviewing the compatibility of the

¹⁶ Letter dated 28 September 2010 from the 1267 Chair to the President of the Security Council, S/2010/497 at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/549/27/PDF/N1054927.pdf?OpenElement>

¹⁷ These numbers are for Al-Qaida listings only; at the peak, the names of more than 500 individuals and entities were included on the 1267 list.

¹⁸ 13th Report of the Monitoring Team.

¹⁹ The “Like Minded States” includes Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.

²⁰ Letter submitted to the Security Council by Switzerland and the Like-Minded States in April 2011, at <http://www.news.admin.ch/NSBSubscriber/message/attachments/22759.pdf>. Also introduced by the representative from Costa Rica on May 16, 2011, see http://www.un.org/ga/search/view_doc.asp?symbol=S/PV.6536

²¹ Letter dated 1 November 2012 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway and Sweden and Switzerland, addressed to the President of the Security Council, UN Document A/67/557-S/2012/805 at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/805

²² Special Rapporteur report. See also UN press release GA/SHC/4049 on the SR presentation to the General Assembly on 2 November 2012 at: <http://www.un.org/News/Press/docs/2012/gashc4049.doc.htm>.

1267 sanctions regime and Ombudsperson's mandate with international human right norms, the Special Rapporteur found that the Ombudsperson's mandate fell short of international minimum standards of due process: "despite the significant improvements brought about by resolution 1989 (2011), the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee."²³ The Special Rapporteur urged reforms, among others, making the decision of the Ombudsperson concerning delisting binding (not able to be overruled by the Committee or the Security Council), extending the Ombudsperson mandate for no less than 3 years and to include humanitarian exemptions, and increasing transparency of the Ombudsperson process.

Similarly, the United Nations High Commissioner for Human Rights has expressed concerns about the impact of listing and delisting procedures on the rights of targeted individuals. In December 2010, she noted that "while the procedural improvements established under resolution 1904 and the recent appointment and ongoing work of the Ombudsperson are positive and significant developments, they fail to adequately address the structural, due process-related concerns which have prompted these criticisms and challenges."²⁴

Focal Point Activities

Since UNSCR 1904 in December 2009, all delisting requests for 1267 Committee have been handled by the Ombudsperson, with the Sanction Secretariat's Focal Point being responsible for delisting petitions from all other sanctions committees. Since the separation of the Al-Qaida from the Taliban sanctions in June 2011, those listed under UNSCR 1988 (Taliban) are no longer able to utilize the Ombudsperson mechanism but can avail themselves of the Focal Point Process for delisting petitions. During the December 2012 consideration by the Council of the 1267 Committee renewal, there likely will not be any discussion of or attention to the Focal Point mechanism. The information in Table II, therefore, is provided in the context of future considerations to promote fair and clear procedures by extending the Ombudsperson mandate to include other sanctions regimes.

As noted in the updated table of Focal Point cases, delisting requests have increased, but not significantly. Beyond the previous four sanctions committees from which delisting petitions had been received, individuals and entities from the Sudan/Eritrea, Iran and the Taliban lists have also utilized the focal point, all of which have been denied.

²³Special Rapporteur report, para 35.

²⁴ Human Rights Council, A/HRC/16/50, 15 December 2010.

Table II: Focal Point Statistics

Focal Point Statistics				
Country – Committee: petitioner type	Total number of individuals/entities requesting delisting through Focal Point	Of these: petitioners pending with Focal Point²⁵	Of these: petitioners delisted	Of these: petitioners remaining listed
S and E – 751 and 1907: individuals	1	0	0	1
AQ and T – 1267: individuals ¹	18	0	3	13
AQ and T – 1267: entities ²⁶	22	0	17	3
Iraq – 1518: individuals	3	0	2	1
Iraq – 1518: entities	1	0	0	1
Liberia – 1521: individuals	19	0	8	10
Liberia – 1521: entities	9	0	0	9
DRC – 1533: individuals	5	0	1	4
DRC – 1533: entities	4	0	0	4
Iran – 1737: entities	1	0	0	1
Taliban – 1988: individuals	2	0	0	2
<i>Subtotal individuals</i>	<i>48</i>	<i>0</i>	<i>14</i>	<i>31</i>
<i>Subtotal entities</i>	<i>37</i>	<i>0</i>	<i>17</i>	<i>18</i>
Total	85	0	31	49

Table dated 3 December 2012 (Available at: <http://www.un.org/sc/committees/dfp.shtml>)

²⁵ Some requests were granted by a Committee decision to delist while the focal point process was ongoing.

²⁶ In June 2011, the Al Qaida and Taliban regime (1267) was split into separate Al Qaida (1989) and Taliban (1988) regimes, with Al Qaida delisting requests through the Office of the Ombudsperson and the Taliban regime continuing to use the Focal Point. Therefore, these figures are from cases decided prior to the June 2011 split.

SECTION TWO: ASSESSMENT OF THE OMBUDSPERSON MECHANISM

This section describes the procedures of the Ombudsperson, summarizes results and challenges of the Ombudsperson process to date, and discusses the central question concerning how the Office of the Ombudsperson delisting procedures comport with the due process principles, specifically ensuring that targeted individuals have access to an independent review body empowered to grant effective relief.

*Ombudsperson Review Procedures*²⁷

There are two distinct stages of the Ombudsperson process once a delisting request is received: information gathering and dialogue with the petitioner, after which the case is forwarded to the 1267 Sanctions Committee for discussion and decision.

During the information gathering phase (four months with optional 2 month extension), the Ombudsperson seeks information from the petitioner, as well as relevant states and UN organizations, including their recommendations on whether the petitioner ought to remain on the list. The 1267 Monitoring Team routinely conducts “fact-checks” of the information provided by the petitioner.

The following two-month dialogue phase provides a critical period in which the Ombudsperson may engage directly (preferably in face-to-face meetings, to the extent possible) with the petitioner. The interaction affords the petitioner an opportunity to be heard, to address issues and answer questions with the goal of ensuring that his or her position is fully explained and understood. The Ombudsperson acts as an intermediary by coordinating inquiries from and responses for the petitioner to relevant States, the Committee, and the Monitoring Team, and vice versa. By the end of the dialogue period, the Ombudsperson drafts and circulates her comprehensive report to the Committee summarizing the information gathered (including the sources of it, subject to confidentiality restrictions), and describes the interaction and activity undertaken by the Ombudsperson with respect to the request. This includes a description of any interaction with the petitioner, and sets out the principal arguments concerning the delisting request, based on an analysis of all the available information and the Ombudsperson’s observations. As a result of the 1989 changes, the Ombudsperson makes a recommendation that the individual or entity remains on the list, or that the Committee considers delisting.

After the Committee has had 15 days to review the Ombudsperson’s report (in all official United Nations languages), it is placed on the Committee’s agenda for consideration. The Committee’s review, including oral presentation by the Ombudsperson, must be completed no later than 30 days from the time the committee has received the report.

Where the Ombudsperson recommends retaining the listing, the individual or entity remains on the list; where the Ombudsperson recommends that the Committee consider delisting, the individual or entity will be removed from the list in 10 days if there no objection, or within 60

²⁷ Considerable information regarding the operations, standards, approaches of the Ombudsperson, and the status of cases is available on the Ombudsperson website, at: <http://www.un.org/en/sc/ombudsperson/>

days unless the Committee decides by consensus (unanimous vote) that the individual or entity should remain subject to the sanctions. Where consensus does not exist, the Committee Chair, on request of a Committee Member can refer the question of delisting to the Security Council. The Security Council then has a further 60 days to make its decision.

After a decision has been made, the Ombudsperson informs the petitioner of the decision and the reasons behind it, and removes the petitioner from the list, if applicable.

Standards of Review

The Security Council did not lay out specific criteria to be met in order for a delisting to occur; therefore the Ombudsperson established standards of review in order to ensure a fair and just evaluation of each case.²⁸ The basic test each request must undergo is the opposite of the requirements for listing: the Ombudsperson considers how the circumstances of the case have changed since the original listing, and recommends delisting of members and/or associates of Al-Qaida who no longer meet the criteria for listing.

According to UNSCR 1989, acts and activities indicating association with Al-Qaida include: “participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related material to; and recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof.” In addition, any undertaking or entity indirectly associated with Al-Qaida is also eligible for designation.

The guidelines established by the Ombudsperson are based on what are widely considered fundamental concepts in legal systems around the world. The Ombudsperson has developed a process that emphasizes “whether there is sufficient information to provide a reasonable and credible basis for the listing,” according to her office (‘sufficiency, reasonableness, & credibility test’). The growing body of comprehensive reports allows for increasing standardization of review, while retaining the flexibility needed to address each case as unique.

²⁸ The Security Council has not defined separate criteria which must be met for delisting to occur. While Resolution 1735, in paragraph 14, sets out factors of a non - exclusive nature, which the Committee “may consider,” in deciding on delisting, these cannot be categorized as criteria which must be met for delisting to occur.
<http://www.un.org/en/sc/ombudsperson/approach.shtml>

Chart I: The Ombudsperson Mechanism and Due Process

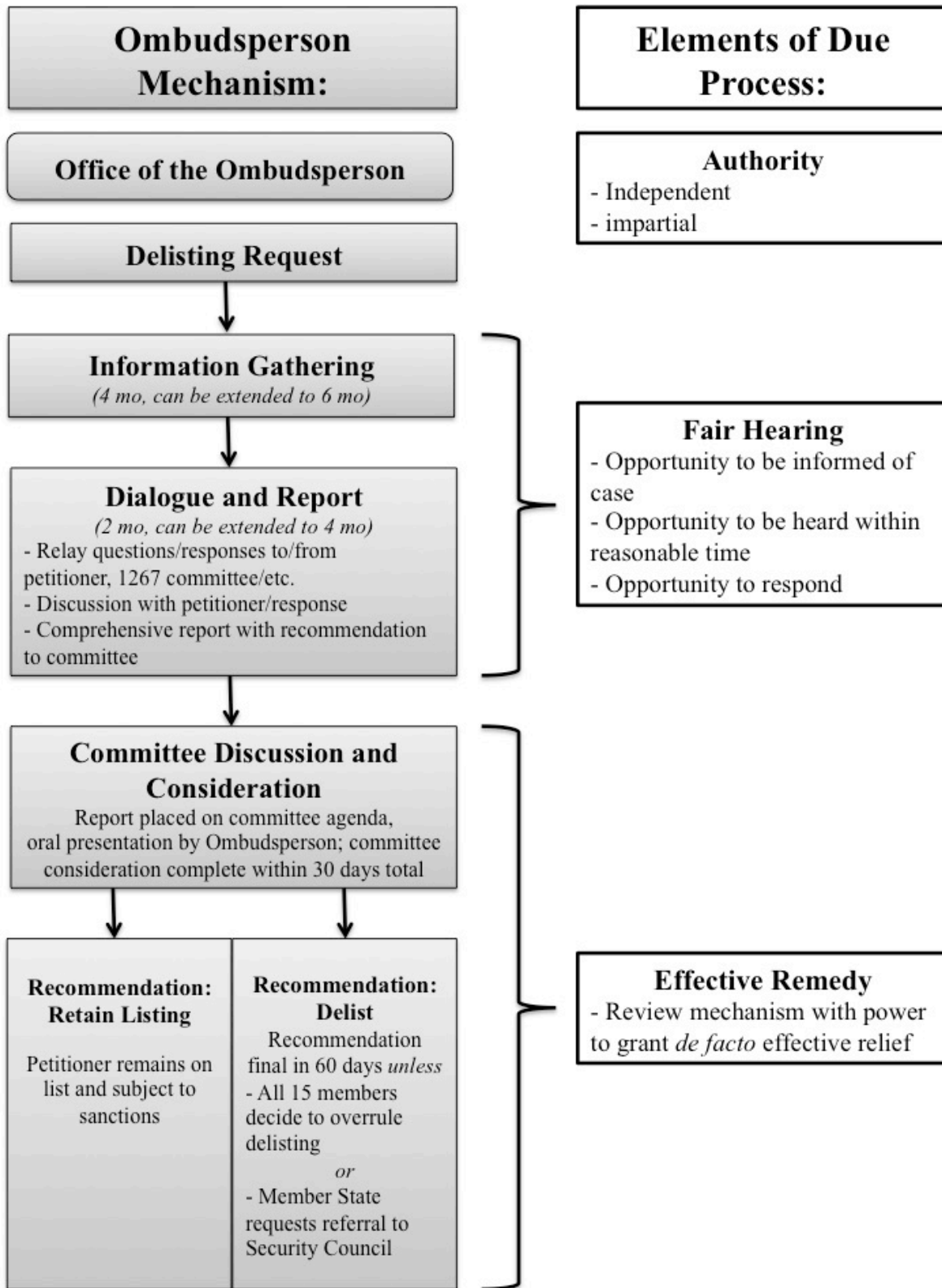


Table III: Office of the Ombudsperson – Status of Delisting Requests

Office of the Ombudsperson – Status of Delisting Requests				
Case	Name	Type	Decision	Date Delisted/Other Decision Made
1	---	Individual	Denied	25 August 2011
2	Safet Ekrem Durguti	Individual	Delisted	14 June 2011
3	---	Entity	Withdrawn	---
4	Shafiq Ben Mohamed Ben Mohammed Al Ayadi	Individual	Delisted	17 October 2011
5	Tarek Ben Al-Bechir Ben Amara Al-Charaabi	Individual	Delisted	14 June 2011
6	Abdul Latif Saleh	Individual	Delisted	19 August 2011
7	Mr. Abu Sufian Al-Salamabi Muhammed Ahmed Abd Al-Razziq (Abousfian Abdelrazik)	Individual	Delisted	30 November 2011
8	Ahmed Ali Nur Jim'ale and 23 entities	Individual and Entities	Delisted	6 entities: 28 December 2011, individual and 17 entities: 21 February 2012
9	Saad Rashed Mohammed Al-Faqih and Movement for Reform in Arabia	Individual and Entity	Delisted	1 July 2012
10	Ibrahim Abdul Salam Mohamed Boyasseer	Individual	Delisted	8 May 2012
11	Mondher ben Mohsen ben Ali al-Baazaoui	Individual	Delisted	30 March 2012
12	Kamal ben Mohamed ben Ahmed Darraji	Individual	Delisted	4 May 2012
13	Fondation Secours Mondial	Entity	Amended	17 February 2012
14	Sa'd Abdullah Hussein Al-Sharif	Individual	Delisted	27 April 2012
15	Fethi Ben Al-Rebei Absha Mnasri	Individual	Delisted	2 May 2012
16	Mounir Ben Habib al-Taher Jarraya	Individual	Delisted	2 May 2012
17	Rachid Fettar	Individual	Delisted	20 June 2012
18	Ali Mohamed El Heit	Individual	Delisted	19 July 2012
19	Yassin Abdullah Kadi	Individual	Delisted	5 October 2012
20	Chabaane ben Mohamed ben Mohamed	Individual	Delisted	20 June 2012

	al-Trabelsi			
21	---	Individual	---	---
22	Ibrahim ben Hedhili ben Mohamed al-Hamami	Individual	Delisted	21 November 2012
23	---	Individual	---	---
24	---	Individual	---	---
25	Abdullahi Hussein Kahie	Individual	Delisted	26 September 2012
26	---	Individual	---	---
27	---	Individual	---	---
28	---	Individual	---	---
29	---	Individual	---	---
30	---	Entity	---	---
31	---	Individual	---	---
32	---	Individual	---	---
33	---	Individual	---	---
34	---	Individual	---	---
<i>Subtotal individuals</i>		<i>19 delisted, 1 remains on list, 11 pending</i>		
<i>Subtotal entities</i>		<i>24 delisted, 1 amended, 1 withdrawn, 1 pending</i>		
Total		43 delisted, 1 remains on list, 1 amended, 1 withdrawn, 12 pending		

Table updated 6 December 2012 (Available at: <http://www.un.org/en/sc/ombudsperson/status.shtml>.)

Results to Date

Table II presents the results of the Office of the Ombudsperson since it was created in 2010: 22 cases have been completed, 19 individuals and 24 entities have been delisted, one entity has been removed as an alias of a listed entity, one delisting request has been refused and one petition has been withdrawn.

Under UNSCR 1989 procedures, the Ombudsperson's recommendation has prevailed in every case. No recommendations of the Ombudsperson to delist have been overturned by the Committee nor referred to the Security Council, although there have been several contentious cases, one of which came close to being overturned.²⁹ The following box provides information on the cases for which press reports are available.

²⁹ The appeal of the Saudi dissident Saad al-Faqih came close to being overturned (see <http://www.reuters.com/article/2012/07/02/us-saudi-dissident-un-idUSBRE8610ST20120702>). Reportedly 12 members of the Committee supported retaining his listing, but ultimately the issue was not referred to the Security Council.

Selected Delistings through the Ombudsperson Process

*Mr. Abu Sufian Al-Salamabi Muhammed Ahmed Abd Al-Razziq (Abousfian Abdelrazik)*³⁰

The review of Abdelrazik's case began on January 28, 2011. Abdelrazik was added to the sanctions list in 2006 based on suspicions of association with Al-Qaida. He was suspected of being an Al-Qaida associate due to his wide travels to Muslim conflict zones in the late 1990s and his links to several Islamic extremists, including Osama bin Laden recruiter Abu Zubaydah. A Montreal resident and Canadian citizen, Abdelrazik was imprisoned and allegedly tortured in 2003 in his native Sudan while visiting his ailing mother. He remained in Sudan (in prison, under house arrest, or squatting in the Canadian Embassy in Khartoum) for six years, prevented from returning to Canada until the Federal Court ordered his return in 2009. Despite surveillance of Abdelrazik, Canadian intelligence lacked information warranting his listing, and the Ombudsperson recommended that he be delisted, which the Security Council agreed to 30 November 2011. The review process took ten months, and was Abdelrazik's second request for delisting, with the first denied in 2007.

*Ahmed Ali Jim'ale*³¹

Mr. Jim'ale's review began 17 March 2011. An accountant and businessman, he was listed by the Security Council for close links with bin Laden. He founded the Barakaat network of companies (also accused of financing Al-Qaida and maintaining close ties to Osama bin Laden), based in Somalia and the UAE, that acted as a source of funding and money transfers, as well managing, investing and distributing funds for Al Qaida. The decision to delist Jim'ale (and the related Barakaat entities) was made on 17 February 2012; the same day, he was added to the 751 sanctions (Somalia and Eritrea) list for being a financier of Al Shabaab and facilitating payments to the group through a hawala fund allowing mobile-to-mobile money transfers sans identification.³²

³⁰ Paul Koring, "Canadian Abousfian Abdelrazik Taken Off United Nations Terror List," *The Globe and Mail*, 6 September 2012 at: <http://www.theglobeandmail.com/news/world/canadian-abousfian-abdelrazik-taken-off-united-nations-terror-list/article4179856/>; Graeme Hamilton, "Abousfian Abdelrazik is Off UN Watch List, But Still Under a Cloud of U.S. Suspicion," *National Post*, 1 December 2011, at: <http://fullcomment.nationalpost.com/2011/12/01/graeme-hamilton-abdelrazik-is-off-the-uns-watch-list-but-still-faces-u-s-suspicious-for-alleged-terrorist-ties/>; Andrew Chung, "Cleared from Terrorist Blacklist, Abdelrazik Furious with Ottawa," *The Toronto Star*, 1 December 2011, at: <http://www.thestar.com/news/canada/politics/article/1095648--cleared-from-terrorist-blacklist-abdelrazik-furious-with-ottawa>; Paul Koring and Ingrid Peritz, "UN Jurist Delivers Abdelrazik Justice Canada Refused," *The Globe and Mail*, 6 September 2012, at: <http://www.theglobeandmail.com/news/politics/un-jurist-delivers-abdelrazik-justice-canada-refused/article4179966/>

³¹ "Head of Telecommunication Company's Assets Frozen by UN Security Council," *Garowe Online*, 21 February 2012, at: http://www.garoweonline.com/artman2/publish/Somalia_27/Somalia_Head_of_telecommunication_company_s_assets_frozen_by_UN_Security_council.shtml

³² "Security Council Committee on Somalia and Eritrea Adds One Individual to List of Individuals and Entities," *United Nations Security Council*, February 17, 2012, at: <http://www.un.org/News/Press/docs/2012/sc10545.doc.htm>

*Saad Rashed Mohammed Al-Faqih*³³

On 1 July 2012, Mr. Faqih, a former professor of medicine in Saudi Arabia who insists he is committed to peace, was removed from the 1267 list along with his organization, Movement for Reform in Arabia (Mira). After a short stint in jail for opposition activities, Faqih moved to the UK in 1993, where he formed Mira. After posting Al-Qaida and Iraqi Islamist militant statements on its website, the organization became controversial, leading to his listing on 23 December 2004, along with Mira, for aiding Al-Qaida. As Faqih is an outspoken critic of the current Saudi leadership, Riyadh strongly objected to his removal and was supported by eleven Security Council members, including the United States. His case was considered seminal, as there was clear division on the committee regarding his listing; with four states (UK, Germany, South Africa and Guatemala) supporting the Ombudsperson's recommendation to delist Faqih, the Committee was unable to reach the consensus needed to overturn the Ombudsperson's delisting recommendation.

*Yassin Abdullah Kadi (formerly listed as Yasin Abdullah Ezzedine Qadi)*³⁴

Mr. Kadi's case is the most-well known due to his numerous legal challenges of his listing in European and American courts. The formal review of Kadi's case began 16 November 2011 but his listing dates back to the immediate post-9/11 period. Kadi is a multimillionaire Saudi businessman who was added to the list for suspected association with Osama bin Laden. Kadi's businesses involved diamonds, real estate, consulting, and chemical and banking companies in the Middle East and Asia. He was suspected of funding 9/11 terrorist attacks on the United States through Muwafaq, a charitable foundation believed to have served as a front for Al-Qaida. Kadi claims to be a philanthropist and that the foundation was closed before attacks. Kadi actively pursued litigation to free himself from United States and European Union sanctions and was the subject of landmark rulings in international law by the European Court of Justice in 2008 and 2010, which are under appeal. The UN Security Council delisted Kadi on 5 October 2012, after reviewing his case for 10 1/2 months and following a recommendation to that effect by the Ombudsperson.

³³ Louis Charbonneau, "U.N. Confirms Saudi Dissident, His Group Off Al Qaeda List," Reuters, 2 July 2012, at: <http://www.reuters.com/article/2012/07/02/us-saudi-dissident-un-idUSBRE8610ST20120702>; "Saudi Dissident Faqih Removed From UN Sanctions List," BBC, 3 July 2012, at: <http://www.bbc.co.uk/news/world-middle-east-18688045>

³⁴ ³⁴ "Saudi Man Dropped From U.N. Al Qaeda Sanctions List," Chicago Tribune, 5 October 2012, at: http://articles.chicagotribune.com/2012-10-05/news/sns-rt-us-alqaeda-sanctions-unbre89501k-20121005_1_al-qaeda-sanctions-list-saudi-dissident-saad-al-faqih-committee-ombudsman; Jeff Gerth and Judith Miller, "A Nation Challenged: On the List; Philanthropist, or Fount of Funds for Terrorists?" The New York Times, 13 October 2001, at: <http://www.nytimes.com/2001/10/13/world/a-nation-challenged-on-the-list-philanthropist-or-fount-of-funds-for-terrorists.html>; Samuel Rubinfeld, "UN Removes Saudi Businessman From Al Qaeda Blacklist," The Wall Street Journal, 8 October 2012, at: <http://blogs.wsj.com/corruption-currents/2012/10/08/un-removes-saudi-businessman-from-al-qaeda-blacklist/>; Sanchita Bhattacharya, "Banking for Terror – Analysis," Eurasia Review, 12 November 12, 2012, at: <http://www.eurasiareview.com/12112012-bangladesh-banking-for-terror-analysis/>; Glenn Simpson, "Well Connected, A Saudi Mogul Skirts Sanctions," The Wall Street Journal, 29 August 2007, at: <http://online.wsj.com/article/SB118835025334911761.html>; Peter Fromuth, "The European Court of Justice Kadi Decision and the Future of UN Counterterrorism Sanctions," The American Society of International Law, 30 October 2009, at: <http://www.asil.org/insights091030.cfm>

Challenges and Difficulties

In her fourth report to the Council, the Ombudsperson characterized the current procedure as a “robust one with significant protections which enshrine the principles of fairness.”³⁵ While significant progress has been made, challenges nonetheless have been encountered as the Ombudsperson implements her mandate, primarily related to limitations on her mandate and access to confidential information.

Limitations of Ombudsperson authority and transparency

The fact that the Ombudsperson’s mandate is subject to frequent renewal (authorized for 18 month, and extended once in UNSCR 1989) contributes to the perception of the mechanism as temporary; indefinite or a longer extension of the mandate would convey a greater sense of independence and permanency, strengthening the credibility of the process.

There have been ongoing issues regarding the improper application of sanctions - some people with names similar to those of listed individuals and entities are being mistakenly affected, and at times, restrictions against individuals and entities removed from the 1267 list persist. The Ombudsperson lacks a specific mandate to respond to requests for help in such situations.

Likewise, the Ombudsperson is not authorized to provide assistance to petitioners seeking humanitarian exemptions. Currently only Member States may submit such requests to the Committee, but may be either unwilling or unable to do so. The need for exemptions (travel) for petitioners to meet with the Ombudsperson during the dialogue phase also argues in favor of the Ombudsperson being able to submit exemptions to the Committee. The Ombudsperson also faces the difficult and time-consuming task of seeking the consent of designating states to disclose their identity to the petitioner and in the comprehensive report.

The Ombudsperson is also constrained in the information she is permitted to relay to the petitioner in cases considered through her office or make available at the conclusion of the case. There is no basis in the mandate for updating petitioners and relevant states once the case reaches the Committee, or for notifying petitioners of delistings conducted independently of the Ombudsperson mechanism. The inability of the Ombudsperson to communicate with the petitioner regarding recommendations made and next steps unnecessarily impairs the transparency of Ombudsperson process, detracting from credibility and fairness.

Similarly, there is little transparency of the committee’s reasoning behind its decisions, even though to date, the committee has ratified the Ombudsperson decisions. The Ombudsperson has emphasized in her reports the importance of the Committee providing reasons for decisions taken.

Access to information

³⁵ Fourth Report of the Office of the Ombudsperson, S/2012/590, 30 July 2012, at: <http://www.un.org/en/sc/ombudsperson/reports.shtml>.

One of the most significant challenges faced by the Ombudsperson is access to classified or confidential information. This is a major issue since a thorough analysis of all available information is critical for due process; restricted access to detailed and specific information calls into question the effectiveness of the mechanism. Overall, Member States cooperation with the Ombudsperson has been good, but some States have failed to respond in a timely manner, or at all, to requests from the Ombudsperson for relevant information relating to a delisting petition.³⁶ To facilitate the sharing of vital information, the Ombudsperson has formal arrangements with 11 states on the sharing of classified and confidential information essential for fully understanding the case of each petitioner.³⁷

Administrative and Resource Issues

The Ombudsperson has experienced problems in ensuring the full and timely translation of her reports. The word limit on translations applicable to parliamentary documents in the UN system has been applied to Ombudsperson reports. This restriction inhibits the comprehensive review by the committee of all relevant facts, as well as infringes on the effectiveness and independence of the Ombudsperson.

As the Ombudsperson's caseload has grown, the General Assembly has provided additional resources through the establishment of two positions for the Office of the Ombudsman. Funding for the translation of materials for or from petitioners remains a problem, as is the need for interpretation services during the dialogue period for face-to-face interviews. It is essential for the fairness of the mechanism that the Ombudsperson is able to communicate with the petitioner in a language they understand. Secure funding for translation/interpretation services would address this shortcoming that negatively affects the fairness and efficacy of the Ombudsperson process.

Assessment

The creation and enhancement of the Office of the Ombudsperson has been welcomed by Member States and the human rights community alike as important progress in making UN sanctions more fair and clear, but questions continue as to how the Ombudsperson process comports to due process requirements.

In June 2006, Secretary General Annan conveyed to the Security Council an informal paper which enumerated basic elements for fair and clear procedures. Persons against whom measures have been taken by the Security Council have:

³⁶ The Ombudsperson has noted, however, that the procedural changes contained in UNSCR 1989 have increased the incentive for States to respond in depth and in a timely manner.

³⁷ Arrangements for access to confidential information are in place for Australia, Austria (first formal agreement), Belgium, Costa Rica, France, Germany, Liechtenstein, New Zealand, Portugal, Switzerland and the United Kingdom. Also during the reporting period, the US expressed willingness and demonstrated an ability, to share confidential information on an ad hoc basis. See <http://www.un.org/en/sc/ombudsperson/accessinfo.shtml>

- the right to be informed of those measures and to know the case against him or her as soon as, and to the extent, possible;
- the right to be heard within a reasonable time by the relevant decision-making body (including ability to directly access the body as well as a right to be assisted or represented by counsel);
- the right to review by an effective review mechanism (the effectiveness which depends on impartiality, degree of independence, and ability to provide effective remedy).³⁸

With the creation and enhancement of the Office of the Ombudsperson through UNSCRs 1904 and 1989, the rights of individuals to be informed, have access to, and be heard, appear to have been addressed. Providing effective remedy (requiring independence, impartiality, and an ability to grant relief), however, continues to be outstanding issue. Criticism of the current Ombudsperson mechanism thus is focused on two perceived deficits: that the Ombudsperson is not sufficiently independent, and that because Ombudsperson's recommendations are not binding on the Committee, the Ombudsperson is not able to grant relief.

There are two aspects of independence: appointment and decision-making. While there is no question that the Ombudsperson is independently appointed and has gone to great lengths to demonstrate independence of mind and impartiality, her independence relating to decision-making and the ability to grant relief is contested.

The Special Rapporteur maintains that, "as regards an (objective) appearance of independence, the structural flaws remain the same" since the possibility of the Security Council overturning the Ombudsperson decision exists, no matter how unlikely or infrequently the power is exercised.³⁹ He concluded that even after the 1989 reforms, "the mandate of the Ombudsperson still does not meet structural due process requirement of objective independence from the Committee."⁴⁰ Other legal experts likewise contend that the Ombudsperson lacks the power to grant effective remedy and continue to argue for judicial review with binding authority for the Ombudsperson over the Committee.⁴¹

The Ombudsperson and some experts argue, however, that Ombudsperson's current mandate adequately safeguards the rights of listed persons to a fair, independent, and effective process. If we "focus ... on the fundamental components of fairness, as opposed to the mechanics by which they are delivered, ... the Office of the Ombudsperson ... can provide the necessary fair and

³⁸ See letter dated 15 June 2006 from the Secretary General to the President of the Security Council, informal paper entitled, "Targeted individual sanctions: fair and clear procedures for listing and delisting". Proceedings of 5474th Meeting, S/PV.5474, New York 22 June 2006. Available online at: <http://daccessdds.un.org/doc/UNDOC/PRO/N06/400/28/PDF/N0640028.pdf?OpenElement>. These elements, based upon a report commissioned by the UN Office of the Legal Affairs of Professor Bardo Fassbender, represented articulation by UN officials of minimum standards of procedural fairness and due process.

³⁹ The Special Rapporteur argued that the 'very existence' of an executive power to overturn the decision of a quasi-judicial body vitiates the regime. Special Rapporteur report, para. 32 and 34.

⁴⁰ Special Rapporteur report, para 34.

⁴¹ Ibid. para 35; Willis. It should be noted, however, that these critiques largely focus on *formal* legal criteria, usually disregarding the informal authority exercised by the Ombudsperson in providing a fair review process.

clear process.”⁴² As echoed by the 1267 Monitoring Team, “the argument that the Ombudsperson’s mandate provides due process guarantees is now a strong one,” and both in law and in practice, the Ombudsperson mechanism appears to meet required criteria, “including an effective review through the presumption that her recommendations will have the force of decisions.”⁴³ Adoption of the reform in UNSCR 1989 reversing the presumption was critical and groundbreaking in that an independent reviewer’s recommendation to delist is final unless unanimously overturned by 15 countries – a high bar with strong political and legal disincentives for exercising veto authority.

The Ombudsperson further argues that fair process is contextual and does not require structural due process in the form of formal judicial review; rather fair process from a principled basis can be sufficient since courts have recognized the unique circumstances of overlaying a quasi-judicial mechanism onto a political process. Indeed, the Ombudsperson maintains that the current mechanism allowing her to consider all information *de novo*, (especially current information, not just that at the time of the listing decision as a court does) and to interact with designees face-to-face, offers advantages over judicial review. Moreover, the strict time limits of the Ombudsperson process are superior in terms of rendering a decision in months rather than years.

That said, the current system is not without problems: difficulties continue in ensuring that the Ombudsperson has access to relevant information. As noted by the Ombudsperson, “many of the challenges faced in this respect relate to the question of classified/confidential material, again highlighting the importance of reaching agreements with states on access to such material.”⁴⁴ Reflecting the complexity of applying legal standards of a national level to an international political body, the critical question remains how the Ombudsperson process comports to due process requirements.

Clearly the Ombudsperson process does not constitute *formal* judicial review of Security Council decisions: there is no requirement to provide evidence to targets (although the Ombudsperson provides information to the petitioner), no hearing before definitive decision-makers (although the Ombudsperson’s process of dialogue, report and presentation before the committee constitutes hearing, and if the committee overturns the recommendation, it must provide reasons), and Ombudsperson recommendations are not binding (but the threshold of unanimous agreement of all 15 Security Council members is a high threshold). While the Ombudsperson process falls short of *formal* judicial review, it offers what arguably are equivalent elements that go a long way to address due process concerns, in essence, *de facto* judicial review.

European courts thus far have not required judicial review of the underlying reasons for listing, but rather held that the review should meet standards of ‘*effective judicial protection*’ (emphasis added). The focus on formal judicial review, therefore, could be overcome if ultimately the review is independent, impartial and substantive, thereby approximating effective judicial protection. A more flexible interpretation than that offered by the Special Rapporteur provides

⁴² See 12th report of the 1267 Monitoring Team, para 32 citing Ana María Salinas de Frías, Katja L. H. Samuel and Nigel D. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012), chap. 16.

⁴³ *Ibid.*

⁴⁴ 4th Report of the Ombudsperson

leeway for European courts to avoid decisions that strike down implementation of UN targeted sanctions. While imperfect, the current system appears to come “as close as meeting the calls for an independent and binding review mechanism as seems possible.”⁴⁵

Separate from the question as to whether the Ombudsperson mechanism provides equivalent due process is the issue of extending the Ombudsperson’s mandate to other regimes. At the time the Office of the Ombudsperson was created, the Committee chair was asked why the Ombudsperson mechanism was limited to the 1267 Committee and not other sanctions regimes. Mr. Mayr-Harting responded that the 1267 Committee was “the mother regime of all sanctions regimes,” in which the lack of due process was most criticized in court. If the Office proved effective in strengthening due process and the rule of law, it should serve as a model for others in the organization.”⁴⁶ In particular, the Jim’ale case⁴⁷ (the same day he was delisted from the 1267 list, he was added to the Somalia sanctions list) raises fundamental issues of fairness and begs the question of Al-Qaida-related designees only having access to the Ombudsperson. While the issue of extending the Ombudsperson mechanism to other regimes likely will not be formally enjoined during the Security Council consideration of the 1267 renewal in 2012, attention to the formation of a cross-regime mechanism to prepare for this eventuality should be established.

⁴⁵ 13th Report of the Monitoring Team.

⁴⁶ See UN press release 15 July 2010, at: http://www.un.org/News/briefings/docs/2010/100715_1267.doc.htm

⁴⁷ <http://www.un.org/News/Press/docs/2012/sc10545.doc.htm>

SECTION THREE - LITIGATION UPDATE AND TRENDS

Larissa van den Herik and Armin Cuyvers⁴⁸

1. Introduction

Legal challenges continue to affect the 1267/1989 sanctions regime. The most pertinent judgement in the litigation landscape since the 2009 Watson report is the 2010 judgement of the General Court⁴⁹ of the EU in the Kadi case.⁵⁰ This judgement was rendered before the 1989 amendment of the Ombudsperson's mandate and the subsequent enhancement of her powers. The 2010 Kadi judgement is currently on appeal and the appeal judgement is expected in Spring 2013. The Kadi appeal judgement presents an opportunity for the European Court of Justice (ECJ) to offer its *obiter dicta* views on the office and procedures of the Ombudsperson as lastly amended by Resolution 1989. In its judgement, the ECJ may evaluate under which conditions it would defer to a UN mechanism, or more concretely to what extent the institution of the Ombudsperson in its current form can and does comport with requirements of an effective review procedure. Given the grand visibility of this case, such an evaluation may well have *de facto* precedential value.

The 2012 Nada judgement of the European Court of Human Rights (ECtHR)⁵¹ and the UK House of Lords judgement in the case of Ahmed and others⁵² present other instances of recent 1267/1989 litigation which have further exposed some perceived inadequacies of the system.⁵³ The ECtHR's Nada judgement offered the first European opportunity for engagement and assessment of the upgraded Ombudsperson procedure after Resolution 1989,⁵⁴ yet the Court did not seize the opportunity. Instead, similar to the Kadi approach, it focused on the implementation measures and state action rather than that it directly challenged the sanctions system at UN level.⁵⁵

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⁴⁹ The General Court exists as of 1 December 2009, after the entry into force of the Lisbon Treaty. It replaces the Court of First Instance.

⁵⁰ *Kadi v. the European Commission*, Judgement of the General Court, Case T-85/09, 30 September 2010.

⁵¹ ECtHR, *Nada v. Switzerland*, Judgement of the Grand Chamber, Appl. No. 10593/08, 12 September 2012.

⁵² UK House of Lords, *Ahmed and others v. Her Majesty's Treasury*, [2010] UKSC 2, 27 January 2010.

⁵³ The fact that Nada had been delisted and the sanctions lifted at the time of the judgement, did not deprive Nada of his victim status given the restrictions he had suffered while being listed from 2001, or in any event when the sanctions were effectively imposed in November 2003, until he was delisted in September-October 2009, *Nada Judgement*, para. 129.

⁵⁴ The institution of the Ombudsperson post-dated the case brought before the ECtHR in *Nada* as the Court pointed out in para. 78 of the Judgment, but it preceded the outcome of the Judgment as such and thus allowed the ECtHR to offer some *obiter dicta* views. As indicated by Special Rapporteur Emmerson, the *Nada* Judgement has implications for three of the permanent members of the Security Council and is wider in geographical reach than the ECJ *Kadi* Judgement, Promotion and protection of human rights and fundamental freedoms while countering terrorism, 2nd annual report by Special Rapporteur Ben Emmerson, *UN Doc. A/67/396*, 26 September 2012, para. 21.

⁵⁵ *Nada* complained that the ban on entering or transiting Switzerland violated in particular his right to liberty, his right to family life and the right to an effective remedy. The Court found that, in light of the unique geographical situation of the small Italian enclave in Switzerland in which *Nada* lived, Switzerland should have done more to adapt the sanctions regime to *Nada's* individual situation, *Nada Judgement*, para. 196. Other cases have also tended

The approach to focus on domestic implementation measures and other state actions is based on the premise that states enjoy a certain latitude in implementing the 1267/1989 sanctions regime.⁵⁶ The hypothesis that states have indeed such a free choice to decide on implementation methods may seem to offer a way out of the constraints for review imposed by Articles 25 and 103 of the UN Charter. However, as already noted by the Court of First Instance in the Kadi judgement of 2005 and again by Judge Malinverì in the concurrent opinion to the Nada case, this may be a false premise.⁵⁷ Ultimately, states are obliged to impose the sanctions on the persons listed by the Sanctions Committee, and unlike in the 1373 procedure, they do not enjoy any discretion as to the selection of the individuals or the type of sanctions to be imposed. Their discretion remains limited to the methods, modalities and procedures of implementation. In this process, states are now encouraged by the Kadi and Nada judgements to integrate a certain domestic review.⁵⁸ However, as observed by Special Rapporteur Emmerson, national or regional judicial review can most likely not serve as an adequate substitute for procedural guarantees at UN level, since the implementing state or regional organization cannot effectively review the listing as such, as it will often have no access to the evidence underlying the listing.⁵⁹

Therefore, the crucial question remains under which conditions regional and national courts will defer to the UN mechanism. This question is discussed in sub-section 2 with a focus on the Kadi case and the findings of the EU courts on this matter. In parallel with specific legal actions challenging the implementation of 1267/1989 listings in regional and national courts, a new litigation trend is emerging in connection with autonomous EU listings. These autonomous listings concern individuals and entities which the EU has added on its own motion while implementing UN sanctions as has been done in relation to the Iran and Ivory Coast sanctions, or they can involve sanctions regimes that operate without a UN counterpart, such as the EU sanctions imposed on Burma, Syria and Belarus. This special EU litigation will be analysed in sub-section 3, with some observations on the relevance of these proceedings for UN sanctions regimes and their implementation in the EU legal order.

2. Specifying conditions for deferral to the Ombudsperson

The quest to identify the adequate yardstick to evaluate the Ombudsperson as a review mechanism is directly linked to the characterization of the sanctions. Political measures generally leave the executive with a large measure of discretion which would minimize requirements of review, whereas criminal sanctions require more procedural safeguards, including judicial review.

The Security Council has always emphasized that the sanctions are not supposed to be penal. In Resolution 1989, it reiterated, “that the measures [...] are preventative in nature and are not

to zero in on implementation modalities. Cf. the Federal Court of Canada, *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 4 June 2009, [2009] A.C.F. no 656, 2009 FC 580, No. T-727-08, as of para. 55 in which the Canadian Federal Court in particular focused on the denial to grant Abdulrazik an emergency passport. The Monitoring Team also observed that most national cases do not challenge the Security Council as such, e.g. Ninth report of the Analytical Support and Sanctions Monitoring Team, *UN Doc. S/2009/245*, 13 May 2009, para. 17.

⁵⁶ *Kadi I* Judgement 2008, para. 298; *Nada* Judgement, paras. 176 and 180.

⁵⁷ *Nada* Judgement, concurring opinion Judge Malinverì, paras. 2-7.

⁵⁸ *Kadi I* Judgement 2008, para. 299.

⁵⁹ 2nd annual report by Special Rapporteur Ben Emmerson, *UN Doc. A/67/396*, 26 September 2012, para. 22.

reliant upon criminal standards set out under national law.”⁶⁰ Initially, courts respected the qualification of the sanctions as being non-penal which would allow for more discretion as regards the level and the nature of review required.⁶¹ However, in the 2010 Kadi judgement, the General Court called this qualification into question in light of the indeterminate duration of the measures imposed.⁶²

The 2010 Kadi Judgement did remain somewhat ambiguous as to the consequences of this finding in terms of the nature of review required. It still appeared to leave room for pragmatic approaches that do not necessarily call for *judicial* review at UN level. A central dictum of the 2010 Kadi Judgement is included in paragraphs 126 and 127. In these paragraphs, the Court enunciated that it would not refrain from exercising its jurisdiction “so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection”. This phrase is reminiscent of the so called *So Lange* approach.⁶³ At face value, it seems to require that a UN review body be of judicial nature. Yet, by way of *obiter dictum*, the Court subsequently held that the creation of the Office of the Ombudsperson did not resolve the defect of insufficient guarantees since it could not be regarded as “an independent and impartial body responsible for **hearing and determining**, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee.”⁶⁴ This statement would perhaps allow for some more discretion as to the precise format of the review body.

The Court rebuked in particular the fact that delisting could only occur by a consensus decision of the sanctions committee and it denounced the discretion of states to withhold information and evidence from the listed person.⁶⁵ The implication of this dictum seems to be that the ECJ would equate the Ombudsperson with the provision of an effective judicial procedure, if:

- The decision of the Ombudsperson becomes binding on the Sanctions Committee.
- Sufficient evidence is disclosed to the listed person to ensure that he can defend himself effectively and the listed person is informed of the identity of the designating state.

In paragraphs 132-151, the General Court stipulated the conditions for judicial review at EU level. This review will have to be undertaken as long as adequate guarantees at UN level remain absent, but these conditions do not necessarily apply *mutatis mutandis* to the Ombudsperson.

⁶⁰ *UN Doc. S/RES/1989*, 17 June 2011, 15th preambular paragraph.

⁶¹ *Kadi I* Judgement 2005, para. 248, *Kadi I* Judgement 2008, para. 358.

⁶² *Kadi II* Judgement 2010, para. 150. More recently, Special Rapporteur Emmerson also held that the *de facto* permanent nature of the sanctions gave them the colour of a penal sanction and he characterized the consequences of the measures as quasi-penal in nature, *UN Doc. A/67/396*, 26 September 2012, para. 58.

⁶³ See already BVerfGE 37, 271 (1974) *Solange I*; and BVerfGE 73, 339 (1986) *Solange II*, with further Brunner (Maastricht Urteil) BvR 2134/92 and 2159/92 Brunner v. European Union Treaty, judgment of 12 October 1993, BVerfGE 89, 155 (1993), with English translation in [1994] 1. In this Judgement, the German Constitutional Court declared it would not review specific Union acts so long as the ECJ offered fundamental rights protection. In a similar vein, Judge Malinverri in para. 23 of his Opinion to the Nada Judgement referred to the ECtHR’s *Bosphorus* case law. In this case, the ECtHR held that state action taken in compliance with obligations imposed by international organizations such as the UN and the EU is justified if these organizations offer *equivalent* human rights protection, ECtHR, *Bosphorus v. Ireland*, Appl. No. 45036/98, 30 June 2005, para. 155.

⁶⁴ *Kadi II* Judgement 2010, para. 126-127, emphasis added.

⁶⁵ *Kadi II* Judgement 2010, para. 128.

3. Legal challenges to/and implications of EU autonomous sanctions

The most notable development since the 2009 Watson report is the significant increase of litigation before the EU Courts that concerns autonomous EU sanctions. The question is what the implications are, if any, of this development for UN sanctions regimes and their implementation in the EU legal order.

3.1 The system of EU autonomous sanctions

In addition to the implemented UN sanctions regimes, the EU has also created its own regimes. The EU autonomous sanctions can be subdivided into sanctions aimed directly against individuals suspected of (supporting) terrorism and sanctions aimed against states yet including individuals closely linked to the state.⁶⁶

3.1.1 EU Autonomous anti-terrorist sanctions against individuals

The EU autonomous anti-terrorist sanctions are effectively intended to comply with the obligations of the EU Member States under UN resolution 1373 (2001). Common Position 2001/931/CFSP⁶⁷ lays down a general framework for EU sanctions against persons, groups and entities involved in terrorist acts. This Common Position has been further implemented and developed via Council Regulation 2580/2001.⁶⁸ Together these instruments create a system to sanction individuals, groups and entities suspected of terrorist acts, amongst other means by freezing their funds and imposing travel bans.

In contrast to the 1267 regime, it is the EU Council of Ministers, acting on its own initiative, and therefore autonomously, that determines which individuals are to be listed. The procedure for such autonomous listings is as follows.⁶⁹ First a 'competent authority' in a Member State must have taken a decision concerning the individuals or entities to be listed. This decision must concern either the *instigation of investigations* or *prosecution* for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or *condemnation* for such deeds. Listing, therefore, does not require a conviction, but is possible as soon as one competent authority finds there are at least sufficient grounds to instigate an investigation.⁷⁰ 'Competent authorities' are either judicial authorities, or, where judicial authorities have no competence in the area covered, an equivalent competent authority in that

⁶⁶ As discussed further below, due to the recent judgment in case C-310/10 *Parliament v. Council*, sanctions under art. 215 TFEU, which primarily provides the basis for sanctions against third countries and individuals, may also concern the fight against terrorism. Nevertheless it is still useful to subdivide all the existing sanction regimes in this manner.

⁶⁷ Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ L 344, 28.12.2001, p. 93), as amended by: Common Position 2009/468/CFSP (OJ L 151, 16.6.2009, p. 45), Council Decision 2011/701/CFSP (OJ L 277, 22.10.2011, p. 18), Notice that concerns the listed persons, groups and entities (OJ C 186, 26.6.2012, p. 1).

⁶⁸ Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ L 344, 28.12.2001, p. 70).

⁶⁹ See article 1(4) of Common Position 2001/931/CFSP and art. 2(3) of Regulation 2580/2001.

⁷⁰ The listing is thus more closely linked to criminal processes than the 1267/1989 listing process. The Guidelines of the 1989 Committee of 30 November 2011 explicitly mention in para. 6 (d) that, "a criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature."

area.⁷¹ Second, on the basis of the decision by a competent authority a Member State must then suggest listing at the EU level in the Council of Ministers. In practice this suggestion is dealt with first by Council working party CP 931 WP. This working group then has a maximum of two weeks to examine the listing and make a recommendation to the Council.⁷² Virtually always this recommendation follows the suggestion of the Member State to list.⁷³ Subsequently the Council, by unanimity, formally places an individual or entity on the EU list. Listings are reviewed every six months, yet delisting also requires unanimity. As a result each Member State can prevent a delisting, including the Member State that requested the listing in the first place. Listed individuals can challenge their listing before the General Court.

3.1.2 Autonomous EU sanctions against states and (affiliated) individuals

In addition to the anti-terrorist sanctions regime, the EU also has a practice of imposing sanctions on third states. Where it decides to do so, these sanctions may be targeted at individuals where this contributes to the objectives of the sanctions against the state or regime targeted. With the introduction of art. 215 TFEU in Lisbon, it is no longer required that these individuals are directly connected to the targeted state.⁷⁴

Currently 25 sanction regimes are in place against third states and affiliated individuals.⁷⁵ These sanctions may complement UN sanctions or rather exist in the absence of collective UN sanctions. They concern Afghanistan, Belarus, Bosnia and Herzegovina, Burma (Myanmar), China, Democratic Republic of Congo, Cote d'ivoire, Egypt, Eritrea, Republic of Guinea (Conakry), Haiti, Iran, Iraq, Democratic People's Republic of Korea (North Korea), Lebanon, Liberia, Libya, Moldova, Serbia and Montenegro, Somalia, South Sudan, Sudan, Syria, Tunisia, and Zimbabwe. Each of these regimes has its own tailored listing criteria.

The individuals targeted by these sanctions can challenge their listings before the European Courts. This option is increasingly used, and often with success: annulment actions against autonomous sanctions have seen an enormous rise in number. This new litigation trend is rather successful and a substantial number of listings have effectively been annulled. This trend may

⁷¹ See also C. Eckes and J. Mendes, 'The Right to be Heard in Composite Administrative Procedures: Lost in between Protection?', 36 *European Law Review* 2011, pages 651-670 for examples where these are not judicial authorities.

⁷² Council document 10826/07 on the fight against the financing of terrorism, including annex I and II.

⁷³ Also note that though the working group can examine the grounds for the listing, it may not substitute its own assessment for that of the competent authority. Under the principle of loyal cooperation the Council is bound, to a certain extent, to this national finding. See explicitly the ECJ in *OMPI II*, Case No. T-256/07, para. 133 and 147.

⁷⁴ Before the Treaty of Lisbon the legal basis for such sanctions, art. 301 TEC, did not refer to individuals.

Nevertheless the ECJ had accepted the inclusion of sanctions against individuals who were affiliated sufficiently closely and directly with the targeted state. The Lisbon Treaty has now clarified and extended the competences of the Union in this regard by providing an explicit competence for sanctions targeted at individuals in the context of state sanctions, without demanding a sufficiently close link, in art. 215 TFEU. On this general scope also see the recent judgment by the ECJ in Case C-130/10 *European Parliament v. Council* nyr. For the criteria applying to measures under the old art. 301 TEC see Case C-376/10 P, *Pye Phyo Tay Za v Council*, 13 March 2012, nyr.

⁷⁵ NB: this includes the sanctions against China only based on a Declaration of the European Council, Madrid, 27.6.1989, whereas the highly elaborate sanctions against, for instance, Iran and Syria are counted as one, even though based on several instruments. Several other regimes, furthermore, such as against Moldova are also more limited in scope and do not include freezing of funds, whereas others, such as the sanctions against Haiti and the former Yugoslavia are related to UN sanctions even though not based on UN measures.

undermine the tool of sanctions per se. It may call into question the legitimacy of sanction as a policy tool within EU context which may, in turn have negative spill-over effects to the implemented UN sanctions.

3.2 *An inventory of the legal challenges to autonomous EU sanctions: a new frontier*

In terms of numbers, sanctions against third states including individuals have been challenged most, much more than the terrorist-related sanctions. On 1 December 2012, 177 cases were pending against autonomous EU sanctions against third countries and linked individuals.⁷⁶ Of these 71 concerned sanctions against Iran, 59 the sanctions against Syria, and 24 against Belarus. Considering the influx of cases, this number will be outdated quickly, but it does provide an indication of the scale of the problem.

As far as autonomous EU terrorist listings are concerned, the General Court (formerly Court of First Instance) has so far rejected the request for annulment in three cases.⁷⁷ Two of these, however, were atypical in the sense that in *Morabit*, the claimant had already been removed from the list, and in *Kongra-Gel* the action was rejected on a point of admissibility.⁷⁸ In the eight other terrorist-listing cases it annulled the listing, although it should be kept in mind that three of these concerned the People's Mojahedin Organization of Iran (PMOI), whereas *Sison* and *Al-Aqsa* were each annulled twice.⁷⁹ The ECJ has so far ruled five times on appeal on autonomous terrorist sanctions.⁸⁰ Interestingly, two cases solely concerned requests for damages which were both denied.⁸¹

As for autonomous sanctions against individuals related to third States, the General Court has so far given seven judgments. One of these cases concerned the sanctions against Burma,⁸² two the

⁷⁶ In contrast, at least seven cases were pending against the autonomous terrorist sanctions: Action brought on 1 September 2010 - *Maftiah v Commission* (Case T-101/09), Action brought on 1 September 2010 - *Elosta v Commission* (Case T-102/09), Action brought on 23 July 2010 - *Yusef v Commission* (Case T-306/10), Action brought on 6 April 2010 - *Ayadi v Commission* (Case T-527/09), Action brought on 14 August 2009 - *Al-Faqih and MIRA v Council and Commission* (Case T-322/09), Action brought on 7 January 2010 - *Al Saadi v Commission* (Case T-4/10), Action brought on 15 April 2009 - *Abdulrahim v Council and Commission* (Case T-127/09).

⁷⁷ Case T-49/07 *Fahas v. Council* [2010] nyr, Case T-37/07 and T-323/07 *El Morabit*, [2009] ECR II-131, and Case T-253/04 *Kongra-Gel* [2008] ECR II-46.

⁷⁸ For the interesting inroad into primary law that was made to ensure legal protection in the linked case of the PKK see A. Cuyvers, Case note to cases T-229/02 and C-229/05P: The PKK and the KNK v. the Council, 45 *CMLRev* (2008) p. 1487.

⁷⁹ Case T-228/02 *OMPI I*, Case T-256/07 *OMPI II*, case T-284/08 *OMPI III*, Case T-229/02 *PKK v Council*, case T-327/03 *Al-Aqsa*, Case T-348/07 *Al-Aqsa II*, Case T-47/03 *Sison*, Case T-341/07 *Sison II*. Most recently it also annulled a listing related to the situation in Ivory Coast, though applying the framework developed in the terrorist cases, see Case T-86/11 *Bamba v. Council* [2011] nyr.

⁸⁰ Case C-266/05 P Judgment 2007-02-01 *Sison v Council*, Case C-229/05 P Judgment 2007-01-18 *PKK and KNK v Council*,⁸⁰ Case C-354/04 P Judgment 2007-02-27 *Gestoras Pro Amnistia and Others v Council* and case C-355/04 P Judgment 2007-02-27 *Segi and Others v Council*. On damages further see most recently T-341/07 *Sison v Council* where the General Court also denied damages because the breach concerned was not found sufficiently serious. Case C-550/09 Judgment 2010-06-29 *E and F*.

⁸¹ Case C-354/04 P Judgment 2007-02-27 *Gestoras Pro Amnistia and Others v Council* and case C-355/04 P Judgment 2007-02-27 *Segi and Others v Council*. On damages further see most recently T-341/07 *Sison v Council* where the General Court also denied damages because the breach concerned was not found sufficiently serious.

⁸² Case T-181/08, *Tay Za v. Council*.

sanctions against Ivory Coast,⁸³ and four the sanctions against Iran.⁸⁴ In five of these cases the listings were annulled. Only in the two *Bank Melli* cases were the listings upheld. These latter listings concerned an institution that was quite directly and closely involved with the primary entity and actions that the sanctions aimed to target.⁸⁵

So far the ECJ has ruled three times, on appeal, on the validity of autonomous sanctions and linked individuals. In the two *Bank Melli* cases the ECJ upheld the sanctions, just as the General Court had done.⁸⁶ In the appeal against *Tay Za* the ECJ annulled the judgment of the General Court, but on different reasoning also annulled the listing as the General Court had done.⁸⁷ The ECJ held in this case that it had not been established that *Tay Za* benefitted directly from the economic policies of the leaders of Burma, since he was only a family member from a leading business figure and it was not proved that he benefitted himself directly.⁸⁸ Similar to Advocate-General Mengozzi, the ECJ held that the causal link between the targeted person and the situation that was the primary target of the sanctions was too tenuous and thus lacked a legal basis in EU law.⁸⁹ In other cases, the annulment was based on the finding that the statement of reasons underlying the listing was too vague and general.⁹⁰

Recently, furthermore, the ECJ gave an important judgment in the case C-130/10 *European Parliament v. Council*. This case did not concern an annulment action, but rather the legal basis for sanctions that served, *inter alia*, the objective of combating terrorism by sanctioning certain individuals linked to a third state. The European Parliament had demanded that this action be taken under art. 75 TFEU. This provision provides a specific legal basis for sanctions in the fight against terrorism, and incidentally also requires a larger role for the European Parliament. The Council, however, had based the sanctions on art. 215 TFEU, which allows for sanctions against third states and individuals, and only requires the Council to inform the Parliament. The ECJ allowed this use of art. 215 TFEU, and therefore allowed that sanctions under this provision may have as their aim to combat terrorism. This rather lenient approach can make it easier to adopt such sanctions, and may signal a more general margin of discretion that the ECJ is willing to grant the Council in this regard. Whereas the Courts are very strict in their review of individual listings in terms of meeting the listing criteria, statement of reasons and providing sufficient evidence that underlies the listing, they respect the Council's discretion in designing sanctions regimes. Therefore, the more concise and clear the listing criteria are, the greater is the chance that they withstand legal challenges provided that a certain level of information and evidence exists that meets the listing criteria and hence justifies the listing.

⁸³ Case T-86/11 *Bamba v. Council* and Case T-316/11 *Morokro v. Council*.

⁸⁴ Case T-390/08 2009-10-14 *Bank Melli Iran v. Council*, Joined cases T-332/08 and T-246/08 *Bank Melli v. Council*, Joined Cases T-439/10 and T-440/10 *Fulmen v. Council* and Case T-509/10 *Kala Naft v. Council*.

⁸⁵ Case T-390/08 2009-10-14 *Bank Melli Iran v. Council*, Joined cases T-332/08 and T-246/08 *Bank Melli v. Council*.

⁸⁶ Case C-380/09 P (Appeal *Bank Melli* 332/08 T-246/08) and Case 548/09 P (Appeal *Bank Melli* against T-390/08).

⁸⁷ Case C-376/10 P *Tay Za v. Council*.

⁸⁸ Case C-376/10 P *Tay Za v. Council*, para. 71.

⁸⁹ Case C-376/10 P *Tay Za v. Council*, Opinion of Advocate-General Mengozzi, 29 November 2011.

⁹⁰ Case T-86/11 *Bamba v. Council*, para. 51 and Case T-316/11 *Morokro v. Council*, para. 29.

Consequently both actions against autonomous terrorist sanctions and against autonomous state sanctions have had a very high rate of success before the EU courts. Out of a total of 22 challenges 15 have succeeded. Of the 7 that have not, furthermore, 4 concerned the more straightforward sanctions against *Bank Melli*, and two others were rather atypical. Once this is taken into account the success rate of these challenges is compelling. The inadequate listing procedure and the inability or unwillingness to provide sufficient information to listed individuals, but especially to the Courts is a main cause of these difficulties.

3.3 Legal protection and the use of confidential information

When discussing the legal protection against autonomous EU sanctions two elements should be kept in mind. First, these sanctions are not based on UN measures. As a result there is no UN authority that needs to be respected by the EU courts. Consequently there is no formal ‘hierarchy obstacle’ to judicial review. Second, and only in relation to the anti-terrorist listing regime, these listings are based on a decision from a national competent authority, which means or presupposes that those listed have had the benefit of a certain form of legal protection in national jurisdictions. Of course this protection may differ per situation, but there is a two-tier procedure⁹¹ and the EU courts are not the sole providers of legal protection for autonomous sanctions, as they are in the case of UN sanctions.⁹²

With these points in mind, the European courts have unequivocally held that **in the absence of an adequate UN review mechanism**, *the same effective legal protection must be provided for UN-based listings as for autonomous EU listings*.

The leading case law on legal protection can be found in the *OMPI* judgments of the General Court, and these indeed require far more than a marginal review.⁹³ Although the *OMPI* framework leaves a wide discretion to the Member States, Commission and Council,⁹⁴ it remains up to the EU courts ‘to review the *interpretation* made by that institution of the relevant facts.’⁹⁵ Such review includes *inter alia* the question of whether ‘the evidence relied on is factually accurate, reliable and consistent’, and whether ‘it is capable of substantiating the conclusions drawn from it.’ This thus includes a verification of the facts underlying the listing.⁹⁶ Yet, ‘when conducting such a review, it is not [the Court’s] task to substitute its own assessment of what is appropriate for that of the competent Community institution.’⁹⁷

In relation to the use of confidential information, the General Court held in the *OMPI* case that a refusal to communicate information to the Court rendered a review impossible, which would result in annulment of the implementation measure or the listing. This finding was confirmed in

⁹¹ *Kadi II* Judgement 2010, para.185.

⁹² *Kadi II* Judgement 2010, para.135. Also see Case C-550/09 *E and F* [2010] (nyr).

⁹³ Case T-228/02 *People’s Mojahedin Organization of Iran (OMPI)* [2006] ECR II-4665, Case T-256/07 *OMPI II* [2008] ECR II-3019, Case T-284/08 *OMPI III* [2008] ECR II-3487, as well as Case T-47/03 *Sison* [2009] ECR II-1483, Case T-341/07 *Sison II* [2009] ECR II-3625, Case T-348/07 *Al-Aqsa* [2010] nyr. Also see Case T-229/02 *PKK v Council* [2008] ECR II-45, following the appeal in Case C-229/05 P *PKK and KNK v. Council* [2007] ECR I-439.

⁹⁴ In *Kadi II* Judgement 2010, para. 142, the ECJ restrictively formulated as ‘some latitude’.

⁹⁵ *Kadi II*, para. 142, cf further *OMPI I*, para. 138, *OMPI II*, para. 55, and *Sison v Council*, para. 98.

⁹⁶ *OMPI I*, para. 137.

⁹⁷ *Kadi II* GC, para. 142-143.

the Kadi Judgement of 2010,⁹⁸ and the Court explicitly held that the case law pertaining to the implementation of 1373 sanctions was equally relevant in the context of 1267 sanctions.⁹⁹

It is thus clear that at the EU level, problems exist regarding the sharing of confidential evidence that are similar to those encountered by the Ombudsperson. More concretely, the *OMPI* case highlighted the absence of concrete procedural rules at the European Courts to take proper account of confidential information.¹⁰⁰ Currently, the EU courts do not have a procedure in place which allows the Court to take confidential information into account for the purposes of the Judgement without disclosing it to *all* parties in the proceedings.¹⁰¹ In her opinion to the *OMPI* case, Advocate-General Sharpston has urged the Court to amend its procedures in this respect. In addition, she gave some suggestions that were concretely tailored to the specificities of the 1373 procedure and which therefore took existing national procedures into account as they relate to the national decision that is a prerequisite for listing in the 1373 context.¹⁰² Even if all specificities of this Opinion might therefore not be fully applicable to the implemented UN regimes, the overall observation that the Rules of Procedure of the EU courts are inadequate does in fact apply across the board.

3.4 Concluding remarks

Overall, in their treatment of challenges to UN implemented sanctions, the European Courts have engaged in a balancing exercise that respects fundamental principles of the EU legal order while not fully ignoring other institutional arrangements and relationships with other legal orders and while taking account of legitimate security interests.

They have set strict standards of judicial review that apply at EU level, but they have left the door ajar for slightly different procedures in other legal orders as long as these meet the requirement of adequate protection. In essence, the two criteria are that the review of an individual listing must be binding on the executive body and that it must be based on a verification of underlying facts.

In relation to the binding nature of decisions on the listing authorities, the EU case law may be more amenable to respecting the UN system and the special position of the Security Council than it seems. In this respect it is important to observe that in their case law on autonomous sanctions, the Courts have shown respect for the discretion of political bodies to design sanctions regimes in the *Parliament v Council* case. It is furthermore notable that the two listings in which there

⁹⁸ *Kadi II* Judgement 2010, para. 145.

⁹⁹ *Kadi II* Judgement 2010, para. 138.

¹⁰⁰ *Kadi II* Judgement paras. 145, 147, cf. *OMPI II*, para. 158.

¹⁰¹ Article 67(3) of the Rules of Procedure of the General Court reads: 3. Subject to the provisions of Article 116(2) and (6), the General Court shall take into consideration only those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views. Where it is necessary for the General Court to verify the confidentiality, in respect of one or more parties, of a document that may be relevant in order to rule in a case, that document shall not be communicated to the parties at the stage of such verification.

Where a document to which access has been denied by an institution has been produced before the General Court in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties.

¹⁰² *OMPI II*, Opinion Sharpston, paras. 171-221

were close links to the regime and activities that were the cause of the sanctions, *Bank Melli*, were upheld. In a similar vein, the European Courts might be amenable to respecting the Security Council's design of sanctions and the listing criteria which could on occasion be drafted with such precision as to capture particular individuals directly at the Security Council level.

The current high success rate of EU litigation in the context of autonomous sanctions can be explained primarily by inadequate listings that are based on vague and general statements of reasons and insufficient evidence. This is a flaw that has already received much attention and remedied to a great extent at UN level and may thus be called a European problem which is particularly pertinent in the context of European autonomous sanctions. It does however have potential to affect the tool of sanctions more generally and therefore it deserves to be examined with greater care and attention.

In relation to the confidential nature of evidence underlying certain listings which has been at the core of litigation in terrorist-related sanctions regimes, it can be concluded that this problem exists equally at the UN level as well as at the EU level. Therefore at both levels further amendments need to be made to accommodate this problem.

SECTION FOUR – RECOMMENDATIONS TO STRENGTHEN DUE PROCESS AND SANCTIONS IMPLEMENTATION

The 2009 Watson report presented three approaches with a range of options within each to address the critical challenges the UN system faced at the time. Due to the severity of the situation and the need for bold action to address effectively the legal and political challenges to targeted sanctions, we argued:

It is time to move beyond traditional arguments about Security Council prerogatives. While there are, without question, practical difficulties in establishing any kind of review body, they appear to be far outweighed by the real and current dilemmas Member States face in being able to carry out their obligations under the UN Charter without violating domestic laws.

Because of the significant steps taken by the Security Council to create an effective review mechanism at the UN level, the situation in 2012 has changed substantially. Unprecedented action by the Security Council to establish the Office of the Ombudsperson in UNSCR 1904, and equally important, to strengthen the mechanism in UNSCR 1989, has addressed critical due process concerns. The Ombudsperson mechanism provides essential elements of due process for listed individuals – the right to review by an independent and impartial authority, the right to be informed of the case against them and to be heard (and respond), and approximates the provision of effective remedy – removal from the list. It has proven to be an effective and successful means of protecting individual rights.

Pending legal challenges regarding prior 1267 designations, while greatly diminished in number from three years ago, still connote a test of adequacy of the Ombudsperson mechanism; adverse court decisions could complicate the ability to impose and implement United Nations' targeted sanctions. For reasons of credibility and fairness, *it is important that the Security Council, as it considers extension of the Ombudsperson mandate in 2012, not only renew it, but also continue to enhance the mechanism.*

The following section presents several approaches the Council should consider as addresses the extension of the Ombudsperson's mandate. These opportunities are not mutually exclusive; many or even all could be undertaken simultaneously. Rather, the threshold question for Security Council action at this juncture is whether additional steps to upgrade the Ombudsperson process to approximate more closely formal judicial review should be taken, or whether enhancements to reinforce the existing mechanism will suffice.

Renew the mandate of the Office of the Ombudsperson

Accord formal judicial review through binding decisions of the Ombudsperson

Among the suggestions for the renewal of the mandate of the Ombudsperson, the Special Rapporteur proposed making the determination of the Ombudsperson final and binding. This step would extend the standard of a domestic judicial review, and preclude the possibility that the recommendation of the Ombudsperson could be overturned by unanimous vote of the 1267

Sanctions Committee or the Security Council. A variant of this idea would be to make the Ombudsperson's determination final on the sanctions committee, but still allow the possibility for the Security Council to overturn the delisting decision. The committee could unanimously refer the matter to Security Council, or the Council could act on own to relist an individual directly. Removing the ability of the Security Council to overturn the Ombudsperson's decisions represents the most far-reaching option, ensuring that the process most closely resembles formal judicial review as exercised at national levels.

According formal judicial review by making the Ombudsperson's decision final might be optimal from the perspective of the courts (satisfying conditions of independence and effective remedy), but it could ultimately prove to be less efficacious than strengthening of the Office of the Ombudsperson along the general lines suggested below. The Council is a special political body with unique competences and responsibilities; the UN Charter confers significant discretion to the Security Council in carrying out its primary responsibility for the maintenance of international peace and security. Targeted sanctions adopted under Chapter VII of the Charter, counter-terrorism measures in this case, are taken to protect individuals from acts of terrorism. While it is imperative that the Council act in conformity with the purposes and principles of the United Nations, peremptory norms of international law, and the rule of law, creating an independent authority to overrule the Security Council's designations is not an even-handed approach that respects the Council's unique prerogatives. The Council took the unprecedented and extraordinary step of ceding significant authority to the Ombudsperson under certain circumstances, but the provision of due process has to be balanced with the Council's responsibility to maintain international peace and security in a manner that respects both to the greatest extent possible. Just as non-compliance with norms of due process has undermined the effectiveness of UN targeted sanctions, an excessively narrow and rigid institutional framework of formal judicial review could impair the ability of the 1267 Committee to take effective decisions in the collective interest. Standards of due process that have been developed in national contexts should not be applied mechanically to international settings. Instead, they should be transposed and adapted to the particularities of the new institutional setting in which they are applied. Therefore, when applied to sanctions regimes, the standard of due process should be tailored to the unique features of the United Nations system and Security Council prerogatives should be taken into account in this transposition process.

While the Office of the Ombudsperson does not have formal, *de jure* legal authority to delist designated individuals or entities, over the past three years, the Office has created a presumption of *de facto* authority. The fact that none of her recommendations has been over-turned by the Council is significant, as is the widespread perception among Member States that it would be politically difficult and costly to overturn a decision of the Ombudsperson. The reverse veto, requiring unanimity to overturn a recommendation of the Ombudsperson, constitutes a high threshold and evinces establishment of a new norm. In addition, as described previously, the fact that the Ombudsperson can take account of changed situations in the cases of designated individuals, meet face-to-face with petitioners, and render decisions in a timely manner, offers some advantages over formal legal processes. While the Ombudsperson process falls short of *formal* judicial review as advocated by the Special Rapporteur, it offers what arguably are equivalent elements to address due process concerns, in essence, *de facto* judicial review.

In political terms, one of the principal motivations for the creation of a review mechanism at the UN level was to respond to ongoing and increasing legal challenges to the implementation of UN Security Council resolutions at the national and regional level. Many, but not all, of these challenges emanated from within Europe. As indicated in section three of this report, however, most of the current and pending litigation is directed against EU autonomous designations (where there is no Ombudsperson), not against UN designations. The creation of the Office of the Ombudsperson should generally be regarded as a success, but additional procedural reforms could strengthen the consideration of due process even further.

Reinforce Ombudsperson mechanism through procedural reforms

While we do not recommend changes to accord formal judicial review to the Office of the Ombudsperson, we believe the Ombudsperson mechanism should be strengthened, and the gains of the past three years consolidated, through the following actions:

- **Extend the *timeframe* of the Ombudsperson's mandate**

Currently, the mandate expires every 18 months; an extended period (from 3 to 5 years or indefinitely) would convey greater independence and sense of permanency to the mechanism

- **Authorize the Ombudsperson to request humanitarian *exemptions* on behalf of listed individuals**

Humanitarian exemptions to 1267 sanctions currently must be requested by a member state, which might lack resources, adequate knowledge, or the will to do so. Further, travel exemptions to facilitate dialogue between the Ombudsperson and a petitioner must be requested by member states, complicating petitioner interviews

- **Enhance *transparency* of process by authorizing the Ombudsperson to inform petitioners of the status of their cases (including her recommendation), release summary of comprehensive reports at the conclusion of the process, and disclose the identity of designating states, and publish reports of cases for which listing is continued**

More information in the public domain regarding the Ombudsperson process will serve to enhance perceptions of fairness and credibility, and demonstrate the rigor of the review process in safeguarding petitioner's rights. Greater transparency will also make it more difficult for individual Member States to challenge the decisions of the Ombudsperson in Council deliberations.

- **Provide adequate *resources* to ensure translation of Ombudsperson's reports (or at least essential portions) and facilitate dialogue with petitioner**

Administrative limits on translation of complete reports can impede the committee's consideration of important information. Further, the Ombudsperson must be able to communicate in the dialogue phase in a language understood by the petitioner

- **Member States, particularly those responsible for most of the designation proposals, should provide the Ombudsperson with timely access to relevant information, including to the extent possible, confidential and classified information, as recommended by the Like-minded States**

The greater degree to which intelligence information is shared with the Ombudsperson, the lower the likelihood that she will prematurely recommend a delisting that could threaten international peace and security

Although not specific to the renewal of the Ombudsperson mandate, the Security Council could take the additional step of imposing time limits on all designations. A “sunset” of listings would underscore the preventative and temporary nature of 1267 sanctions, and supplement the important ongoing triennial review of listed names pursuant to UNSCR 1822 and subsequent resolutions. A three year sunset would further ensure that designations are not open-ended *de facto* permanent (i.e. punitive) measures.

Beyond renewal of the Ombudsperson’s mandate for the 1267 regime is the broader issue of whether the Office of the Ombudsperson should be extended to other sanctions committees.

Extend procedural safeguards of the Ombudsperson mechanism to other UN sanctions regimes

Given that the Ombudsperson mechanism has proven largely effective in establishing a procedure that *de facto* satisfies due process concerns, it is important that the Council contemplate next steps to address the broader question of fairness, equal application, and the lack of due process in other UN sanctions committees.

These questions, as well as inconsistent application of fair and clear procedures, are most evident in the Jim’ale case. Following his delisting from the 1267 list on the recommendation of the Ombudsperson, he was added to the UNSCR 751/1907 (Somalia and Eritrea list), beyond the jurisdiction of the Ombudsperson. There can be little justification for the fact that the very same individual can, for the same actions, be subject to entirely different review mechanisms just because the listing was made by a different committee of the Security Council. It is difficult to argue why one group has an avenue to redress potentially wrongful listings, while others are limited to the focal point.

Recognizing the primary role of the Security Council in maintaining international peace and security, there may be need for suspension of the Ombudsperson process in exceptional circumstances. For example, drawing on established practices relating to ICC deferrals, the Council could maintain the right to suspend temporarily the Ombudsperson’s review during sensitive political developments such as peace negotiations over a ceasefire agreement, during final negotiations for a comprehensive peace settlement, or while making arrangements for political exile within ongoing conflicts. Normal Ombudsperson review processes could be resumed at a later date.

It is important for the Council to begin to consider how best to extend the Ombudsperson system to other sanctions regimes. This will not be easy, but the need to reconcile the procedural

inconsistencies between sanctions regimes is something that the Security Council will inevitably face.

Concluding Thoughts

Substantial progress has been made in reforming the UN system to provide individuals with effective judicial protection, but the system not perfect. Legal cases are likely to persist and new challenges may develop. The need to balance the prerogatives of the Council with protection of individual rights will continue. Rather than a problem to be solved, a more appropriate perspective may be that these are challenges to be managed. As such, continued reforms of the UN Ombudsperson mechanism to expand the mandate, make it more transparent, and extend it to other regimes, are important to the ultimate objective of strengthening the credibility of the Security Council and its instruments of targeted sanctions.

As we reflect on more than a decade of procedural innovations to ensure that implementation of UN sanctions is more fair and credible, we conclude with the hope that attention will shift from a predominant focus on due process issues to a more concerted focus on ways to make sanctions more effective. The fundamental objective of sanctions measures in promoting international peace and security will falter if more effective implementation of UN sanctions does not ensue. New initiatives to strengthen the implementation and enforcement of sanctions beyond 1267 measures, as well to enhance the capacity of member states to carry out their obligations, are necessary to make UN sanctions more effective tools of collective security.

Finally, we note a disturbing trend in sanctions-related litigation – while the number of 1267-related challenges has declined significantly, there has been a precipitous rise in EU autonomous sanctions being successfully challenged. Different procedures for UN-based sanctions compared to third country sanctions may account for the escalation of European legal challenges, but courts routinely striking down EU designations are likely to have a deleterious impact on the perceived legitimacy of targeted sanctions more generally. Deficiencies in the EU's listings procedures, as well as challenges regarding sharing classified information, need to be managed, especially as EU sanctions against Iran and Syria represent key elements of the international community's coordinated approach to these security threats. Just as the Security Council took note of and responded to legal challenges to UN sanctions, so too does this new challenge of EU litigation need to be addressed to ensure the continued credibility of targeted sanctions in promoting international peace and security more generally.

16 Recent articles and reports examining the due process concerns of the 1267 sanctions regime. Melbourne Journal of International Law. [Vol 10. 36 See, eg, Bardo Fassbender, Targeted Sanctions and Due Process (Commissioned by UN Office of Legal Affairs, 20 March 2006) 5, . This point has also been made by Dick Marty of the Parliamentary Assembly of the Council of Europe, who cited a Swiss case in which an individual was acquitted of terrorism-related charges in a domestic criminal proceeding and the Swiss state.