

# FAIRLY CLEAR RISKS:

Protecting UN sanctions' legitimacy and effectiveness  
through fair and clear procedures

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## **Acknowledgments**

The authors wish to thank the anonymous interview subjects that kindly shared their views for this study, and the following who generously contributed time, energy and insights to the research and writing process: Justine Allan, Thomas Biersteker, Selma Blank, Julia Blocher, Anna Bradshaw, Damaris Carnal, Elio Castellano, Alexandra Cerquone, Adam Day, Thomas Dörfler, Sue Eckert, Daniel Frank, Emanuela-Chiara Gillard, Matthew Happold, Larissa van den Herik, Kate Jones, Christopher Michaelson, Giovanna Mura, Naima Müller, Julie Oppermann, Kimberly Prost, Martin Scheinin, Martina Selmi, Antonios Tzanakopoulos, Jennifer Welsh.

Publisher: United Nations University

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ISBN: 978-92-808-9063-1

Printed in the USA

Design by: Creatrix Design Group

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# Executive Summary

Sanctions imposed by the United Nations Security Council affect large numbers of people, businesses and governments worldwide. They are central to the United Nations' (UN) efforts to maintain international peace and security in contexts from the Democratic Republic of Congo (DRC) to the Democratic People's Republic of Korea (DPRK). Yet concerns about the fairness and clarity of the processes by which individuals and entities are listed as sanctions targets, and delisted, have threatened to disrupt the effective, universal implementation of UN sanctions regimes, particularly in the counter-terrorism context.

The origins of this 'due process' debate lie in the adoption of a UN counter-terrorism sanctions regime aimed at disrupting the involvement of the Taliban and Al Qaida in terrorist activity and forcing the surrender of Usama bin Laden. Because this regime applied globally, it required a new level of vigilance by all Member States, beyond anything that had been required under earlier UN sanctions regimes. The first sanctions list under this regime, published in March 2001, included 162 individuals and seven entities primarily located in Afghanistan. After 9/11, however, the list's size and geographic reach grew substantially, with the US proposing over 200 additional targets in the weeks following the attacks.

Unintended consequences emerged rapidly during implementation, including mistaken listings causing major disruptions to innocent people's everyday lives. Yet from 1999 to 2002, there was no mechanism available to remove someone from the 1267 sanctions list. In 2002, the Committee charged with overseeing the counter-terrorism sanctions regime issued guidelines on how to pursue delisting through a State. Until 2006, this diplomatic channel was the only option for those affected to seek de-listing. They could not petition the 1267 Committee directly. Criticism quickly arose. Academics and civil society decried the lack of fairness. States protested that they were being expected to implement intrusive restrictive measures with no knowledge of the basis for those measures, with Sweden taking a prominent role. In 2005 at the UN World Summit, Member States called upon the Security Council to ensure fair and clear procedures in relation to the imposition of sanctions against individuals. In June 2006, Secretary-General Kofi Annan identified four basic elements that needed to be addressed in order to respond to these concerns: (1) the right of a person against whom measures have been taken to be informed; (2) the right of such a person to be heard; (3) the right to review by an effective review mechanism; and (4) a periodical review of sanctions by the Security Council.

Since then, courts, especially but not only in Europe, have held that States and other authorities implementing UN counter-terrorism sanctions cannot give effect to UN sanctions listings without first ensuring respect for certain minimum due process standards. Meeting those standards has sometimes been held to require judicial review of the listing decisions by the Security Council. The fairness and clarity of sanctions processes have thus emerged as an important determinant of the implementation and impact of UN sanctions – at least in the counter-terrorism sphere. The Security Council has responded to these concerns by developing arrangements to improve sanctions targets' ability to petition for review of their sanctions listings, including the creation and development of an Ombudsperson to review listings relating to the sanctions regime concerning ISIL/Da'esh and Al Qaida (IDAQ).

For most of the last two decades, legal challenges to listings have been mounted primarily in the counter-terrorism context. Fair process concerns have been raised in relation to the Security Council's sanctions regimes focused on addressing other global security concerns, such as armed conflicts and the proliferation of weapons of mass destruction, but rarely litigated in courts. That is now changing.

In the last two years, litigation relating to Central African Republic (CAR), Democratic Republic of Congo (DRC), Iraq, Libya and restrictive measures for Iran has demonstrated the willingness of courts to review listing and delisting decisions in non-counter-terrorism contexts, where procedural safeguards are much weaker. Over a decade ago, the Security Council created a Focal Point in the UN Secretariat to work with relevant Council sanctions committees to handle petitions for delisting under those sanctions regimes. But that system is, as we explore in this study, less independent, and less effective in providing fair and clear procedures (as the courts understand those terms), than the Ombudsperson system. In fact, as these

arrangements currently stand, the implementation of these non-counter-terrorism sanctions regimes may be at risk, especially in the almost 50 Member States, including three Permanent Members of the Security Council, that fall within the jurisdiction of courts that have already ruled on these concerns. The risk is that not only the legitimacy, but the effectiveness, of UN sanctions are weakened, at a moment when the Security Council is relying precisely on that effectiveness to achieve its strategic goals in a range of global crises from central Africa to north-east Asia.

In this study, we explore how the Security Council has arrived at this risky – and under-appreciated – situation, and suggest steps that UN system actors might take to mitigate these risks. Our analysis is based on extensive desk review of relevant jurisprudence (see Annex 1), prior proposals for reform (Annex 2) and anonymous interviews with more than 20 insiders from across UN Member States and the UN system.

## I. Understanding the risks

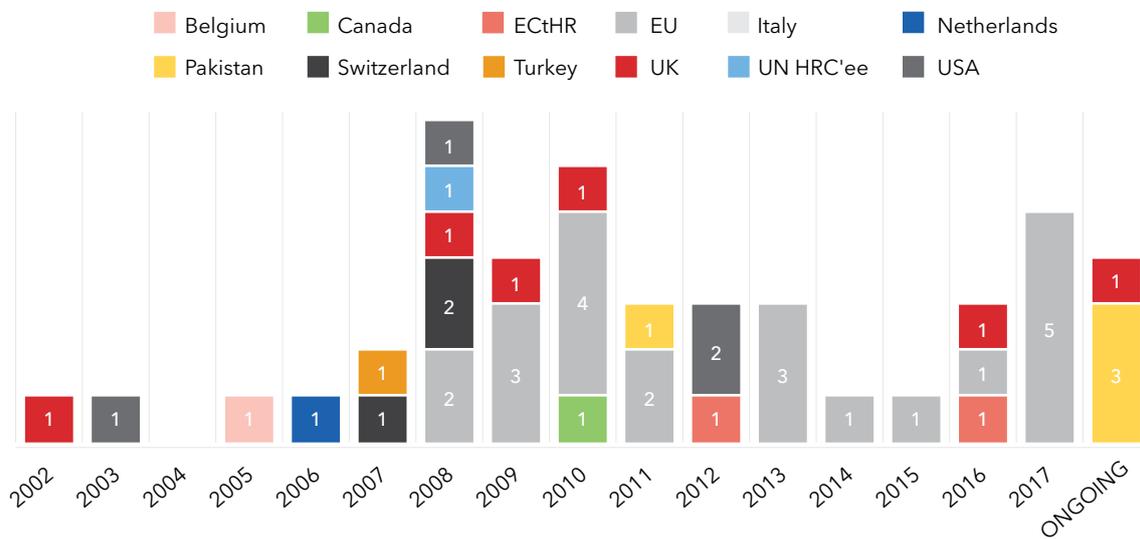
First, we consider the nature of the risks and how questions of fairness and clarity in UN sanctions procedures have been addressed over the last decade and a half, particularly through actions in courts and in the Security Council.

We reviewed jurisprudence and proceedings from 47 fair process challenges brought against UN sanctions regimes in 12 jurisdictions (see Annex 1). We argue that the 'dialogue' between courts and the Security Council on these issues has already been through two 'rounds', focused primarily on the UN's counter-terrorism sanctions. The expansion of the discussion to other sanctions regimes – dealing with armed conflict and crisis, and non-proliferation – signals the start of a third round, and the opening of a new front in these debates.

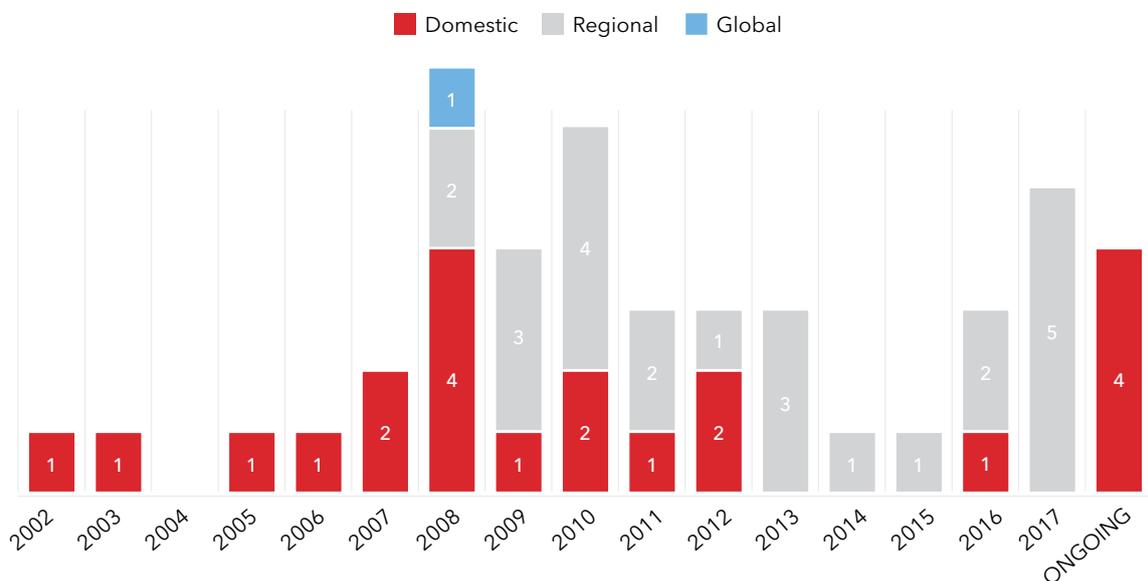
## FAIR PROCESS CHALLENGES TO UN SANCTIONS BY REGIME TYPE, IN THREE 'ROUNDS'



## FAIR PROCESS CHALLENGES TO UN SANCTIONS BY JURISDICTION AND YEAR



## FAIR PROCESS CHALLENGES CONCLUDED BY YEAR AND VENUE TYPE



## 2. What do fair and clear procedures look like?

What does a decade and half of jurisprudence and commentary from expert jurists tell us about what constitutes 'fair and clear procedures' in practice? Our study reached the following conclusions:

- *Fair process standards are well established.* International jurisprudence suggests that the parameters for 'fair and clear procedures' laid out by UN Secretary General Kofi Annan in 2006 accurately summarize what courts expect in terms of fair process. This includes: (1) the right of a person against whom measures have been taken to be informed; (2) the right of such a person to be heard; (3) the right to review by an effective review mechanism; and (4) periodic review of listings.
- *The challenge remains to ensure these standards are respected in practice.* A central requirement is that those targeted by sanctions can request an impartial and independent review of the fact-base for listing - i.e. the facts that underpin the assessment that a person or entity is eligible to be listed. Exactly what that review will look like may however depend on several factors, such as the intrusiveness of the sanctions adopted, and what forms of information about 'facts' underpinning listing decisions is reasonably available. The more intrusive sanctions are (depending on whether they involve, for example, arms embargos, travel bans, financial freezes or other measures), the more intensive must be the process of independent review of the facts. Since the Security Council develops this fact base in different ways in different contexts - relying on national law enforcement and intelligence actors in counter-terrorism contexts, specially-organized Groups of Experts in armed conflict contexts, and highly sensitive technical expertise in non-proliferation contexts - the arrangements for review of the fact base may need to be somewhat different in each of these different sanctions regime contexts.
- *There is growing judicial acceptance that the Ombudsperson system created to provide a review mechanism in the counter-terrorism context is adequate, but that assessment is threatened by risks to the office's independence.* There appears to be growing judicial recognition (e.g. in *Al-Ghabra v European Commission*) that the Ombudsperson system may ensure effective protection of fair process in the ISIL/Da'esh/Al-Qaida context. There are still structural weaknesses, however, in the Ombudsperson arrangements that threaten to lead to judicial determinations that the Ombudsperson does not provide fair process protections. Ensuring the independence of the Ombudsperson in both

legal fact and in appearance is crucial, and there are concerning signs of interference with that independence.

- *Armed conflict and non-proliferation sanctions are highly vulnerable to legal challenge.* Recent cases concerning CAR, DRC, Iran, Iraq and Libya show that courts are paying growing attention to how the fact-base for restrictive measures is verified in non-counter-terrorism contexts, especially the role of the specially commissioned independent Groups of Experts who gather information and propose designations of sanctions targets, especially in conflict/crisis contexts, and in non-proliferation contexts. There is a real risk of courts requiring states not to implement UN sanctions as a result of process concerns in these contexts.
- *Courts are paying close attention to the reasons given for listing and delisting decisions, and refusals of requests for humanitarian exemptions that lack statements of reasons for the refusal may be highly vulnerable to legal challenge.* Courts have expressed dissatisfaction with listing processes that do not give sanctions targets adequate information about why they have been listed. Narrative summaries and 'reasons letters' are coming under scrutiny. The absence of explanations for refusals of humanitarian exemption requests may likewise render them highly vulnerable to legal challenge.
- *The legitimacy and effectiveness of UN sanctions regimes could be disrupted.* While courts have been broadly deferential to listing and delisting decisions made in the Security Council, at least 47 states, including three Permanent Members of the Security Council, currently operate in legal regimes that require them (or their courts) to test UN sanctions listing decisions for respect of fair process. A new expectation arising from a recent decision of the European Court of Human Rights that states review the 'arbitrariness' of listings may create real burdens not only for European states, but also for Sanctions Committees and states that initially proposed listings, as European states' courts seek access to the information underpinning listings in order to assess whether they were 'arbitrary'.

## 3. Three options for equivalent protection

One way of loosely summarizing these findings is to say that courts increasingly appraise international sanctions listing and delisting processes by asking whether they provide 'equivalent protection'. This involves assessing whether the listing and delisting processes afford those affected procedural protections that are equivalent to (though not necessarily procedurally identical to) the protections that would be available if similar restrictive

measures were applied at the domestic level. There is apparently increasing (though by no means total) recognition that the Ombudsperson provides 'equivalent protection' in the IDAQ sanctions regime context. But the 'third round' of litigation we identified in our research seems to make fairly clear that existing review arrangements for the 13 other sanctions regimes are much more likely to be found not to meet this test.

In the third part of the study, we therefore examine if or how the Security Council could take steps to address the risks that sanctions regimes currently face, by adjusting listing and delisting arrangements to provide the 'equivalent protection' that courts expect. We consider three different approaches - strengthening existing listing and review arrangements (i.e. those based on the Ombudsperson and Focal Point systems); international or domestic judicial review; and, building on the lessons learned from the Ombudsperson system and existing jurisprudence, creation of new, independent, context-sensitive non-judicial review mechanisms.

### Strengthening existing listing and review arrangements

It is likely to be more feasible to strengthen existing arrangements than to create something new. We explore how the Security Council and Secretariat could take steps to strengthen existing arrangements by:

- Defending the independence of the Ombudsperson, including by appointing a suitable new Ombudsperson, and employing him or her on a staff contract rather than as a consultant;
- Giving clearer reasons for listing and negative humanitarian exemption decisions;
- Making greater use of open source material;
- Automating reviews of sanctions regimes and lists and providing sufficient resources to the Secretariat to ensure this can be done efficiently and accurately; and
- Developing guidance on Fair and Clear Procedures, and using these for induction of incoming sanctions experts and as the basis of experts' subsequent investigations.

### International or domestic judicial review

Even those adjustments to existing arrangements may, however, not be adequate to cure them against the current wave of fair process legal challenges. While the IDAQ regime has been somewhat inoculated against such challenges by the creation and development of the Ombudsperson system, the other sanctions regimes remain highly vulnerable, because they lack a system of independent and impartial review of listings. The most obvious way to cure this is through international or domestic judicial review.

One recurring proposal to address this concern, by both states and expert legal commentators, is to allow binding review of listing decisions by an international court or tribunal. While this approach would address some courts' fair process concerns, it is unlikely to gain political support in the Security Council, because key states see it as incompatible with the delicate mechanisms of collective security enshrined in the UN Charter. And national-level judicial review meets similar objections, risks impracticality (especially relating to the difficulties national courts have in accessing the information that underpins sanctions listings), and poses its own risks of fragmentation of the authority of Security Council decisions.

Judicial review may also be unnecessary. Courts recognize that non-judicial review of facts underpinning decisions to impose restrictive measures may in some contexts provide fair process. What is required is independent and impartial verification of *eligibility* to be targeted by restrictive measures such as sanctions, rather than review of the final decision on the *utility* or merits of being subjected to such measures. In the sanctions context, this implies that while courts may expect independent and impartial review of eligibility for sanctions (whether before or after that listing occurs), they may be satisfied to leave the final decision on whether sanctions should actually be pursued (or retained) in any given case to the Security Council (or its Sanctions Committees). International law in fact recognizes similar combinations of non-judicial review of eligibility plus political determination of utility in the determination of extradition cases and, in certain limited contexts, review of detention during armed conflict. The test is thus not necessarily whether review is 'judicial' or so-named, but whether in practice it is 'independent and impartial' and otherwise meets the fair process standards summarized by Secretary-General Annan in 2006.

We also explain why, in certain cases, a judge sitting in a court may not be in the best position to carry out such a review, especially where s/he lacks access to relevant information or the technical expertise to analyze it. Other approaches - detailed below - may be better tailored to allow an independent reviewer to access the highly sensitive national security information involved, for example, in non-proliferation sanctions cases; or to interact with and solicit information from sources in the field, in the case of armed conflict sanctions.

### Independent context-sensitive non-judicial review mechanisms

Ensuring the effectiveness of UN sanctions will require recognizing the realities of how factual information underpinning listings is shared, and how this relates to the political context in which specific sanctions regimes operate. Information underpinning listings differs across UN sanctions regimes: the information that states possess and will share in counter-terrorism, non-proliferation and armed conflict or crisis contexts comes from different sources and varies significantly. The method by which

the UN Security Council can ensure respect for fair process may also differ in these contexts, because access to this information is critical for any effective review. Judicial review – and even the role of Ombudsperson, as currently organized – may not be the best method to provide effective review. The table below summarizes three different ‘contexts’ in which sanctions are applied and highlights how information sharing and listing review may be affected across those contexts.

One important reason for the opposition of Permanent Members of the Security Council to the expansion of the role of the Ombudsperson appears to be a lack of

attention to the legitimate national security concerns raised by allowing an independent international actor to examine the highly sensitive information associated with non-proliferation sanctions. Another reason is lack of attention to the transaction costs involved for states that propose listings, in responding to requests for information arising from petitions for delisting made to the Ombudsperson. A third reason is a belief that the Ombudsperson does not have the investigative modalities or resources to investigate in armed conflict theatres and crisis contexts.

	COUNTER-TERRORISM CONTEXT	ARMED CONFLICT CONTEXT	NON-PROLIFERATION CONTEXT
Actor that sanctions seek to constrain or influence	Individuals, entities, terrorist groups	Conflict parties (state and non-state)	Government regimes
General objective	Containment	Leverage to generate individual and group behavioural change	Leverage to induce regime-level policy change
Designation	Required ‘association’ can be conduct or status-based	Both conduct and status-based	Both conduct and status-based
Main proposers of designations	US, UK	Varies	P5
Main source of information	States	States, field experts – especially Groups of Experts	States, technical agencies, private sector
Highly sensitive / classified information involved	Yes	Sometimes	Yes
Profile suitable for independent and impartial reviewer	Former judge	Former judge or diplomat with suitable training, knowledge of conflict contexts	Former or current international technical expert
Actual or potential source of supporting expertise	Analytical Support and Sanctions Monitoring Team	Former Group of Experts members not involved in prior listing (to avoid conflicts of interest)	IAEA/OPCW and UN Secretariat
Nature of investigative process that would be required for independent review of facts	Desk and interview based, some field investigation	Extensive field investigation, including in active conflict theatres	Desk and interview based, investigations in capitals

This suggests that an approach that simply advocates extension of the role or mandate of the Ombudsperson to the 13 remaining sanctions regimes will not find support. But an approach that suggests extension of the Ombudsperson's *functions*, with necessary adaptations of the investigative process to better fit it to non-counter-terrorism contexts, might find more success. Such an approach seems more likely to inspire the trust and confidence of those parties whose cooperation the Council will rely upon to gain access to information relevant to listing reviews. It may therefore be useful, as some states have recently argued, to extend the *functions* of the Ombudsperson – but adapt them to different information system contexts – rather than simply extend the Ombudsperson's *role*. In the third part of the study, we explore what that might look like. In the armed conflict situations, this might involve liaison between an independent and impartial reviewer and current or former Group of Experts members, and the ability to travel to conflict theatres. In the non-proliferation context, it might require careful consideration of the profile of the person appointed to the review role, or to some related advisory role, to ensure he or she brings the technical knowledge and professional reputation required to foster cooperation with relevant Member States. A former senior expert from a relevant international technical agency (such as the International Atomic Energy Agency) might, for example, prove more convincing as an interlocutor for states than a former judge – the profile usually sought for the IDAQ regime's Ombudsperson role.

Our study also suggests that different approaches to listing may lend themselves to different sanctions regimes contexts. It may be useful to distinguish between status-based and conduct-based sanction designations. Status-based designations turn on the structural ties between the targeted person or entity and the actor the Security Council is seeking to attain or influence. They include, for example, listings covering family members or regime

associates. Conduct-based listings turn, in contrast, on the target's actual conduct. They include listings based on conduct that meets certain defined eligibility criteria (such as association with a particular group, or violation of defined legal standards). Status-based designations may be easier to substantiate and review (including from open source material) than conduct-based listings – and have already survived fair process legal challenges.

Moreover, as we show in the study, greater use of status-based designation criteria may give the Security Council finer control over how sanctions can be temporarily suspended, to achieve larger strategic objectives. Conduct-based listings that are suspended on such political grounds may give rise to questions of unequal treatment before the law, or violation of the principle of legality. Status-based listings may not raise the same questions. Using status-based designation criteria may improve the ability of the Security Council to suspend sanctions on certain individuals and to reward or incentivize conduct that helps it achieve its objectives – such as promoting peace talks, or respect for international humanitarian law.

### Weighing the options

While it is for Member States to determine which of these options best suit their needs, in this study, we adapt a table used in the influential 2006 'Watson Report' to assess the utility of different fair process reform options. This assessment, summarized in the table below, suggests clear conclusions: that delisting review processes based on the Focal Point system may not pass the current fair process legal challenges; and that strengthening the existing Ombudsperson arrangement (in the IDAQ regime context) and developing new, independent, context-sensitive non-judicial review mechanisms (for the other sanctions regimes) may be the safest options overall.

	OPTIONS FOR PROVIDING EQUIVALENT PROTECTION	STRENGTHENED EXISTING MEASURES		INTERNATIONAL JUDICIAL REVIEW	INDEPENDENT CONTEXT-SENSITIVE NON-JUDICIAL REVIEW MECHANISMS
		OMBUDSPERSON (IDAQ REGIME)	FOCAL POINT (OTHER REGIMES)		
WILL IT SURVIVE A FAIR PROCESS LEGAL CHALLENGE?	<b>Composition</b> Independently appointed	Yes	No	Yes	Yes (by the SG)
	<b>Authority</b> Independent to make decisions	Yes - on eligibility	No	Yes	Yes - on eligibility
	<b>Power</b> Competence to grant relief	Yes - unless overruled by consensus in sanctions committee, or by Security Council decision	No	Yes	Yes, in concert with Security Council
	<b>Accessibility</b> Is mechanism affordable, easy to understand and able to make timely decisions?	Yes	No (free to access but no strict time frames in place)	Can be costly and timely	Would depend on mandate, methods and resources
	<b>Reasons provided / Transparency</b> Are reasons for decisions provided to petitioner and made public	Usually so	Depends on Sanctions Committee	Yes	Yes
	<b>Investigatory power</b> Access to non-redacted information	Depending on international cooperation, but also has some independent investigative power	No	Depends on international cooperation - and likely to depend on what complaints are brought to it	Depends on international cooperation, but could have some independent investigative power
	<b>Transparency</b> Decision made public	Yes	Not applicable	Yes	Yes
	<b>Preview</b> Assessing eligibility of targeted party to be sanctioned in the first place	No	No	No	Could be given challenge function in pre-listing eligibility process
IS THE PROPOSAL POLITICALLY REALISTIC?	<b>Recognizes UNSC political discretion over listing</b>	No	Yes	No	Yes
	<b>Political feasibility</b>	Already exists	Already exists	Highly unlikely	Unclear
	<b>Aggregate 'score'</b>	7.5 out of 10	2.5 out of 10	6 out of 10	8 out of 10

● 1 for each Yes ● 0.5 for each partial yes ● 0 for No

## 4. Moving forward – recommendations for action

The Security Council is currently relying on sanctions for the generation of leverage to deal with crises from central Africa to the Middle East to East Asia. At just this moment, a new wave of litigation risks undermining their universal implementation and thus not only their legitimacy but also their effectiveness. States, especially the Members of the Security Council, must come to understand that there are clear legal standards against which the UN's sanctions regimes dealing not only with counter-terrorism, but also with armed conflict and crisis, and non-proliferation, are now being measured. They must also come to understand what the consequences of losses in those legal challenges may be. Amongst them, little noticed, could be the loss not only of leverage over states such as DPRK and Iran, and armed groups from Libya to Yemen, but also of one of the few remaining areas of clear willingness by Great Powers to cooperate.

The new wave of fair process legal challenges to UN sanctions regimes now unfurling poses fairly clear risks to UN sanctions, because it is testing sanctions regimes that lack the fair and clear procedures that have been developed for the IDAQ regime. The other UN sanctions regimes are highly vulnerable to fair process legal challenges, because the Focal Point system falls well short of the fair process standards reflected in the 47 cases we reviewed, across twelve jurisdictions.

In the final Part of the study, we consider and reject the idea that small changes to the Focal Point system will be adequate to mitigate these risks. Instead, we argue for States to come together to explore how to develop arrangements that ensure the existence of capable, independent actors empowered to review sanctions eligibility beyond the counter-terrorism context. This will require careful reflection on tailored information-sharing and investigation capacities, and efforts to bring States together around a shared vision of what constitutes free and clear procedures in these different contexts. The Secretary-General, and the Secretariat, have a central role to play, in raising awareness of the risks sanctions regimes face, of mobilizing support for further developments to ensure fair and clear procedures, and of catalysing preventive action.

At the end of the study we offer ten recommendations to achieve these objectives: four to the Secretary-General and Secretariat and six to UN Member States, especially those sitting on the Security Council:

### Recommendations to the Secretary-General and UN Secretariat:

1. **Take preventive action** to forestall courts finding that implementation of conflict and non-proliferation sanctions regimes falls short of required legal standards: Raise the awareness of the UN Membership of the risks that non-counter-terrorism sanctions regimes face from fair process challenges and the need for preventive action to address these risks. This could be done through:
  - direct engagement with the UN Membership;

- reporting to the UN General Assembly on the rule of law;
- discussions on Target 16.3 of the Sustainable Development Goals ('Promote the rule of law at the national and international levels and ensure equal access to justice for all'); and
- direct engagement with the Security Council, for example at private luncheons or annual retreats.

2. **Protect the ISIL/Da'esh and Al Qaida sanctions regime:** Ensure the regime's legitimacy and effectiveness by protecting the Office of the Ombudsperson, by:

- appointing, as soon as possible, an Ombudsperson with requisite professional skills and reputation regarding respect for the rule of law;
- establishing a fully-fledged Office as called for in UNSCR 1904; and
- appointing the next Ombudsperson as a staff member (not a consultant).

3. **Develop independent, context-sensitive, non-judicial review mechanisms for sanctions regimes adopted in non-counter-terrorism contexts.** This could involve:

- commissioning an independent analysis of options, reprising the approach taken by Secretary-General Annan in 2006;
- encouraging UN inter-agency discussion of ways to strengthen fair and clear procedures in these contexts, for example, through the Inter-Agency Working Group on Sanctions, or the Rule of Law Coordination Group;
- direct engagement with the Group of Like Minded States on Targeted Sanctions, and with other UN Member States.

4. **Develop and publish clear guidance on 'Fair and Clear Procedures during Investigations'**, drawing on existing material such as guidance used by commissions of inquiry established by the UN Human Rights Council, and use it to enhance fair process training for Groups and Panels of Experts.

### Recommendations to UN Member States, especially the Security Council:

5. **Protect, respect and promote independent review of sanctions eligibility,** by:

- respecting the independence of the Ombudsperson, including in drafting reasons letters; and
- exploring options for extending the functions of the Ombudsperson to non-counter-terrorism sanctions regimes, including through the development of new, independent, context-sensitive, non-judicial review mechanisms.

6. **Strengthen statements of reasons and narrative summaries**, especially in unsuccessful delisting and humanitarian exemption petitions. This could include making better use of **open source material** during listing processes.
  7. **Explore clearer differentiation between 'status-based' and 'conduct-based' designations** since different approaches to factual review may be possible in handling delisting petitions in each case. This could create greater efficiencies, fairness and clarity, and strengthen the ability of the Security Council to calibrate the impact of sanctions to help maintain international peace and security.
  8. **Automate periodic reviews** of sanctions designation lists and the regimes themselves and start with a review of the sanctions concerning the situation in Iraq.
  9. **Press for preventive action through debates in the Security Council**: Use open debates and closed horizon scanning-style discussions in the Security Council to raise the issue, re-emphasize and reframe the problem, request briefings from the Secretariat on the issue, and develop support for more comprehensive solutions.
  10. **Ensure that debates on Working Methods in the Security Council include discussion of working methods of sanctions committees**, given the central role they play in determining the operation, and thus the legitimacy and effectiveness, of this crucial tool for the maintenance of international peace and security.
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# Introduction

Sanctions imposed by the United Nations Security Council affect large numbers of people, businesses and governments worldwide. Yet concerns about the fairness and clarity of the processes by which individuals and entities are listed as sanctions targets and delisted, have threatened at times over the last two decades to disrupt the effective, universal implementation of UN sanctions regimes – particularly in the counter-terrorism field.

Courts, especially but not only in Europe, have held that States and other authorities implementing UN counter-terrorism sanctions cannot give effect to UN sanctions listings without first ensuring respect for certain minimum due process standards. Meeting those standards has sometimes been held to require judicial review of the listing decisions by the Security Council. The fairness and clarity of sanctions processes have thus emerged as an important determinant of the implementation and impact of UN sanctions – at least in the counter-terrorism sphere. To date, similar concerns have only rarely been raised in relation to the Security Council's sanctions regimes focused on addressing other global security concerns, such as armed conflicts and the proliferation of weapons of mass destruction.

That is now changing. Over the last two years, new litigation in Europe suggests these same concerns about the fairness and clarity of sanctions processes will be litigated in the context of UN sanctions regimes going beyond counter-terrorism. Already, we have seen legal claims raised in relation to sanctions regimes addressing situations in Central African Republic (CAR), Democratic Republic of Congo (DRC), Iraq, Libya and restrictive measures for Iran. Similar litigation is foreseeable in relation to the Democratic People's Republic of Korea (DPRK).

The expansion of litigation to these other sanctions regimes should give UN Member States, and especially Members of the Security Council, pause. As we explain in this study, all the indications are that these sanctions regimes are potentially highly vulnerable to successful legal challenges, since the listing and delisting procedures for these regimes lack some of the features adopted by the Security Council over the last decade to strengthen counter-terrorism sanctions processes. The implementation of sanctions in almost 50 Member States, including three Permanent Members of the Security Council, may be at risk. The risk is that not only the legitimacy, but also the effectiveness, of UN sanctions are weakening, precisely when the Security Council is relying on sanctions' effectiveness to achieve its strategic goals.

In this study, we explore how the Security Council has arrived at this risky and under-appreciated situation and suggest steps that the Security Council, and other UN system actors, might take to mitigate these risks. First,

we consider the nature of the risks, and how questions of fairness and clarity in UN sanctions procedures have been addressed over the last decade and a half, particularly through actions in courts and in the Security Council. We argue that this process has already been through two 'rounds' of intellectual dialogue and practical engagement, focused on the UN's counter-terrorism sanctions. The expansion of the discussion to other sanctions regimes dealing with armed conflict and crisis, and non-proliferation signals the start of a third round. And we also argue that these debates reveal three competing visions of the role of the Security Council in shaping the relationship between executive power and individual liberty – a liberal vision, a pluralist vision, and a conservative vision.

Second, we consider what the resulting jurisprudence and related commentary tell us about what fair and clear procedures comprise in practice. We argue that analysis based on a rigid dichotomy between 'political decision-making' and 'judicial review' is not only unhelpful, but also an inaccurate reflection of what international law expects of processes that impose restrictive measures, as borne out in practice. A review of over 45 fair process legal challenges over the last decade and a half suggests that what matters is that sanctions processes provide protection equivalent to (and not identical to) the protection afforded individual rights when restrictive measures are applied at the purely national or domestic level. Specifically, this involves an impartial and independent, but not necessarily judicial, review of the fact base, through meaningful hearing of all relevant parties, to deliver context-sensitive listing and delisting determinations.

Third, we examine three potential approaches the Security Council could take to address the risks it currently faces and provide the 'equivalent protection' expected of sanctions processes if they are to be inoculated against fair process challenges. We argue that the key question is not the character of the individual or entity that reviews the fact-base upon which listing and delisting decisions are made – i.e. whether it is a court, an ombudsperson or some other entity. Rather, what matters, is that actor's ability to assess, through an independent examination of the fact-base, the targeted person's factual eligibility to be sanctioned. And we also argue that the systems in place for such examination will need to differ, depending on the sources of information that provide that fact-base. We explore both the potential and limits of simply trying to strengthen existing arrangements, and of judicial review. We then go on to explore how context-sensitive non-judicial review mechanisms might be constructed, while allowing for both impartial factual review, and the political discretion of the Security Council.

In the final Part of the study, we consider how a discussion of the risks facing the Security Council, and the measures it could take to address them, could be promoted.

The study draws on an extensive analysis of existing jurisprudence (47 cases in twelve jurisdictions, see Annex 1), commentary and related literature, including all major prior proposals for reform (summarized in Annex 2). It also draws on more than 20 anonymous in-person interviews with experienced and senior UN sanctions insiders (from the ambassadorial to the technical working level, from both Permanent and elected Members of the Security Council, and from sitting, former, and future Members of the Council, as well as individuals from relevant areas within the UN Secretariat). To encourage frank reporting on and assessment of experiences, all interview subjects were offered anonymity. And to further

assure their anonymity, where we quote sources, we ensure those quotes are not otherwise attributable.

We also benefited greatly from the generous hospitality of Professor Jennifer Welsh, Ms Emanuela-Chiara Gillard and Ms Martina Selmi who hosted a one-day workshop for us with leading academic, practitioner and government experts, at the European University Institute in Fiesole, to discuss preliminary findings of the study in October 2017. We are indebted to them and to the more than 20 participants who so generously shared their time and insights with us, and to our colleagues at the Swiss Federal Ministry of Foreign Affairs and at United Nations University for guidance and feedback throughout the project. Any errors or misperceptions of course remain our own.

# I. Understanding the risks: why does it matter if UN sanctions procedures are fair and clear?

One expert interviewed for this study stated bluntly: “Member States do not grasp the consequences that will flow if things do not change in sanctions processes.” In this first section we seek to explain what the consequences of leaving sanctions processes as they are may be, for the Security Council. The answer, it seems, depends on who is asked.

The restriction of sanctions targets’ liberties – their freedom of movement and private property rights – is, of course a deliberate and intended consequence of United Nations sanctions. The theory is that the imposition of restrictions on travel, financial activity, arms transfers and diplomatic activity will change the incentives and behaviour of those targeted, or the armed groups or governmental regimes with which they are associated, reducing threats to international peace and security.<sup>1</sup> When analogous restrictive measures are imposed at the domestic level, international law requires certain due process protections, including affording those affected by the measures access to an independent and impartial review mechanism.<sup>2</sup> Some UN Security Council sanctions resolutions, notably Resolution 1373, encourage states to determine for themselves which individuals or entities will be targeted for sanctions. In those cases, the question of whether due process was afforded is a matter of national or domestic law.<sup>3</sup> When the Security Council makes that determination, however, who is to ensure that due process is afforded and human rights are respected, both in the process of imposing the sanctions, and in subsequent implementation measures?

As courts have pointed out, given the Security Council’s support for human rights, it might be expected that the Council would be explicit if it meant States to derogate from human rights law in implementing those sanctions.<sup>4</sup> It has never done that. On the contrary, the Security Council has repeatedly made clear its belief that its counter-terrorism obligations, in particular, can and should be implemented with full respect for international human rights law, including by ensuring that sanctions procedures are “fair and clear”.<sup>5</sup> That phrase is drawn from an important intervention in 2006 by Secretary-General Annan that has framed the discussion in the Security Council ever since. Drawing on expert inputs, Annan suggested that sanctions processes should ensure those affected the right to be informed, the right to be heard and the right to an effective review of their case, and encouraged the Security Council to undertake regular reviews of sanctions lists.<sup>6</sup> Yet the limited opportunities for those targeted by UN sanctions to have restrictive

measures independently reviewed has emerged, over the last 15 years, as an important source of unintended consequences in UN sanctions implementation – notably, the vulnerability of sanctions implementation to legal challenge on ‘fair process’ grounds (‘fair process challenges’). The question that arises for the Security Council is: how can it achieve its objective of influencing sanctions targets’ behaviour, while also making the listing and delisting process sufficiently fair and clear to respect the rights of those impacted *and* without ceding its authority under the UN Charter to maintain international peace and security?

The Security Council has taken time and care over the last decade and a half to craft arrangements that meet these dual objectives, significantly informed by judicial findings and opinions, at least in the case of sanctions related to certain terrorist groups. For many years, those so targeted by UN sanctions could seek relief only through diplomatic representations made by a state on their behalf. As time passed, and many people, including some who claimed to have no connection to the terrorist groups targeted by the Council, remained on the Council’s sanctions lists, they turned increasingly to domestic and regional courts to seek a remedy to their situation. As we explore further below, in 2008, a seminal case in the European Court of Justice (ECJ) (now the Court of Justice of the European Union (CJEU)), *Kadi v. Council & Commission*, opened up the possibility of national or regional review of UN Security Council sanctions committee decision-making – and of 27 EU States refusing to implement UN sanctions on the basis that they failed to respect due process standards.<sup>7</sup> The pressure created by this and other related judicial and quasi-judicial decisions, including the UN Human Rights Committee’s *Sayadi and Vinck v. Belgium*, led to an intellectual and practical dialogue between various domestic (including both national and regional) courts and the Council.<sup>8</sup> This dialogue resulted in the creation of a Focal Point system to receive and handle delisting requests from individuals and entities on all UN sanctions lists, and later an independent Ombudsperson verifying the factual basis for the Council’s political decisions to list (or delist) individuals and entities associated with ISIL/Da’esh and Al Qaida (the ‘Al Qaida/Taliban sanctions regime’ or, following various reforms, the ‘IDAQ regime’). Recent decisions in European court systems (also discussed further below) suggest that this system provides a level of procedural protection that meets the human rights obligations of European members of the UN system.<sup>9</sup>

Yet the situation is very different, and potentially risky, for the 13 other sanctions regimes. As Figures 1, 2 and 3 below indicate, fair process challenges to UN sanctions seem to have come in three rounds: first, a wave of litigation in domestic, then regional courts, which led to the creation of the Ombudsperson to deal with counter-terrorism delisting processes in 2010; second, a period of litigation from 2011 to 2015, primarily in the EU courts and European Court of Human Rights (ECtHR) around those arrangements; and, most recently, a new wave of litigation, especially in the EU courts and ECtHR, dealing with armed conflict situations such as Central African Republic, Democratic Republic of Congo, Iraq and Libya.

One of these cases – *Al-Dulimi*, a case in the European Court of Human Rights (ECtHR) dealing with the sanctions regime concerning Iraq<sup>10</sup> – also seems to transform the *possibility* of domestic judicial review of Council sanctions decision-making (raised by *Kadi*) into a *requirement* of limited domestic review.<sup>11</sup> This leaves the 47 states subject to the jurisdiction of the ECtHR, including three Permanent Members of the Security Council (France, the Russian Federation and the United Kingdom) in a potentially difficult position. If they proceed to conduct such domestic reviews and their courts find that there is, in any given case, an inadequate basis for the imposition of restrictive measures on a person or entity that the Security Council has decided to list, those States may be left with a very difficult choice: they will either violate their UN Charter obligations by refusing to implement the listing of that person, or violate their European Convention on Human Rights (ECHR) obligations by discharging the implementation anyway.

If States do not act soon to strengthen due process protections, the unintended consequence of the current approach may be the undermining of not only the legitimacy, but also the effective implementation, of a broader cross-section of UN sanctions regimes – including non-proliferation regimes. Due-process based litigation is, in fact, also foreseeable in relation to sanctions addressing Democratic People's Republic of Korea. Putting effective implementation of sanctions

at risk, can only be an unintended consequence of the Security Council's approach. What might be done to assist Member States, and to ensure the viability of universal and effective implementation of UN sanctions regimes?

Some commentators, and the Group of Like Minded States on Targeted Sanctions,<sup>12</sup> continue to advocate for strengthening the Security Council's sanctions procedures, whether through the creation of a judicial review mechanism at the international level – an international court or tribunal to review listing and delisting decisions – or by incremental reforms to the existing Ombudsperson and Focal Point arrangements, including the extension of the existing IDAQ regime Ombudsperson arrangements to other UN regimes. The obvious solution, one might think, would be to extend the Ombudsperson arrangements to these other UN sanctions regimes. Yet at present there appears to be no serious debate of this proposal in the Security Council; and only a very small minority of commentators have pushed explicitly for the Security Council to consider developing new procedures tailored to the context of armed conflict and counter-proliferation procedures.<sup>13</sup>

In fact, the insiders we interviewed for this study suggest that support for strengthening the Council's sanctions procedures has ebbed significantly over the last year. If anything, the tide appears to be running in the *opposite* direction – with efforts under way to weaken the independence and authority even of the Ombudsperson. The outgoing Ombudsperson, Catherine Marchi-Uhel, warned the Secretary-General in July 2017 of a burgeoning “climate of interference” in the work of her Office.<sup>14</sup> And, as a signal of the Council's disinterest in the Ombudsperson playing a strong and continuous role in sanctions processes, at the time of writing, the post has stood vacant for more than six months. In this next section, we consider the contours of the debate on these issues over the last two decades, with a view to understanding where things may go from here – and what the risks to the UN sanctions system, from this new litigation, may in fact be.

FIGURE 1. FAIR PROCESS CHALLENGES TO UN SANCTIONS BY REGIME TYPE, IN THREE 'ROUNDS'



FIGURE 2. FAIR PROCESS CHALLENGES TO UN SANCTIONS BY JURISDICTION AND YEAR

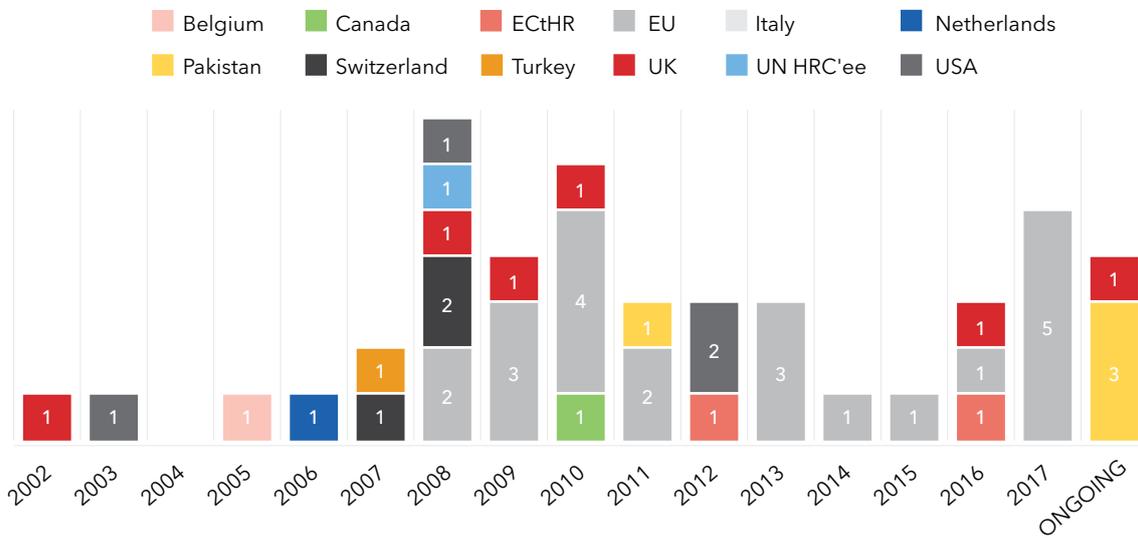
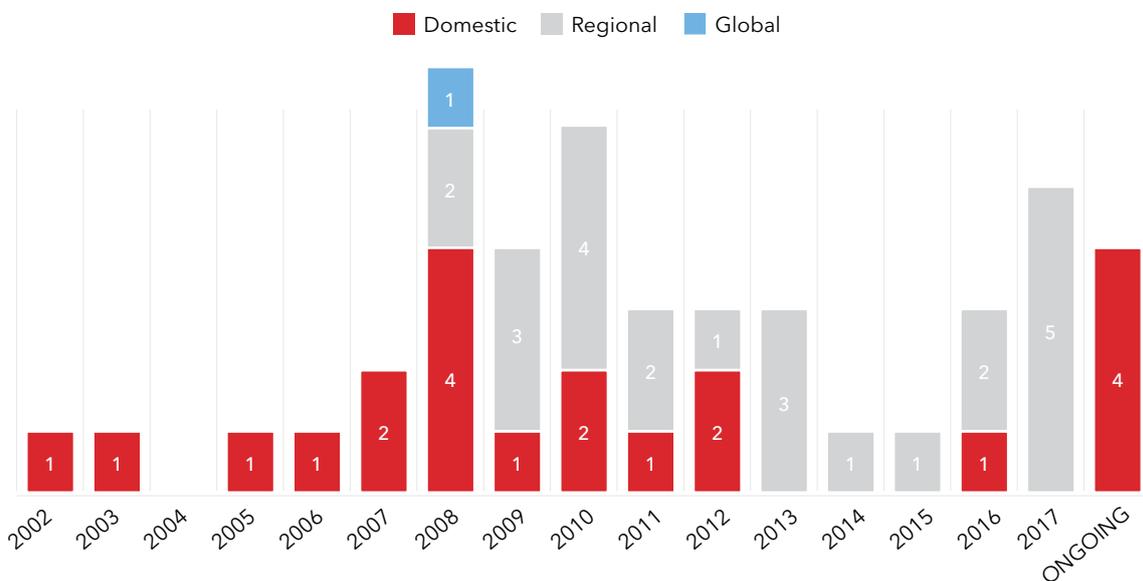


FIGURE 3. FAIR PROCESS CHALLENGES CONCLUDED BY YEAR AND VENUE TYPE



## a. It's not just about sanctions...

Why is there such a lack of interest in these questions, given the fairly clear risks to the UN sanctions system posed by the emerging litigation in Europe? Answering that question accurately requires an understanding of how 'due process' questions are perceived by different actors involved in imposing, implementing and reviewing United Nations sanctions. These arrangements have changed substantially over the last two decades, and with them, perceptions of the relationship between the sanctions process and the legitimacy and effectiveness of UN sanctions have also changed.

Our study suggests that these shifting perceptions of the risks posed by unfair or unclear sanctions procedures respond to different conceptions of the role of the Security Council in the international legal order - and thus to different notions of 'fairness'. Debates over sanctions listing and delisting procedures in the Security Council are, in one sense, coded debates about normative power and authority in international affairs, and especially the question of what authority the Security Council should have to shape the relationship between executive power and individual rights. Our desk and interview research suggests that there are at least three different perspectives on this question present in debates on UN sanctions procedures - and that each perspective leads to the prioritization of different objectives.

The first, *liberal* conception of Security Council power treats it as a mechanism for the realization of a set of global public values enshrined in the Principles and Purposes of the UN Charter. Seen in this light, the Council is expected to *both* maintain international peace and security *and* protect human rights. When it uses executive powers in ways that restrict individual liberty, in this vision, independent and impartial checks and balances are required as a matter of principle or 'global public law'.<sup>15</sup> Seen from this perspective, procedural fairness is something that individual rights-holders should be able to ensure, irrespective of how accountability arrangements are organized.

The second conception of the Security Council's normative role is a *pluralist* one. It treats the Council

as a specific instrument of international cooperation, embedded in a heterogeneous normative order, with state, regional and UN legal orders interacting in complex ways, shaped by power. This more pluralist vision recognizes that different legal orders have different subjects and rights-bearers, and may not always neatly reconcile.<sup>16</sup> In this vision, the reconciliation of competing obligations is a matter of politics as much as law, which may entail dialogue between authorities within different legal systems - for example between the courts and the Council over how to ensure due process is respected. Seen from this perspective, procedural fairness may look different in different legal and normative contexts; and what may matter equally is that arrangements adopted are *effective*.

And the third, *conservative* conception of the Council's role sees the central question as how to conserve the system which has helped to preserve international peace and security without a serious Great Power war for almost eight decades. In this view, efforts to protect individual rights that over-emphasize fair process at the expense of respect for Articles 25 and 103 of the UN Charter, which give Chapter VII decisions of the Security Council supremacy over all other international obligations, risk upsetting the delicate mechanism of collective security enshrined in the Charter. Seen from this perspective, procedural fairness is largely in the gift of the Council itself, and must, fundamentally, be reconciled with the rights and prerogatives enshrined in the UN Charter, notably those of the Permanent Members.

As the legal scholar Devika Hovell contends, debates over due process in international organizations are not only political but also normative. When the Security Council, or its sanctions committees, make choices about who to sanction, and how, they are making choices about the relationship between executive power and law. As Hovell explains, the choices we make about accountability reflect value-laden choices of how to order the international community.<sup>17</sup> The debate over sanctions process is, in this sense, not simply about sanctions - but about the public order we wish the Security Council to promote and the public policy goals we wish it to protect.

## b. Protecting human rights

The origins of the 'due process' debate lie in the adoption of UN Security Council Resolution 1267 in 1999, which imposed sanctions on the Taliban, and, after subsequent extension to cover Al Qaida, aimed to disrupt those groups' involvement in terrorist activity and force the surrender of Usama bin Laden.<sup>18</sup> Resolution 1267 imposed a travel ban, asset freeze and arms embargo on the Taliban (later extended to Al-Qaida associated individuals).<sup>19</sup> Because the regime applied globally, it required a new level of vigilance by all Member States, beyond anything that had been required under earlier

UN sanctions regimes. The first sanctions list under the regime, published in March 2001, included 162 individuals and seven entities, many believed to be located in Afghanistan.<sup>20</sup> After 9/11, however, the list grew dramatically, with the US proposing over 200 additions in the weeks following the attacks.<sup>21</sup>

Unintended consequences emerged rapidly during implementation, including allegations of factually mistaken listings causing massive disruptions to innocent people's everyday lives.<sup>22</sup> Yet from 1999 to 2002 there was no mechanism available to remove someone from

the 1267 sanctions list. In 2002, the 1267 Committee issued guidelines on how to pursue delisting through a State. Until 2006, this diplomatic channel was the only option for individuals to seek de-listing. They could not petition the 1267 Committee directly. Criticism quickly arose. Academics and civil society decried the lack of fairness.<sup>23</sup> States protested that they were being expected to implement intrusive restrictive measures with no knowledge of the basis for those measures, with Sweden taking a prominent role.<sup>24</sup> In 2005 at the UN World Summit, Member States called upon the Security Council to ensure fair and clear procedures in relation to the imposition of sanctions against individuals.<sup>25</sup> In June 2006, Secretary-General Kofi Annan identified four basic elements that needed to be addressed in order to respond to these concerns: (1) the right of a person against whom measures have been taken to be informed; (2) the right of such a person to be heard; (3) the right to review by an effective review mechanism; and (4) a periodical review of sanctions by the Security Council.<sup>26</sup>

Yet despite the nuance of the Secretary-General's position, the surrounding commentary quickly came to focus on the need for sanctions listing decisions to be subject to 'judicial' review - in part because Article 6 of the ECHR and Article 14 of the International Covenant on Civil and Political Rights (ICCPR) speak of review by an independent court or tribunal.<sup>27</sup> This binary approach to the question of how to ensure Security Council sanctions decisions respect human rights tends to treat the Security Council as a purely political body, and, at best, uninterested in the law, or, at worst, opposed to its constraints. This perspective can at times fail to recognize that the Council is a hybrid legal and political entity.<sup>28</sup> As the late Thomas M. Franck pointed out, the Council itself is a political forum that generates law reflecting the international community's evolving norms and standards.<sup>29</sup>

As they lacked avenues beyond diplomatic channels through which to engage the Council in dialogue, affected parties looked increasingly to the courts.<sup>30</sup> Most of these were not challenges to the acts or decisions of the Security Council itself, but rather "collateral" challenges - challenges brought under 'domestic' law to the acts and omissions of States and other authorities implementing sanctions.<sup>31</sup> Most courts confronted with such requests to review the Council's decisions, however, were initially quite deferential. This was the case whether courts adopted a liberal, pluralist or conservative approach to the Security Council.

On the liberal end of the spectrum, in 2003, for example, the Al-Rashid Trust, a Pakistani organization alleged to have provided support to Al Qaida, sought and temporarily won relief in the Sindh High Court

from a Pakistani freezing order implementing 1267 sanctions - but only for 24 hours.<sup>32</sup> Likewise, in 2005 the European Court of First Instance took the view in *Yusuf and Al Barakat* that while it could review actions of the European Union implementing UN Chapter VII sanctions to see if they gave rise to violations of *jus cogens*, no violation had in fact occurred in this case.<sup>33</sup> At the more 'conservative' end of the scale, in 2007, the Administrative Appeals Board of the Turkish Council of State ruled that Articles 25 and 103 of the UN Charter gave the Security Council a free hand, unfettered by judicial review, to respond to threats to international peace and security.<sup>34</sup> And in 2008, the Swiss Federal Court similarly relied on the primacy of the UN Charter established by Article 103 to deny an application by Mr Al-Dulimi (according to the Security Council a former senior intelligence official under Saddam Hussein) to annul measures implementing sanctions under Resolutions 1483 (2003) and 1518 (2003), concerning Iraq.<sup>35</sup> The Court held that Resolution 1518 (2003) left "no room for interpretation", and, unlike Resolution 1373, for example, granted "no latitude" to States in the result expected from implementation.<sup>36</sup> Switzerland, the Federal Court found, was not entitled to scrutinize the validity of the Sanctions Committee's decision-making that led to Mr Al-Dulimi's listing, "not even in terms of compliance with procedural safeguards, or to provide redress for any defects in such decisions".<sup>37</sup> Instead, the Court held, Mr Al-Dulimi should be afforded the opportunity to apply for delisting through the newly created Focal Point system.

The Focal Point system, which had been created in 2006, represented the first attempt by the Council to address the critiques of its counter-terrorism sanctions processes. In response to Secretary-General Annan's call for reforms and the conclusions of the World Summit in 2005, the Security Council created a right of notification to listed persons in 2006,<sup>38</sup> quickly adding a channel for direct petition for delisting. This new 'Focal Point' mechanism, operating from within the Department of Political Affairs of the UN Secretariat, served as a conduit for delisting requests and for States to share information with all sanctions committees.<sup>39</sup> Not until 2008, however, did the Council provide for a public statement - a 'Narrative Summary' - of the reasons for listing, and for periodic review of lists - this time only in the context of what is now the IDAQ regime.<sup>40</sup> This has been the incremental pattern of the Security Council's efforts to protect due process and human rights during sanctions listing and delisting - responding to external pressure in a dialectic pattern. Figure 4 (below) provides a summary of these efforts, suggesting that they have, broadly, fallen into three 'rounds' over the last two decades. Each of these rounds is explored below.

FIGURE 4. TIMELINE OF DUE PROCESS REFORMS, 2006-2017

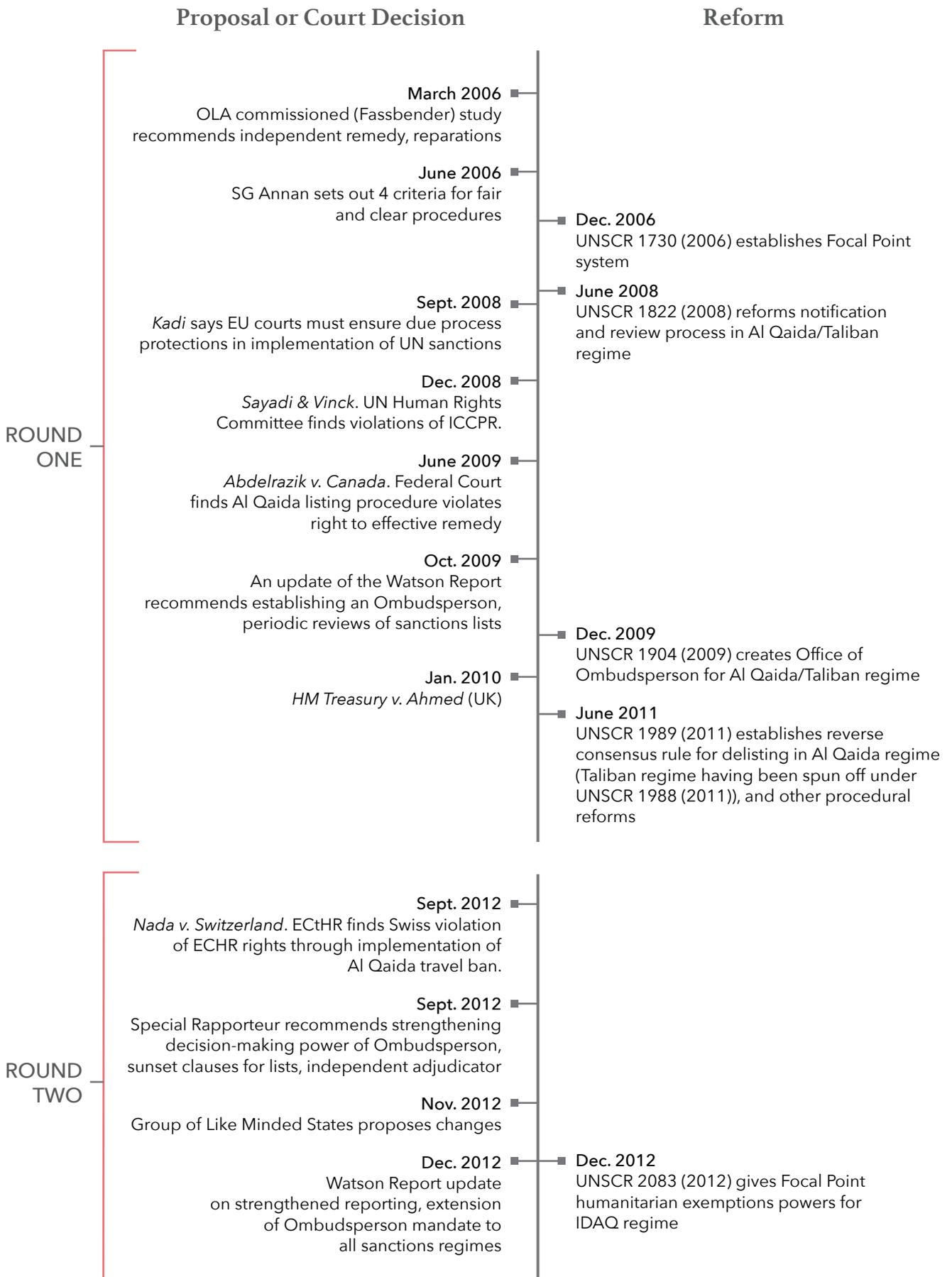
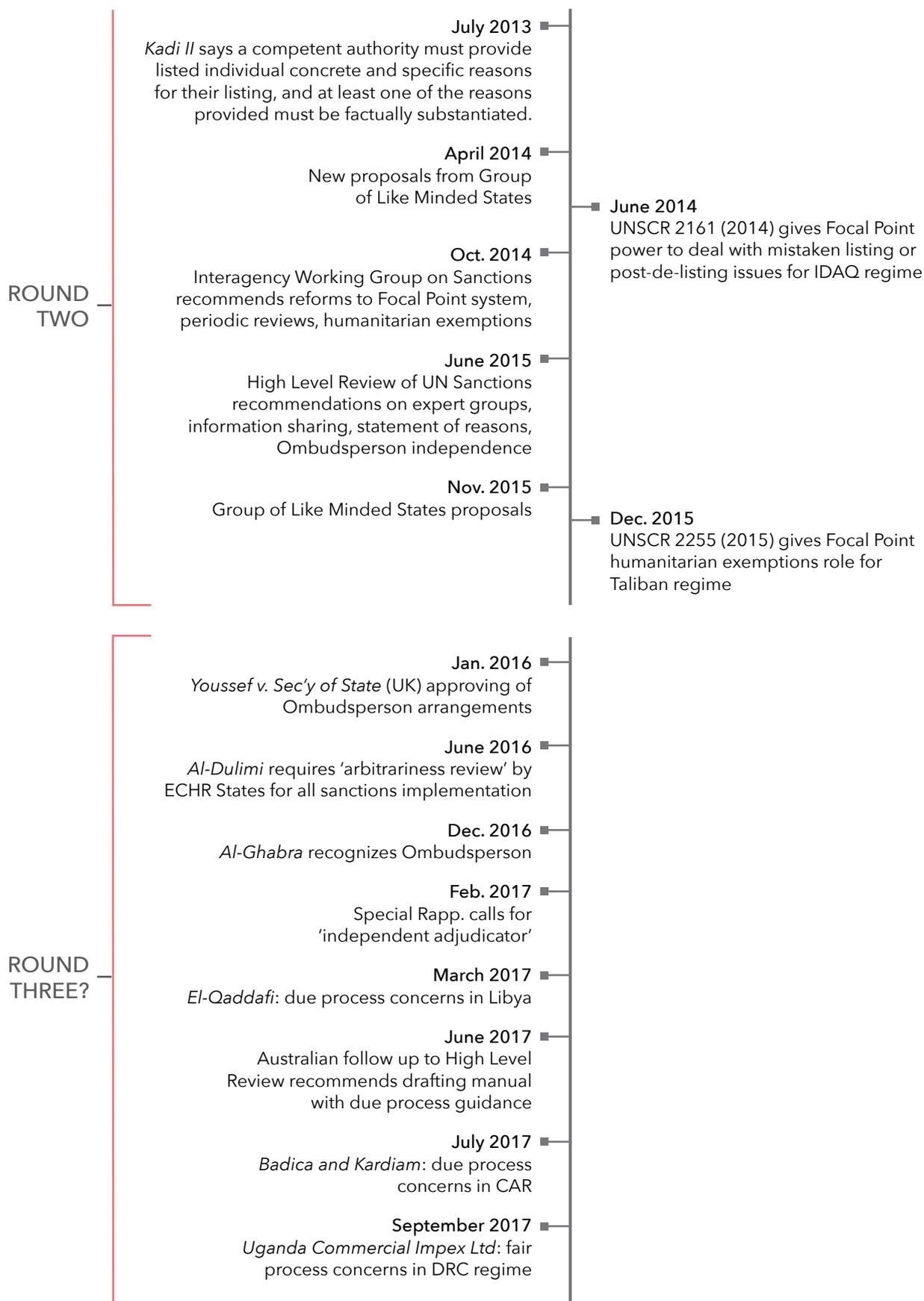


FIGURE 4. TIMELINE OF DUE PROCESS REFORMS, 2006-2017 (CON'T)



### i) Round One: Dialogue and reform

Despite the creation of the Focal Point mechanism in 2006, external agitation for further reform continued. In 2008, the Parliamentary Assembly of the Council of Europe (which included parliamentarians from three UN Security Council Permanent Members) condemned the sanctions listing system as “totally arbitrary... [with] no credibility whatsoever”.<sup>41</sup> Later that year, another UN body – the Human Rights Committee, which serves as the guardian of the ICCPR – unleashed its own criticisms in the case of *Sayadi and Vinck v. Belgium*.<sup>42</sup> Two Belgian nationals, Nabil Sayadi and Patricia Vinck, both of whom had been placed on the 1267 list in September 2002, had unsuccessfully sought relief through various domestic and other channels. Eventually they turned to the UN Human Rights Committee. The Human Rights Committee found Belgium had violated Sayadi and Vinck’s rights under ICCPR Articles 12 and 17, by putting forward the applicants’ names for Security Council listing before a domestic (criminal) investigation had ceased and they had been heard.<sup>43</sup> This liberal vision of the Council’s role and obligations was, however, countered by a more pluralist vision contained in powerful dissents by British, Australian, Romanian and US members of the Committee, whose alternative approach implied a strong sympathy for States’ arguments that they had little room to manoeuvre in reviewing UN sanctions listing decisions.<sup>44</sup>

Six months later, in a judgment in the case of *Abdelrazik v. Canada* (Minister of Foreign Affairs), the Federal Court of Canada held that the Al Qaida Sanctions Committee listing procedure was incompatible with the right to an effective remedy. The case concerned a travel ban on a dual Canadian-Sudanese national, who, as a result of the Canadian implementation of a UN travel ban, was forced to live in the Canadian embassy in Khartoum, Sudan, fearing possible detention and torture should he leave that sanctuary. In the lead judgment, espousing a liberalist interpretation of the international legal order, Zinn J described the Al Qaida sanctions regime’s listing process to generate, “a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness.”<sup>45</sup>

The real game-changer for the Council was, however, the complex 2008 decision of the ECJ, known as *Kadi*.<sup>46</sup> In that case, the Grand Chamber invalidated an EU regulation implementing sanctions imposed by the Al Qaida/Taliban sanctions regime on the grounds that the

European Commission had not respected the targeted individual’s right to be heard, his right to effective judicial review and his right to property. The Court analyzed the Focal Point system and found it did not offer sufficient human rights protections, essentially because the system amounted only to a re-examination by the body imposing the sanctions in the first place.<sup>47</sup> Around 27 States were subject to relevant aspects of the ECJ’s jurisdiction at the time. Many were significant players in the global financial and travel systems. Interviewees for this study indicated that the judgment caused real alarm that one unintended consequence of the Council’s approach to listing and delisting decisions might be that European States could not actually implement those sanctions.<sup>48</sup>

By the early 2010s, the advisory group of experts that supported the Al Qaida/Taliban Sanctions Committee – the Al Qaida / Taliban Monitoring Team – had concluded that the sanctions regime’s perceived unfairness to individuals was detracting from the regime’s credibility and effectiveness.<sup>49</sup> The *Kadi* decision had, however, spurred serious consideration of options for reform.<sup>50</sup> The Group of Like-Minded States on Targeted Sanctions, drawing on ideas from the Watson Institute at Brown University (which was sponsored by the founding members of the Group Switzerland, Sweden and Germany), worked with the Al Qaida/Taliban Sanctions Committee to formulate a reform proposal.<sup>51</sup> This initiative, and others, led to the establishment in December 2009 of an Ombudsperson for the Al Qaida/Taliban sanctions regime, with independent investigative and recommendation powers.<sup>52</sup> The system was further strengthened in 2011 by the introduction of the so-called ‘reverse consensus’ rule, which makes an Ombudsperson’s delisting recommendation automatically enter into force 60 days after that recommendation, *unless* all fifteen members of the Sanctions Committee of the Security Council vote to retain the listing – something that, to this day, has not happened.<sup>53</sup>

Through this long and iterative process, as Antonios Tzanakopoulos has explained, a two-track due process system emerged “through a pattern of defiance, threats, and ultimately negotiation between the Security Council and States, pushed on by their courts, primarily, and also by public opinion or relevant engaged interest groups”.<sup>54</sup> This system is summarized in Figures 5 and 6 below.

## FIGURE 5. SANCTIONS LISTING AND DELISTING PROCESSES - AN OVERVIEW

This box summarizes the listing, delisting and exemptions processes across the existing UN sanctions regimes, excluding the newest regime addressing the situation in Mali, which did not have approved listing and delisting procedures at the time of writing. Processes in fact vary from one regime to another.

### HOW DOES LISTING WORK?

**Option 1:** The Security Council can directly list individuals in a formal Resolution.

**Option 2:** Usually, however, proposals for designation are made to the relevant Sanctions Committee.

- A Member State proposes a name for listing.
- The Sanctions Committee members have (usually) five working days to consider the proposal.
- If no Committee Member objects, the designation is approved.
- If a Committee Member places a hold, the proposal remains pending, but usually for no more than 6 months.
- After 6 months on hold, the designation goes through, unless a Committee Member objects, or the Committee decides 1 more month is needed for a decision.
- If at any point a Committee Member objects to the listing, then the listing request is (usually) unsuccessful. If the relevant Committee cannot reach consensus on a listing decision, the matter may be transferred to the Security Council for deliberation.

**Option 3:** Proposals for designation are, in some regimes, made by an associated Group or Panel of Experts, based on designation criteria set by the relevant Sanctions Committee.

**In all cases**, once an individual or entity has been listed, **narrative summaries** of reasons for listing are published on the relevant Committee's website. The contents of these summaries vary considerably by sanctions regime, but may contain:

- reasoning demonstrating that the relevant designating criteria has been met; and
- the kind of evidence supporting the designation.

Generally, Member States providing information towards a designation can choose which parts of the information may be publicly released.

### HOW CAN LISTED INDIVIDUALS AND ENTITIES APPLY FOR TEMPORARY EXEMPTIONS?

**ISIL/Da'esh/Al Qaida and Taliban regimes:** Apply through the Focal Point to the Sanctions Committee.

**All other regimes:** For an assets freeze exemption, apply through a Member State (usually the state of nationality or residency) to the Sanctions Committee. Some regimes permit requests for travel ban exemptions to be processed via the Focal Point, to the Sanctions Committee.

### HOW DOES PERMANENT DELISTING WORK?

*The ISIL/Da'esh/Al Qaida regime*

**Option 1a:** A Member State submits a delisting request to the relevant Sanctions Committee.

FIGURE 5. SANCTIONS LISTING AND DELISTING PROCESSES - AN OVERVIEW (CON'T)

**Option 1b:** The state of residence or nationality of a listed individual transmits a request from the individual, to the relevant Sanctions Committee.

**Option 2:** Focal Point. The Focal Point can receive communications from individuals claiming to have been wrongly listed under the IDAQ regime on the grounds of mistaken identity.

**Option 3: Ombudsperson**

- Listed individual or entity contacts Ombudsperson to request delisting. Ombudsperson makes preliminary determination on whether request is new or repeat, and whether it sufficiently addresses designation criteria. If a repeat request, the Ombudsperson must be satisfied there is additional material since the last request.
- If the Ombudsperson is satisfied the request meets these threshold criteria, advances to a four-step examination process.

**Step 1: Information Gathering** - 4 months + 2 months at Ombudsperson's discretion

- » Ombudsperson distributes request to Sanctions Committee, Designating State(s), State(s) of Nationality/Residence (or Incorporation/Operation for entities), the Monitoring Team (a group of experts which assists the Committee) and other relevant States or UN bodies
- » Ombudsperson follows up by engaging with any or all of these States and bodies to assemble all relevant information about the request.

**Step 2: Dialogue and Report** - 2 months + 2 months at Ombudsperson's discretion

- » Ombudsperson relays questions and responses between petitioner, States, Committee and Monitoring Team
- » Ombudsperson explores case in detail, including through direct (in-person) dialogue with Petitioner
- » Ombudsperson prepares comprehensive report on case, setting out principal arguments on delisting based on acquired information and Ombudsperson's observations, and providing recommendation on delisting
- » Ombudsperson's recommendation based on assessment "whether there is sufficient information to provide a reasonable and credible basis for the listing"<sup>55</sup>

**Step 3: Committee Discussion and Decision** - 15 to 60 days

- » The 1267 Sanctions Committee receives the report from the Ombudsperson, and has 15 days to review it before it goes on the Committee's agenda
- » The Committee has a further 15 days to review the report - the Ombudsperson presents the report in person, and takes questions
- » Where the Ombudsperson recommends retention of a listing, the name is retained
- » Where the Ombudsperson recommends delisting, the name is delisted within 30 days - unless the Committee agrees (by consensus, i.e. all 15 or participating Members) to retain the listing or transmit the matter to the full Security Council for decision

FIGURE 5. SANCTIONS LISTING AND DELISTING PROCESSES - AN OVERVIEW (CON'T)

**Step 4: Communication of decision** - roughly 15 days

- » The Committee communicates its decision to the Ombudsperson. If the decision is to retain a listing, the Committee sets out its reasons
- » The Ombudsperson informs the Petitioner of the decision. A decision to delist is actioned immediately. Where the decision is to retain a listing, the Ombudsperson provides a summary of the analysis contained in the (earlier) report to the Committee, the process and publicly releasable information gathered by the Ombudsperson. After review of this summary by the Committee, it is disclosed to the Petitioner.

**All other sanctions regimes**

**Option 1a:** A Member State submits a delisting request to the relevant Sanctions Committee.

**Option 1b:** The state of residence or nationality of a listed individual transmits a request from the individual, to the relevant Sanctions Committee.

**Option 2: Focal Point:** The Focal Point can receive and handle requests for delisting from individuals and entities. The process used to handle these requests is summarized in Figure 6 (below). Timelines, notifications to interested parties, and arrangements for the involvement of Groups/Panel of Experts vary considerably by sanctions regime.

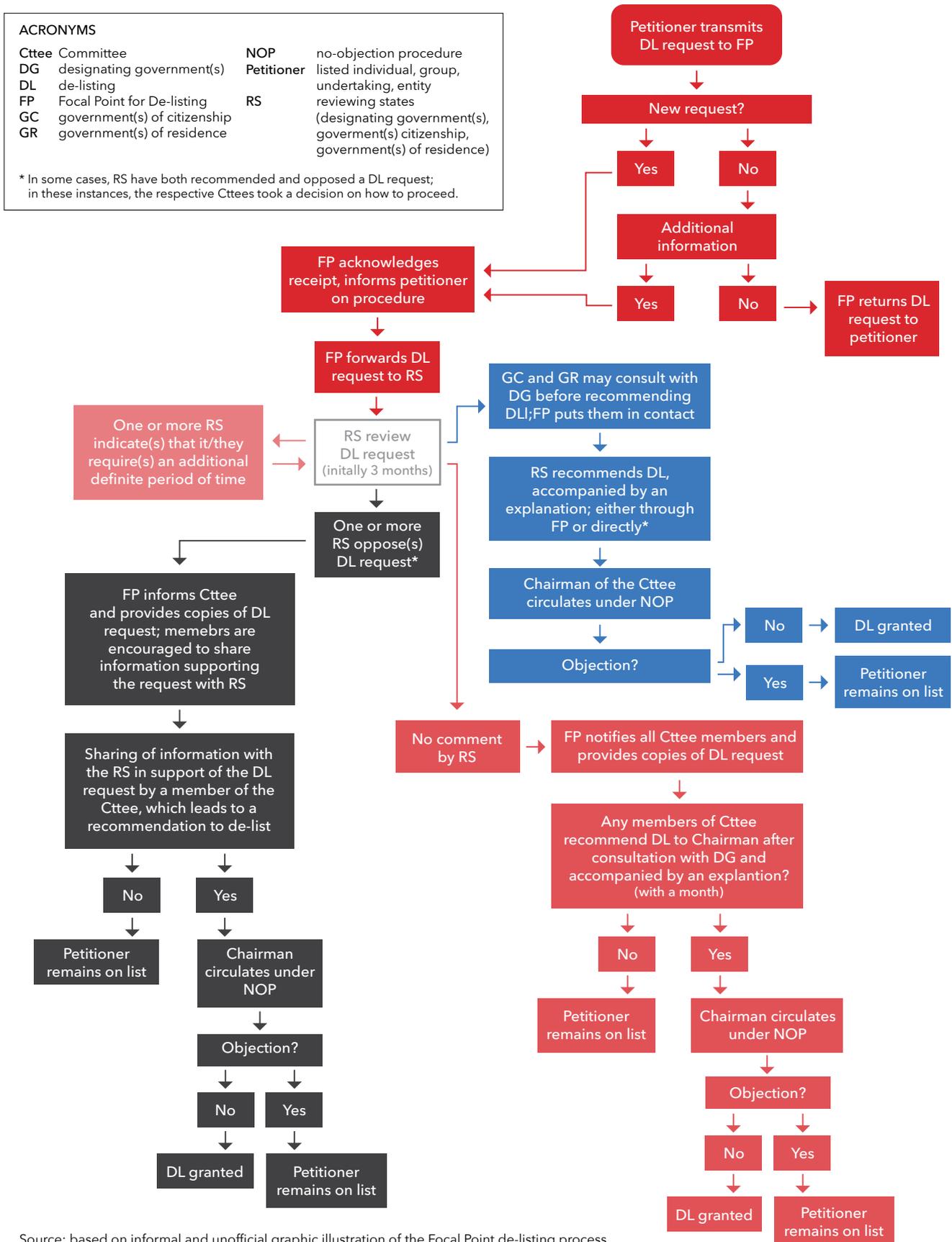
**Are any remedies available after delisting for subsequent harms?**

The **Focal Point** may receive and transmit to the IDAQ Committee any communications from individuals who were removed from the IDAQ Sanctions List but suffer subsequent, related harms, such as wrongful travel bans.

*Sources: Focal Point for De-Listing, available from <https://www.un.org/sc/suborg/en/sanctions/delisting>; Procedure for requests for delisting submitted to the Office of the Ombudsperson, available from <https://www.un.org/sc/suborg/en/ombudsperson/procedure>; and Committee Guidelines of Sanctions Committees, available from <https://www.un.org/sc/suborg/en/sanctions/information>.*

FIGURE 6. INFORMAL SUMMARY OF FOCAL POINT DE-LISTING PROCESS

This flowchart aims to provide a visual guide to the Focal Point de-listing process outlined in the Annex to Security Council resolution 1730 (2006) and pursuant to relevant Committee practice



Source: based on informal and unofficial graphic illustration of the Focal Point de-listing process, UN website for the Focal Point for De-Listing, available from [https://www.un.org/sc/suborg/sites/www.un.org.sc.subor/files/flowchart\\_dl\\_process\\_english.pdf](https://www.un.org/sc/suborg/sites/www.un.org.sc.subor/files/flowchart_dl_process_english.pdf)

## ii) Round Two: A double standard and a high-water mark?

The first Round of 'dialogue' between the courts and commentators on the one hand, and the Council on the other, had thus led to the establishment of two quite distinct tracks for dealing with due process concerns. As Figure 5 makes clear, there is a substantial difference between the two resulting tracks – one primarily for the ISIL/Da'esh/Al-Qaida context in the counter-terrorism context, the other for all other UN sanctions contexts. A second round of dialogue between external actors has ensued, since 2011, with external actors critiquing the mechanisms put in place by the Security Council and proposing various refinements or expansions.

The Group of Like Minded States on Targeted Sanctions have several times proposed extending the Ombudsperson's functions or role beyond the counter-terrorism context,<sup>56</sup> as did an informal High-Level Review of UN Sanctions.<sup>57</sup> That proposal has been met – for reasons we explore further below – with limited enthusiasm in the Council. Yet as the overview in Figures 5 and 6 show, for most sanctions regimes, nothing like the Ombudsperson system exists.

The Focal Point plays an essentially secretarial role, with no independent investigative or effective remedial power equivalent to those of the Ombudsperson.<sup>58</sup> She or he cannot study the merits of the delisting petition, has no access to the information justifying inclusion in the list, and does not make recommendations to the decision-maker – the Sanctions Committee. The Focal Point cannot sway, or even hurry, the Sanctions Committee, with the result that non-counter-terrorism delisting decisions can take years, while those in the counter-terrorism sanctions, Ombudsperson-managed pipeline are subject to clear and strict time limits. Nor does the Focal Point system offer other actors particularly good procedural access: even some directly affected States – such as assets-holding States that are not members of the Security Council at the time – cannot participate in delisting discussions. In contrast, the Ombudsperson has larger freedom to follow the evidence to and through a variety of sources, and to ensure affected States' concerns are at least conveyed to the Security Council.

Most of the people we interviewed were straightforward about the fact that there is a "double standard" in the Council's practice, and that the Focal Point system does not come close to affording the same due process protections offered by the Ombudsperson system. One called it "primitive". What it does offer, our interviewees argued, is improved access for petitioners, and improved transparency compared to the situation prior to 2006. The Group of Like Minded States concluded in 2015 simply that the Focal Point system "has not proven effective".<sup>59</sup>

Perhaps as a result of these limitations, the Focal Point<sup>60</sup> system is little used. At the time of writing, there were only three requests pending before the Focal Point, across thirteen regimes and 625 individuals and entities targeted. In comparison, at the same time, there was one case in the hands of the office of the Ombudsperson and two cases pending before the IDAQ Sanctions Committee – for just one counter-terrorism regime, albeit one with a long list of sanctioned persons.<sup>61</sup> Since its inception,

the Ombudsperson has received 79 delisting petitions, leading to the delisting of 52 individuals and 28 entities, the denial of 16 petitions, and one removal of an alias.<sup>62</sup>

This is not to suggest that the Ombudsperson arrangements provided a panacea. On the contrary, some courts have expressed significant scepticism that the Ombudsperson arrangements satisfy international due process standards. In 2010, for example, the first case ever decided by the newly created UK Supreme Court, *HM Treasury v. Ahmed*, concluded that the United Kingdom had violated an individual's right to a fair trial when implementing the Al Qaida sanctions regime.<sup>63</sup> Moreover, numerous judges across varying jurisdictions began to criticize the Ombudsperson arrangements (which, at that point, did not include the 'reverse consensus' rule). In 2012 the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism offered his own liberalist critique of this arrangement, calling for the creation of a system of full judicial review.<sup>64</sup> The crescendo culminated with two cases in 2012 and 2013: *Nada v. Switzerland*<sup>65</sup>, and *Kadi II* (the sequel in the EU court system to the earlier *Kadi* case).<sup>66</sup>

The *Nada* case represented the first foray by the ECtHR (attached not to the EU, but to the separate Council of Europe) into this controversy, and it is important, especially in the context of Brexit, to understand why the case landed there, and not at the ECJ. Litigants affected by EU Member State actions implementing UN sanctions are likely to prefer the EU courts to the ECtHR as a forum to seek remedy for alleged violations of their rights, because the EU courts have powers to annul EU (and in some cases EU member state) actions, and the ECtHR has no analogous power. Switzerland is not, however, an EU member. As a result, when Mr Nada, an Italian/Egyptian citizen living in an Italian enclave surrounded by Swiss territory, wanted to seek a remedy, he turned to the ECtHR – as individuals and entities may have to, after Brexit, suggesting that ECtHR jurisprudence on these questions will become even more important in the near future. Mr Nada had been listed under the Al Qaida/Taliban sanctions regime. By implementing the resulting travel ban, Switzerland was effectively preventing him from leaving the Italian enclave in which he lived. The Court held that the absence of any effective process for reviewing Mr Nada's listing violated several of his rights under the ECHR. The decision essentially required the Swiss domestic courts to cure the deficiencies of the listing and delisting arrangements in the Security Council by providing Mr Nada with an effective remedy at the domestic level.

Soon after, the *Kadi II* decision saw the General Court of the EU flatly rejecting the adequacy of the sanctions implementation arrangements, baldly stating that the "improvements added" to the UN sanctions delisting system – i.e. the Ombudsperson – did "not provide... the guarantees of effective judicial protection" required by the ECHR.<sup>67</sup> This decision was in fact handed down *after* Mr. Kadi had been delisted by the Council in a process handled by the Ombudsperson.

Taken together, *Nada* and *Kadi II* seemed to suggest that dozens of states faced an unenviable legal dilemma: either to violate their international human rights

obligations by implementing the Al Qaida sanctions based on a process that did not meet judicially identified minimum procedural standards; or to subject UN sanctions decisions to domestic or regional judicial review, and risk being forced by those courts to fail to meet their UN Charter obligations. This meant that something like a quarter of the UN Membership might not be able to implement the Al Qaida sanctions regime. As Antonios Tzanakopoulos has pointed out, the last time there was such a direct challenge to implementation of a sanctions regime was the Organisation of African Unity decision not to implement Libya sanctions in 1998. That led quickly to those sanctions' suspension.<sup>68</sup>

The result, this time around, was quite different. If the General Court hoped, in *Kadi II*, to generate a repeat of the Council's reform efforts after the first *Kadi* decision, then it must have been disappointed. Many people we interviewed told us that *Kadi II* had, in effect, marked the "high-water mark" of efforts to promote procedural protections in the Council. Some told us that *Kadi II* was perceived by some Council members as a "slap to the face" and "disrespectful", given how little time the Court's judgment spent considering the Ombudsperson reforms. *Kadi II*, we were told, "left little motivation for ... further improvements" to Council processes.<sup>69</sup> "*Kadi I* said: You are damned if you don't enact reforms", one close observer of the Council throughout this period told us. "But *Kadi II* said: You are damned even if you do enact reforms." The dialogue that appeared to have emerged between the courts and the Council seemed to have come to a dead end, or perhaps become, as one person we interviewed put it "a dialogue of the deaf".<sup>70</sup> Subsequent judicial opinions seem to have confirmed this perception amongst Council actors in New York, who saw little effort by the courts to understand the way that the Ombudsperson arrangements worked in practice.<sup>71</sup> (For an overview of relevant jurisprudence, see Annex 1.)

### iii) Round Three? From 'equivalent protection' to a new front?

A closer reading of this jurisprudence, however, suggests that the courts have continued to hold the door open to this dialogue, and may even be moving towards a pluralist acceptance that while the protections afforded by the Ombudsperson system may not look quite the same as classical judicial review, they may afford equivalent protection. At the same time, a new front in the debate is rapidly emerging, with courts increasingly examining whether the sanctions regimes that do not have access to the Ombudsperson system – in other words, the armed conflict and non-proliferation sanctions regimes – provide adequate procedural safeguards.

For almost a decade, key judicial actors have advocated for assessing the Security Council's delisting arrangements by asking whether they offer "equivalent protection" to that afforded at the domestic or regional level. In both *Kadi I* and *Kadi II*, the European Advocates-General argued for this approach before the ECJ.<sup>72</sup> There were also arguably signals embedded in decisions of the UK Supreme Court in *Ahmed* and the ECtHR in *Nada* that if the Security Council adopted protections equivalent to those provided by classical judicial review

– even if they took a different form – the domestic and regional Courts would likely resume their customarily deferential posture.<sup>73</sup>

Apparently little noticed in New York, this *has* in fact been the trend in the most recent caselaw concerning the counter-terrorism regime: the Courts have begun to digest how the role of the Ombudsperson works and recognize that it provides significant – and perhaps even sufficient – due process protections. In *Youssef v. Secretary of State*, decided in 2016, the UK Supreme Court declined to follow its own earlier criticisms of the Ombudsperson's "reasonable suspicion" test as the basis of listing. Instead, it took note of the Ombudsperson's practice and approved the Ombudsperson's test for recommending delisting: "whether there [are] sufficient grounds to provide a reasonable and credible basis for the listing". Adopting a rather pluralist perspective, the Supreme Court considered that it would be inconsistent with the UN Charter regime for a national court to substitute its own merits assessment of the listing decision and denied the application for relief.<sup>74</sup>

In *Al-Dulimi*, one of the key concurring opinions explicitly recognizes that the "office of the Ombudsperson is not an insignificant development, which shows that incremental changes in the system are possible".<sup>75</sup> Then, in late 2016, in *Al-Ghabra*,<sup>76</sup> the General Court of the European Union dismissed an application to annul a Commission regulation implementing 1267 sanctions. While following the settled *Kadi* jurisprudence, the Court looked closely at the actual process followed by the Sanctions Committee<sup>77</sup> and considered Mr Al-Ghabra's failure to avail himself of the "in-depth investigation" possibilities offered by the Ombudsperson. "There is no rational reason for failing to do so", it wrote, "particularly as the applicant claims to have arguments to support the removal of his name" from the sanctions list.<sup>78</sup> Failure to engage with the Ombudsperson "does nothing" the Court concluded "to allay the reasonable suspicion falling" on the person in light of the evidence proffered.<sup>79</sup> This *obiter dictum* not only suggests that the Court is now more appreciative of the protections offered at the Council level, it also hints at a move towards what former Ombudsperson Kimberly Prost describes as a "practice of requiring that international remedies be exhausted"<sup>80</sup> before legal suit is brought in an international court.

All of this suggests that 'Round Three' of the dialogue between the Courts and the Council will *not* arise in the context of the counter-terrorism sanctions. Instead, there are growing signs of a wave of litigation on a new front: focusing on the significant difference between the protections offered by the Ombudsperson in the counter-terrorism context and the much weaker protections offered by the Focal Point system for all other sanctions regimes. Litigators, having found success with due process arguments in Al Qaida regime-related litigation, are now using the same arguments to challenge an array of other regimes.

The best-known of these cases is another ECtHR decision, *Al-Dulimi*. This 2016 decision by the Grand Chamber revisited the Swiss Federal Court's decision in 2008 (discussed earlier in this study) not to review the asset freeze imposed on Mr Al-Dulimi (the former

Iraqi intelligence official) and on Montana Management, pursuant to Resolution 1483 (2003). The Court noted the existing criticisms of the Ombudsperson system, which was not even available in this situation and found that the Focal Point system fell well short even of offering those protections. The Focal Point, it concluded, did “not even partly compensate for the lack of” scrutiny providing “satisfactory protection” of due process rights.<sup>81</sup> The Court considered that there was nothing in the Security Council’s resolutions “that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection” the Swiss measures implementing the Iraq sanctions regime.<sup>82</sup> Instead, the Court held, the Swiss authorities should have conducted an “appropriate review” to ensure there was no “arbitrariness” in the effect of the sanctions regime.<sup>83</sup> Consequently, “where a resolution ... does not contain any clear or explicit wording excluding the possibility of judicial supervision of the measures taken for its implementation, it must always be understood as authorising the courts of the respondent State to exercise sufficient scrutiny so that any arbitrariness can be avoided.”<sup>84</sup> A failure by a state to conduct an ‘arbitrariness’ review before implementing the sanctions consequently risked violation of Article 6 of the ECHR.<sup>85</sup> Such a review required affording a targeted person or entity “a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary”.<sup>86</sup>

*Al-Dulimi* is notable in three ways. First, it fundamentally shifts the focus of the ‘due process’ debate from the 1267 regime and the Ombudsperson to the Focal Point and the other sanctions regimes. Second, it introduces the new concept of a domestic ‘arbitrariness’ review, raising a plethora of jurisdictional, norm-hierarchy and especially practical questions. How is a domestic court to get access to the fact base underpinning the Council’s listing decision? What exactly is it expected to review? And what exactly is the standard of ‘arbitrariness’? Third, and perhaps most fundamentally, *Al-Dulimi* appears to reverse the understanding of the hierarchical relationship between Council-issued obligations and domestic review. Where *Kadi I* opened up the *possibility* of domestic review, *Al-Dulimi* seems to signal a *requirement* of limited domestic review.

This last point could perhaps be receiving greater attention in New York than it has, given that some 47 states, including three Permanent Members of the Council, may now face the possibility of being held responsible for carrying out such an ‘arbitrariness review’ on the implementation of all Security Council listing decisions – including those relating to, for example, DPRK. As Judge Ziemele notes in her partially dissenting opinion to *Al-Dulimi*,

*“If the effect of this judgment is such that it provides a precedent for all domestic courts of the world to scrutinise the obligations imposed on States by the Security Council, that would be the beginning of the end for some elements of global governance emerging within the framework of the United Nations.”<sup>87</sup>*

Judge Nußberger, dissenting, argued that were States to conduct such reviews and refuse to implement sanctions on the grounds that their courts identified ‘arbitrariness’, “This would create major tensions within the UN system. If followed as a general example, targeted economic sanctions would become ineffective.”<sup>88</sup>

Yet many of the Council insiders we spoke to in the course of the research seemed dismissive about the risks posed by *Al-Dulimi* to UN sanctions regimes. There was, as one person explained to us, “a sense that this is Europe’s problem – let Europe sort it out.” Another interviewee told us that the Russian Federation, itself subject to ECtHR jurisdiction, had generously offered other European States “technical assistance on sanctions implementation”, including assistance to their judicial organs, if necessary.

This lack of concern seems to flow from two assumptions. The first assumption is that the Courts have not fully digested the due process protections that the Security Council *has* developed. Yet, as we have seen, the most recent jurisprudence, over the last year, suggests quite the opposite. The issue is, increasingly, *not* whether the Ombudsperson arrangements afford sufficiently fair and clear procedures: it is whether such procedures are available in all the *other* regimes. The second assumption seems to be that *Al-Dulimi* will not have knock-on effects to other sanctions regimes because the Iraq sanctions regime is *sui generis*: unlike other sanctions regimes, it creates an assets confiscation and recovery mechanism (rather than simply assets freeze), and rests on Resolution language that is particularly narrowly framed, leaving little room for state discretion during sanctions implementation. We think that misreads the situation. The Court is clear that it sees an ‘arbitrariness review’ as the minimum standard applicable across all sanctions regimes. It turns to this standard precisely *because* the relevant Resolution language affords States so little discretion within which to ensure due process protections. That implicitly signals that the ECtHR may in other cases rule in line with the approach it took earlier in *Nada*, that States must conduct a more extensive review of due process protections in other non-counter-terrorism sanctions listing implementation, where the relevant Security Council Resolution offers them *more* “latitude” to do so. And even if we are wrong about the direction the ECtHR is moving, the reality is that the EU courts are already moving in that same direction. Even as the ECtHR was ruling on *Al-Dulimi*, separate litigation was making its way through the EU court system precisely aimed at using the earlier *Kadi* jurisprudence to challenge other sanctions regimes on due process grounds. That wave of litigation is now beginning to bear fruit.

In March 2017, the General Court of the European Union struck down EU measures implementing sanctions against former Libyan leader Muammar Qaddafi’s daughter, Aisha Qaddafi, under Security Council Resolution 1970. Relying on its earlier *Kadi* jurisprudence, the Court held that the extremely minimal narrative summary made available to explain the basis of her listing – “Daughter of Muammar Qadhafi. Closeness of association with regime” – was entirely inadequate to justify the application of restrictive measures. It did not provide the requisite “individual, specific and concrete

reasons why it was considered that the individual concerned had to be subject to restrictive measures".<sup>89</sup> The Council ruled that the statement of reasons cannot consist merely of a "general, stereotypical formulation".<sup>90</sup> The language provided did "not make it possible to understand the reasons that led the Council to maintain the restrictive measures against the applicant" – especially in light of the changed context in Libya.<sup>91</sup>

The *El-Qaddafi* case also suggests that other regimes that include minimal explanation for listings, such as the sanctions regime addressing the situation in DPRK, may also be vulnerable to such challenges. Across the remaining sanctions regimes, decisions ranging from denials of requests for humanitarian exemptions to the application of travel bans and assets freezes are sometimes accompanied by a statement of reasons – and sometimes not accompanied by such reasons, suggesting the possibility of further litigation in this area. Litigation of the non-proliferation regimes on due process grounds is also likely: already, litigators are using the *Kadi* jurisprudence to contest the EU's (autonomous, i.e. non-UN) sanctions on Iran.<sup>92</sup> Four months later, in July 2017, the General Court of the EU handed down a significant decision regarding European states' implementation of the UN's sanctions regime for Central African Republic.<sup>93</sup> The *Bureau d'achat de Diamante en Centrafrique* (Badica) and its Belgian sister company, Kadium, also contested these measures on due process grounds. Despite the non-counter-terrorism context, the General Court once again followed *Kadi*. The Court allowed that the European Council's implementation actions were based on a summary of reasons provided by the relevant UN Sanctions Committee but required that it conduct a careful and impartial review of whether those reasons were well-founded in fact.<sup>94</sup>

### c. Protecting effectiveness

In the preceding section we focused on how dialogue has played out between the Security Council and external actors around the question of how to ensure individual rights are respected during the imposition, implementation and termination of UN sanctions regimes. This was a dialogue framed, in the judicial setting, in inherently liberal terms. There is, however, another, more utilitarian way to understand the role that due process protections play in UN sanctions processes – seeing these procedural safeguards not primarily in terms of ensuring respect for rights, but rather as a way to protect the utility and effectiveness of the sanctions regimes, in the context of the diverse implementation arrangements states have adopted. This more pluralist and instrumental approach to sanctions came across in many of our research interviews with sanctions designers and implementers in New York.

As Devika Hovell has recently explained, seen from this 'instrumentalist' perspective, the point of due process protections is essentially to ensure the *accuracy* of sanctions targeting.<sup>98</sup> A listing and delisting process that does not respect due process risks inaccuracy, and thus ineffectiveness.<sup>99</sup> This is not an abstract discussion: at present, we were told, the online Consolidated Sanctions

Significantly, in September 2017, the General Court handed down a judgment concerning the EU's implementation of a listing under the UN's sanctions regime for the Democratic Republic of Congo. In *Uganda Commercial Impex Ltd v. Council of the European Union*, the Court considered whether the EU Council was required to re-assess evidence used by the UN Group of Experts to justify designation of this business for listing under the regime. Citing *Kadi II*, the Court stated that "it was for the [European] Council in the present case to examine, carefully and impartially, the evidence on which the Sanctions Committee had relied in order to designate the applicant."<sup>95</sup> However, the Court also found that the information and "evidence" offered by the Security Council for the listing in question, in particular the various UN Group of Experts for the DRC reports, were "clear, precise and consistent".<sup>96</sup> As such, the EU Council was not expected to request additional information on the fact base for the listing decision or conduct its own investigation.<sup>97</sup>

These decisions suggest that we are now seeing the opening of a new front in litigation applying *Kadi* to non-counter-terrorism sanctions contexts. They also suggest that some, if not many, of these regimes are highly vulnerable. While the EU General Court was receptive, in *Badica & Kadium and Uganda Commercial Impex Ltd*, to the information gathered by the Groups of Experts underpinning the relevant Sanctions Committees' decisions, the cases nevertheless include a close examination of the work of the Experts. This suggests that, where Groups and Panels of Experts are involved in listing and delisting decisions, their work may soon be subjected to much closer court scrutiny than they have been in the past – a theme we return to later in the report.

List (used by financial institutions, government agencies, and others to determine if they are dealing with a sanctioned person) is viewed around 1 million times *per month* and updates are routinely sent to over 800 recipients. This points to the breadth of involvement in sanctions implementation, especially as private sector actors automate searches of the sanctions lists. Inaccurate lists will have real implications for a wide range of actors involved in sanctions implementation and could, over time, undermine their willingness to participate in the implementation of UN sanctions.

Seen from this perspective, the significance of the dialogue between the Security Council and external courts over the last decade lies in clarifying the risks posed, by the absence of fair and clear procedures, to the effectiveness of regimes. If states cannot legally translate UN sanctions obligations into domestic law, because they cannot cure due process deficiencies, then the reliability and notional universality of sanctions implementation will be undermined.<sup>100</sup> As one interviewee put it to us, "Only human rights compliant sanctions processes will be universally implemented." So findings that a specific sanctions regime lacks adequate fair process protections, and that states should not comply with the regime,

thus risks quickly undermining that regime's effectiveness. Non-complying states could quickly become havens for sanction-busting activities, especially for access to the global financial system. This has potentially serious implications at a time when the Council is relying on effective sanctions implementation to create strategic leverage in ongoing crises, such as those around DPRK proliferation activities.

A system that incorrectly lists people or keeps them listed after they cease to meet the designation criteria, is not, in the long run, an effective system. It is a liability. If sanctions are supposed to be targeted, then poor targeting may have the unintended consequence of

#### d. Protecting the system

A third, and final, perspective on this debate sees fair process not in terms of individual rights, or in instrumental terms of effectiveness, but in terms of the conservation of the delicate system of collective security established by the UN Charter.

There are several reasons to take this perspective into account. One is a matter of principle: it suggests that we ought to be careful about disrupting the mechanism of Great Power checks and balances institutionalized in the Security Council system, which has helped to secure international peace for over seven decades. Another is more pragmatic: only those protections that do not unduly threaten the prerogatives of Council members, especially the five permanent members, stand any realistic chance of adoption. A related rationale suggests that the Great Powers can be understood as 'particularly affected' States in the operation of the sanctions listing and delisting procedures: the US reportedly proposes around four fifths of ISIL/Da'esh/AI Qaida designations, the Russian Federation proposes a large portion of Taliban designations, China plays a key role in non-proliferation sanctions discussions (especially on DPRK), and both France and the United Kingdom are also actively involved, especially in sanctions in sub-Saharan Africa. Great Power activity on sanctions can be understood as reflective of their particular sensitivity to these issues, both because of their unique responsibilities under the Charter and because of their constituents' sensitization to counter-terrorism issues.

Seeing the debate on fair and clear procedures through this lens is thus helpful in both a descriptive and a prescriptive sense. It helps us make sense of why due process reforms have occurred in the way that they have; and may also help us understand which future reforms are likely not only to be adopted, but to succeed in helping to maintain international peace and security. Due process reform proposals that unduly threaten the P5's prerogatives will not be adopted.

One may ask how, then, did the Ombudsperson reforms come to pass? Many of those we interviewed expressed surprise that they in fact *did* occur. Other suggested that they were the emanation of a particular historical moment, when the Obama administration, under pressure from allies, judicial criticism and public opinion, sought to differentiate its approach to terrorism from that of the prior regime, which, through Guantanamo

undermining of the credibility - and legitimacy - of the system itself. Seen that way, the Ombudsperson actually serves to *strengthen* the effectiveness of counter-terrorism sanctions, by reducing the risks of poor targeting. As the outgoing Ombudsperson put it in mid-2017:

*"the availability of such a trusted recourse undeniably strengthens the effectiveness of the sanctions measures by providing the guarantee to States which uphold the rule of law that the sanctions remain necessary and fair at any particular time."*<sup>101</sup>

Bay, Abu Ghraib and the 'torture memos' had come to be associated with lawlessness. This line of argument suggests that the current US administration would be much less inclined to consider or support extensive due process reforms.

In fact, the winds are probably blowing in the opposite direction. Some of the P5 may, we were told, be showing signs of "buyer's remorse" in their attitude to the Ombudsperson, and for this reason oppose the extension of that system to the other sanctions regimes. Russia and the US, we were informed by one close observer, see the process as "cumbersome and uncomfortable". "It's costly, suggests a loss of control [by the Council] of the process, forces you to spend political capital to ensure there is no delisting - and it's not nice to be questioned!" This may explain why some observers, including the most recent Ombudsperson "observed an increasing intrusion" into her work, notably meddling in (and watering down) of the reasons provided to petitioners when their delisting requests are denied.<sup>102</sup> The Ombudsperson herself reported a rise in states expressing concern that inadequate weight was being given to their opinions,<sup>103</sup> and a growing "climate of interference" in her work.<sup>104</sup> It may also explain why it was widely reported to us that both Russia and the US oppose the extension of the mandate of the Ombudsperson to other sanctions regimes. Even a recent suggestion that the Ombudsperson's mandate be extended *only* to cover the Somalia/Eritrea regime, because of the overlap between IDAQ networks and Al Shabaab networks, was reportedly given short shrift by the US, Russia and one or two influential non-Council Members.

The permanent members' resistance to extending due process protections beyond the counter-terrorism context risks, of course, creating a perception of bad faith on their part. As Joy Gordon reminds us, the "lack of due process" in the Council is usually "not incidental. Rather, it reflect[s] the tension between the stated purpose of the UN bodies and the political goals of some of the Council's members."<sup>105</sup> And as Alexandra Huneus puts it, "[P]ower matters: When a UN regime [lacks] accountability [arrangements], there is likely someone that quietly benefits."<sup>106</sup>

Several people we interviewed suggested that the Jim'ale case was particularly revealing in this regard. Ali Ahmed Nur Jim'ale, listed in the Al Qaida sanctions

regime shortly after 9/11, was delisted on the afternoon of 17 February 2012, as a result of an Ombudsperson-led review. Within 24 hours, he was listed at US request under the sanctions regime for Somalia/Eritrea, apparently on the basis of the same alleged conduct that the Ombudsperson found not to warrant continued listing on the IDAQ list. He approached the Ombudsperson for assistance to address the new listing; she was not mandated, nor able, to provide any remedy for the Somalia/Eritrea regime. He remained on that regime for two years until he was delisted as the result of a state-supported request.<sup>107</sup> It is of course entirely possible that certain conduct may qualify a person for designation under one sanctions regime, but not another. The Council is free, after all, to set designation criteria. But if that was the basis for listing Mr Jim'ale on the Somalia/Eritrea list, one might ask why he was not already listed there before he was delisted from the Al Qaida sanctions regime. The impression left, of course, is that he was only put on the Somalia/Eritrea list because he could no longer be listed in the IDAQ regime. And that, in turn, suggests that the US - and perhaps not only the US - may oppose extension of the functions of the Ombudsperson to other regimes precisely because these regimes allow states to do what they cannot in the IDAQ sanctions regime, with the Ombudsperson present.

Some of those we interviewed that have particularly good understanding of the views of permanent members also made other remarks that point to P5 willingness to instrumentalize sanctions processes. Asked about the potential for the functions of the Ombudsperson to be expanded to other sanctions regimes, they cautioned that permanent members, as the main sources of designation information, may see procedural safeguards as creating more problems than they solve. Specifically, they argued, the bureaucratic transaction costs of responding to requests for information from an independent actor like the Ombudsperson might outweigh the added benefit that would come from the independent verification of sanctions eligibility. Worse, one person said, such inquiries might "reveal the paucity" of operational and tactical intelligence on which listing decisions are made: "[F]or many of these regimes, we just don't have the information that would be needed to meet the standard applied by the Ombudsperson."

Such analysis suggests that permanent members ultimately see due process in highly instrumental terms, and more specifically, as an instrument of their own power, not one intended to ensure the accuracy of the system.<sup>108</sup> One interviewee stated bluntly that some of the permanent members see sanctions as a tool to "help get the bad guys", and due process concerns as "getting in the way". One person told us that when the Ombudsperson's "batting average" got too high - i.e. when she recommended too many de-listings - some permanent members' displeasure increased proportionately. As one senior official put it, "It all comes down to the outcome." In other words, if a delisted person re-engages with terrorist activity, that will undermine the delisting process. Yet, to our knowledge there are no documented cases of individuals that have been delisted through the Ombudsperson process going on to participate in conduct that might have otherwise been sanctioned.

Permanent Member support for due process protections in sanctions has, we were told, "lost momentum" since *Kadi II*, or even, perhaps, reversed. Many of those we interviewed told us that "the burden of protecting and advancing due process concerns largely falls to elected members" now. Elected members have limited political capital to spend on this, concerned that it may jeopardize their ability to achieve other objectives during their limited time on the Council. That view is nurtured, perhaps, by what we were told are direct and explicit warnings from some permanent members to incoming elected members that it would be "futile" to try to make further due process changes. It can be little surprise, then, that, as one interviewee told us, there is "fatigue" even within the Group of Like Minded States on Targeted Sanctions, on these issues. The lesson ultimately is that the perceived utility of procedural safeguards will vary from one political context to another. In particular, the permanent members seem more likely to accept procedural reforms where they are necessary to ensure effective implementation of a regime about which they care strongly. This was the case in the period up to 2011, which we call 'Round One', for the IDAQ sanctions regime. The US, in particular, needed European states to effectively implement the sanctions regime as part of its global effort to fight Al Qaida. Due process reforms were the price of securing effective implementation.

Those circumstances may be *less* likely to hold in relation to many of the current sanctions regimes addressing civil and inter-state wars (rather than global terrorist networks). The highly geographically focused political leverage that these sanctions seek to create may be available through more localized and targeted efforts to create leverage - for example through regional mediation or political engagement - and may not rely on global implementation in quite the same way that the effectiveness of the IDAQ regime did. That may mean that the permanent members are less willing to agree to due process reforms as the 'price' of securing effective implementation. On the other hand, the increasing internationalization of conflicts may alter that arithmetic as conflict actors' access to global travel and financial systems grows steadily easier. Sanctions implementation may need to be more global, if it is to be effective. Interestingly, however, these conditions *do* seem to hold for non-proliferation sanctions regimes. The Great Powers rely increasingly on UN sanctions as the framework for effective response to violations of global non-proliferation norms, as recently demonstrated in the case of DPRK. Should due process litigation lead to States being unable to effectively implement these sanctions, that might create a window for discussion with the Great Powers about procedural reforms intended to ensure sanctions listing arrangements meet the minimum standards identified by the courts. First, however, it is necessary to consider just what, in fact, those due process standards are.

## 2. What do fair and clear procedures look like in practice?

After a decade and a half of fair process legal challenges, the standards by which courts will measure UN sanctions processes have become increasingly clear. In this Part of the study, we provide a summary overview of the process that courts have indicated they consider is 'due'. While both courts and expert commentators at first measured UN sanctions processes against judicial process, there appears to be an increasing recognition that other arrangements can, if they offer sufficiently fair and clear procedures, also meet the internationally agreed legal standards. Increasingly, this is explained in the terms that the Security Council and Member States, are expected to ensure that individuals targeted by UN sanctions receive *equivalent protection* in the process to the protection they would receive if analogous restrictive measures were imposed purely at the domestic level. These protections need not, however, be *identical*. As a consequence, there may be ways to tailor listing and delisting procedures to ensure that they are both sufficiently protective and appropriately sensitive to the political context in which the measures are adopted. Both factors are necessary to ensure the process is credible - and effective.

For more than 10 years, the ECtHR and the courts of the European Union have developed a jurisprudence of 'equivalent protection' and 'reasonable alternative'. The 'equivalent protection' jurisprudence posits a rebuttable presumption that international organizations will provide the same due process and other human rights protections that their member States would provide if they took analogous action at the domestic level.<sup>109</sup> If, and only if, that presumption is rebutted on the facts will the courts approve lower-level review of those international organizations' decisions. This approach has been applied to numerous international organizations, including the UN, and operates similarly to related 'reasonable alternative means' jurisprudence in the ECtHR.<sup>110</sup> In *Al-Dulimi*, the ECtHR declined formally to apply the 'equivalent protection' approach to the UN sanctions regime, but in practice it did something very similar: its justification for its call for the Swiss courts to conduct an 'arbitrariness review' (i.e. to reviewing whether the imposition of sanctions on the target was 'arbitrary') was the absence of "satisfactory protections".<sup>111</sup> As we saw earlier, the CJEU has at times countenanced a similar approach to sanctions,<sup>112</sup> and its *Kadi* jurisprudence articulates various criteria that indicate whether an individual's European law rights have been effectively protected. These are, in a practical - if not formal, sense - indicators of when "equivalent protection" is afforded. The decision in *Al-Ghabra* suggests that, in the Al Qaida sanctions contexts, the General Court of the European Union may now believe that the Ombudsperson offers such protection.<sup>113</sup>

Recognizing this trend in European courts towards assessing the equivalence of protection between the UN and domestic levels helps to clarify two further points. First, that European courts will continue to test sanctions processes against due process standards until they provide *equivalent* protection. And second, that this protection need only be equivalent - i.e. comparable, but not necessarily identical.<sup>114</sup> As Judge Keller noted in *Al-Dulimi*, "Adequate human rights protection at UN level need not take the same form as in domestic criminal proceedings."<sup>115</sup>

So what form *can* they take? What are the standards by which courts will assess whether the procedural protections offered are 'equivalent' or 'sufficient' (after *Al-Dulimi*)? In this Part of the study we parse the fragmented jurisprudence to try to identify specific, minimum due process standards that courts expect to be respected in sanctions listing and delisting processes. This is not a deductive attempt to argue from first principles, as valuable as such efforts continue to be,<sup>116</sup> so much as an inductive approach, based on a review of over 45 fair process legal challenges over the last decade and a half (see Annex 1).<sup>117</sup>

The most developed articulation of these standards has been in the EU court system, notably through the line of jurisprudence in the *Kadi* and *Kadi II* judgements - which, in the last two years, has been extended to cover not only counter-terrorism, but also other types of sanctions regimes. These standards require:<sup>118</sup>

- the rights of a targeted person to be heard and to be informed of the evidence used against him or her;<sup>119</sup>
- notification, such as by a statement of reasons, identifying the "individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures";<sup>120</sup>
- "careful and impartial examination" as to whether the alleged reasons are well founded, including through international sharing of information if necessary;<sup>121</sup> which shall ultimately provide for:
- "verification of the factual allegations in the summary of reasons underpinning that decision" to determine "whether those reasons" or at least one of them "is substantiated".<sup>122</sup>

How do those standards, which seem closely to track the requirements of the ICCPR,<sup>123</sup> play out in practice? What are the characteristics of the protections that lead to this outcome? We turn to these questions below.

## a. Impartial review of the fact base...

Although the CJEU and ECtHR are situated within different legal systems, there has long been interplay between their jurisprudence, because the EU legal system picks up and references the ECHR in important ways. It may therefore be useful, in attempting to understand what the *Kadi* jurisprudence means in practice, to explore the ECtHR's approach to due process considerations. At its heart is a demand for impartial review of the fact base.

Article 6(1) of the ECHR has been interpreted as requiring that those who are to be subjected to restrictive measures have access to an independent and impartial body to review the measures. That body must be able to 'decide' whether the restrictive measures will be imposed. It must be able to secure the termination of the measures if the basis for their imposition is no longer present, and have the power to give a binding decision which may not be altered by another, non-independent body, to the detriment of the person subject to the measures.<sup>124</sup> The power simply to issue advisory opinions without binding force does not rise to the standard required by Article 6, even if those opinions are followed in the great majority of cases.<sup>125</sup> This requirement follows from the principle of legal certainty, which requires that where the courts have finally determined an issue, their ruling should not be called into question.<sup>126</sup> A judicial system whose decisions are liable to review indefinitely and at risk of being set aside repeatedly is not a 'court or tribunal' in the sense required by Article 6 of the ECHR.<sup>127</sup>

Clearly, the Focal Point system (summarized in Part 1) fails at this first hurdle. The clear view of both experts and courts is that "Being a mere transmission point, the Focal Point does not even have the features of a substantive review mechanism, independent or not."<sup>128</sup> It does not provide an effective remedy, and does not offer equivalent due process protection to that offered under the ECHR.<sup>129</sup>

The emphasis that appears to be placed in the relevant jurisprudence on the reviewer having *final* decision-making power might also suggest that the Ombudsperson will not provide protection equivalent to that required under Article 6 of the ECHR. The Ombudsperson can only make recommendations – the final decision on de-listing is for the Sanctions Committee. That is, indeed, the view of many eminent scholars and experts, and the basis for their argument that nothing short of a full judicial review can satisfy this standard. *Al-Ghabra*, while signalling the EU courts' growing respect for the Ombudsperson system, is very far from conclusive on this question, not least because it was decided in the CJEU, not the ECtHR system. The ECtHR's Grand Chamber in *Nada* avoided assessing whether the Ombudsperson affords equivalent protection and in *Al-Dulimi* could not do so (as the Ombudsperson is not available in the Iraq sanctions regime).<sup>130</sup> At least one leading scholar believes that the ECtHR will *not* recognize the Ombudsperson system as affording 'equivalent protection' unless or until the Ombudsperson's delisting decisions *formally* bind the Security Council.<sup>131</sup>

Yet careful reflection is warranted here, because of the risk of conflating the review of the assessment of *eligibility* for sanctions with the question of the *merit* or *utility* of application of those measures, once eligibility has been confirmed. Once the Ombudsperson is petitioned, the Sanctions Committee cannot decide to retain a listing without the Ombudsperson's involvement; and if the Ombudsperson recommends delisting, only the full Sanctions Committee can block that from happening. The Ombudsperson's role is not, in fact, to review the application of sanctions measures or even the utility of such application, but simply to verify the *eligibility* in fact and in law of the individual for the application of those measures by the Sanctions Committee. The EU caselaw speaks of the need to identify whether there is a 'sufficiently solid factual basis' for the political decision to impose restrictive measures.<sup>132</sup> This is not an "assessment of the cogency in the abstract of the reasons relied on", but rather whether the reasons "deemed sufficient ... to support" that decision are "substantiated" in fact.<sup>133</sup> Similarly, the Ombudsperson's practice, now supported by Security Council Resolutions, is to consider "whether there is sufficient information to provide a reasonable and credible basis for the listing" – not to assess whether the Council 'should' apply sanctions to this individual or entity.

Even the ECtHR's new 'arbitrariness review', under *Al-Dulimi*, can be understood in such terms, as requiring a factual verification of whether the implementation of sanctions would be "unfounded".<sup>134</sup> It differs, in this sense, from the use of the term 'arbitrary' in the context of arbitrary detention under ICCPR Art. 9, where courts assess "whether a particular detention is reasonably necessary to satisfy a legitimate government interest"<sup>135</sup>. The 'arbitrariness review' instigated by *Al-Dulimi* is not a determination of the appropriateness or utility of such measures assessed against some abstract 'Security Council' interest, but simply a verification of the factual basis for listing. No consideration of its reasonableness in the broader policy sense is contemplated.

A similar differentiation between verification of eligibility and a review of the utility of continued imposition of measures can be discerned in the US jurisprudence. There, restrictive measures imposed by Department of Treasury's Office of Foreign Assets Control (OFAC) are generally overturned only if the courts find the decision to impose them to have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".<sup>136</sup> The courts' review is, in other words, limited to a verification of whether the restrictive measures were based on facts, not whether they were a reasonable policy choice by OFAC.

It may be better, therefore, to understand the IDAQ sanctions de-listing process as a 'two factor' decision process, in which the Ombudsperson and the Sanctions Committee have distinct and carefully defined, but both necessary, roles. First, the Ombudsperson conducts an impartial review of the fact base to determine eligibility. If she or he determines that the person remains eligible for the continued application of sanctions, *that decision*

is *determinative and binding* – the sanctions continue, unless the Council decides they want to drop them. If she or he, however, determines that the person is *ineligible* for continued application of sanctions, then his or her recommendation to discontinue sanctions can *only* be over-ridden by a unanimous vote of the Sanctions Committee or a decision of the full Security Council. As several people we interviewed pointed out, this means that while Ombudsperson recommendations are not “binding in principle they are binding in practice”. A recommendation to retain a listing automatically becomes such a decision. A recommendation to delist can only be prevented from becoming a decision to delist if 15 States choose to block it. They never have, despite attempts.<sup>137</sup> As one interviewee put it, “Because of the reverse consensus rule, it is the Sanctions Committee that is the check and balance on the Ombudsperson – not the other way around.” Similarly, the extent to which the 1267 delisting process has become one of ‘co-decision’ is reflected in a recent controversy around the proper roles of the Ombudsperson and the Sanctions Committee in drafting and editing the ‘reasons letter’ explaining to a petitioner why his or her listing is being retained.<sup>138</sup>

## b. ...by someone independent – though not necessarily judicial...

Another standard that emerges across the relevant jurisprudence is that the reviewer of the fact-base underpinning the restrictive measures must be independent of the initial decision-maker.<sup>141</sup> There must be a fresh set of eyes verifying the factual justification for the assessment that the person, is or remains, eligible for restrictive measures. Are the requisite indicia of independence present in UN sanctions processes?

The Ombudsperson is appointed by the Secretary-General, rather than the Security Council, and her independence has been emphasized in numerous Security Council resolutions – most recently in Security Council resolution 2368 (2017).<sup>142</sup> But the Ombudsperson is hired as a consultant to the UN Department of Political Affairs, with formal sign-off required monthly by the UN Secretariat for her remuneration. The Ombudsperson cannot formally manage the staff that support her, and she reports, for supervisory purposes, to a member of the Secretariat. Attention was drawn to these issues by the High Level Review on Sanctions,<sup>143</sup> and by the Group of Like Minded states on Targeted Sanctions,<sup>144</sup> and some progress has been made on certain aspects of these administrative questions.<sup>145</sup> Nonetheless, the relatively rapid recent creation, by the Secretariat, of a more structurally independent Office to house the new ‘Syria Mechanism’<sup>146</sup> stands in stark contrast to the situation of the Ombudsperson, almost a decade after the post was created.

Several people we interviewed also suggested that states are seeking to influence the selection of the next Ombudsperson by encouraging selection of an individual from a certain regional bloc. One person we interviewed suggested that some Permanent Members, having been surprised by the independent-mindedness of the last two Ombudspersons, might seek to ensure that the next Ombudsperson is more susceptible to their influence

Resolution 2368 (2017) makes clear exactly what those roles are to be – confirming that there *are* two roles, and that this is, essentially, a co-decision.<sup>139</sup>

‘Two-factor’ decision-making is not, as it turns out, so alien to the imposition of restrictive measures as the past focus on judicial review in this debate might lead one to think. International law in fact recognizes, in several situations involving the imposition of restrictive measures, two-factor systems in which impartial *non-judicial* factual review assesses eligibility for restrictive measures, while the political decision whether to proceed, once an eligibility determination has been made, is left to political actors. Both international extradition law and international humanitarian law provide for such decision-making processes in dealing with situations involving detention and deprivation of liberty.<sup>140</sup> Both, notably, deal with situations where states have to balance security considerations with questions of respect and comity for foreign powers. This may prove instructive, as states look for new approaches to provide equivalent protection in UN sanctions processes, which involves a similar balancing act.

or at least sympathetic to their worldview, for example by encouraging the Secretariat to look at short-listing candidates from specific regions with less liberal legal traditions. Here, the idea that fair process debates are ciphers for competing visions of the international (legal) order, discussed earlier in the study, seems particularly apparent. The choice of the next Ombudsperson will influence how the UN sanctions delisting process works and how the rule of law is practiced in the Security Council.

Of course, though the Ombudsperson’s independence is questionable, the Focal Point’s *lack* of independence is unquestionable. However independent-minded and professional her conduct, the Focal Point is ultimately an employee of the UN Secretariat, and thus *potentially* subject to numerous political, personal and financial pressures.<sup>147</sup> The test of independence is, of course, not merely one of independence *in fact*, but also of the appearance of independence. This seems to suggest that, as it currently stands, the Focal Point system is unlikely to meet the legal standards against which courts will measure armed conflict and non-proliferation sanctions regimes.

### MUST THE REVIEWER OF FACTS BE JUDICIAL?

Above, we suggested that international law recognizes some situations – notably in extradition and certain forms of detention governed by international humanitarian law – where the answer is ‘No’. Nevertheless, many authoritative jurists that have considered UN sanctions processes have come to the opposite conclusion – ‘Yes’.<sup>148</sup> (Though none of them, to our knowledge, have considered the extradition and humanitarian law precedents to which we refer above.) In *Al Dulimi*, the ECtHR states that “Everyone has the right to have any claim relating to his civil rights

and obligations brought before a court or tribunal.”<sup>149</sup> Yet the “right to a court”, as the Article 6 ECHR right is sometimes known may, however, be subject to limitations, so long as they do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.<sup>150</sup> Notably, ECtHR caselaw permits restrictions on access to a court to contest actions of international organizations, if the persons concerned have available to them “reasonable alternative means to protect effectively their rights under the Convention”.<sup>151</sup>

In the EU context, it is often said that *Kadi II* indicated that “effective judicial protection” entitled “the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure [i.e. the sanctions listing] is retroactively erased from the legal order.”<sup>152</sup> That is true. Yet this sentence deserves a closer reading than it sometimes receives. What it *does* say is that where a

person is entitled to have an existing restrictive measure annulled on fair process grounds, a court must be able to issue a declaration that legally erases the past effect of the restrictive measure. What it *does not* say is that *only* judges may determine whether existing restrictive measures shall continue. This is further borne out by the fact that in explaining what was required for “effective judicial protection” the General Court of the EU noted the absence of an “independent and impartial body [sic – not ‘court’] responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee.”<sup>153</sup> It is the independence and impartiality of the reviewer, not his or her judicial character, that ultimately told. And indeed, the UN Human Rights Committee when interpreting Article 14(1) of the ICCPR, stipulated that the right to fair hearing by a ‘tribunal’ means the right to a decision by a body that is independent of the executive and legislative branches of government.<sup>154</sup> It has made explicit that this body does not necessarily have to be judicial.<sup>155</sup>

### c. ... ensuring all relevant parties have a meaningful hearing ...

The final characteristic of equivalent protection that stands out across the jurisprudence is the right of the affected person to be heard by the impartial and independent reviewer of the fact-base, on the evidence in question. In the US, this is summarized in terms of the right to a “meaningful hearing”.<sup>156</sup> In the EU jurisprudence, it is framed in terms of the person affected by restrictive measures being afforded a “reasonable opportunity of putting his or its [sic] case to the competent authorities”.<sup>157</sup>

A meaningful hearing also requires, of course, that the affected person understands the reasons given for imposing the measures and has access to the evidence or information underlying those reasons.<sup>158</sup> The European jurisprudence places particular emphasis on the need for a clear statement of the reasons for the adoption of sanctions, in both the Al Qaida<sup>159</sup> and now also armed conflict situation,<sup>160</sup> even if the original evidence underlying those reasons was confidential.<sup>161</sup> This notification can follow the initial listing decision but must *precede* any decision to retain listing.<sup>162</sup> It may be done in a way that accommodates legitimate security concerns, for example by sharing a summary of reasons.<sup>163</sup> Similarly, in the US, the authorities are entitled to institute assets freezes without giving the targeted individual complete access to all of the evidence providing the basis for that decision.<sup>164</sup>

The sensitivity of the information used as the basis for UN sanctions designations is central to understanding how non-judicial procedures could provide ‘equivalent protection’. The Ombudsperson system has worked well over the last decade precisely because states have developed the trust and confidence required to share sensitive counter-terrorism information with the Ombudsperson. The Ombudsperson may in fact be in a *better* position to develop that trust and confidence over time than a court would be. Similarly, the flexibility the Ombudsperson enjoys in the mode of engagement with listed persons also allows him or her to develop the

trust and confidence of that person, helping to ensure any relevant exculpatory information is forthcoming. The Ombudsperson’s role allows information gathering, consultation, and outreach to a wide range of interested parties. States actively assist the Ombudsperson to provide this access.<sup>165</sup> But the first two Ombudspersons have also engaged researchers, authors, journalists, and even witnesses in legal cases. The Council has also supported efforts by the petitioner to meet face-to-face with the Ombudsperson,<sup>166</sup> which may help to bring new information to light. Devika Hovell points out that the Ombudsperson arrangements are, arguably, superior to those of a court in this regard:

*“The ombudsperson is far more accessible than courts and has the capacity to travel to the petitioner (rather than the reverse) for face-to-face interviews (or alternatively, to communicate through email and telephone discussions) to ensure that the petitioner’s side of the case has been heard.”*<sup>167</sup>

The absence of legal representation during the process, criticized by some, is seen by others (including one Ombudsperson) as encouraging efficiency and speed.<sup>168</sup> And, in fact, roughly half of petitioners (39 of 79 to date) have used legal representation.<sup>169</sup> The two Ombudspersons thus far have also taken important steps to maximize access, such as securing funds for translation to ensure that petitioners can petition in their own language. And the personal access of the Ombudsperson to petitioners, *combined* with this access to confidential information, allows a depth of engagement with intelligence and information that is beyond the scope of most courts.<sup>170</sup>

Trust and confidence are also engendered by the fact that the arrangements around the Ombudsperson put some of the burden of proof for continued listing on states. It is for the proposing state to ensure the Ombudsperson

is furnished with adequate information to support the continued listing. Should it fail to do so, this will lead to a delisting recommendation. This mirrors the position in *Kadi II* that it is for the implementing authority “to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded.”<sup>171</sup>

This approach seems to create pressure on states to work with the Ombudsperson to find mutually acceptable information-sharing arrangements. More than a dozen states – including states often involved in designations – have put in place arrangements to allow the sharing of such information with the Ombudsperson, something actively encouraged by the Security Council.<sup>172</sup>

#### d. ...which ensures a more accurate and trustworthy sanctions regime.

The central benefit of giving many affected parties access to and voice in the review process (i.e. a meaningful hearing) is an increased probability of sanctions list accuracy. As Hovell points out, the flow of information facilitated by the Ombudsperson between the Council and the parties it affects strengthens the Council’s ability to adjust sanctions regimes over time.<sup>173</sup> Through the combined efforts of the Ombudsperson and its Analytical Support and Sanctions Monitoring Team, the IDAQ list has around one hundred changes per year; many of the other sanctions regimes barely change from year to year. That may mean they are becoming less accurate and, therefore, less useful over time.

This poses real risks: *Al-Dulimi* and *El-Qaddafi* are both examples of how extended designations can create implementation complications, though in different ways. In *Al-Dulimi*, the relevant sanctions list includes designations that are decades old. The absence of any opportunity for a meaningful hearing by the Security Council in all that time, and to contest a confiscation ordered in 2006, appears to have contributed to the European Court’s conclusion that the listing may be arbitrary, and thus an ‘arbitrariness review’ was required. In *El-Qaddafi*, Aisha Qaddafi alleged that she was subject to restrictive measures even after the fall of her father’s regime and the achievement of the objectives of the UN Security Council Resolution that provided the basis for the imposition of restrictive measures.<sup>174</sup> The fact that the political context on the ground had shifted considerably since the imposition of the measures was central to the Court’s conclusion that the statement of reasons was inadequate.

*“When considered in a context that is substantially different from that which prevailed in 2011, statements such as ‘daughter of Muammar Qadhafi’ and ‘closeness of association with regime’ do not make it possible to understand the individual, specific and concrete reasons why the applicant’s name was retained... It is not possible to glean from the statement of reasons ... why the original grounds justifying the applicant’s designation remained relevant notwithstanding the evolution of the situation in Libya.”*<sup>175</sup>

As one expert we interviewed pointed out, when a sanctions list grows out of date it can undermine not only the legitimacy and effectiveness of the sanctions regime itself, but also the “political project” of the Council in that context. Non-responsive sanctions are potentially an indication of deeper problems in the Council: an unresponsive political strategy. Having the fact-base for listings verified by an independent and impartial reviewer would, in that case, the interviewee argued, prod the Council to think more carefully about what strategic role sanctions are actually intended to serve in any given political context. The Council will have to determine eligibility criteria according to the current context, and make selections about the application of restrictive measures based on an up-to-date pool of eligible candidates. That should, in theory, lead to them being more effectively targeted – and thus, to creating more leverage for the Council. Fair process is, in other words, one way to help strengthen strategic coherence and thereby reduce unintended consequences.

The Ombudsperson system shows that this is the case. As Figures 2 and 3 make clear, the rising wave of fair process challenges to the IDAQ regime tailed off after 2011, once the Ombudsperson system was in place. The new wave of litigation that appears to have started since 2016, targeting the other sanctions regimes, makes clear that new arrangements are now needed to play a similar role in the non-counter-terrorism sanctions regimes. And the fact that such a successful arrangement as the Ombudsperson system has been figured out in the highly sensitive context of counter-terrorism also suggests the possibility of repeating the approach in other sanctions contexts, if appropriate context-sensitive adaptations can be identified. What might they look like? This is the question to which we now turn.

# 3. Three options to protect UN sanctions regimes from legal challenges

In Part 2 of this study, we identified the basic standards against which courts appear to assess the fairness and clarity of UN sanctions processes. We concluded that, in many areas, existing UN sanctions processes are vulnerable to fair process legal challenges. This is particularly the case for all the sanctions regimes that do not incorporate the Ombudsperson system – which is to say, every current UN sanctions regime except the IDAQ regime.

How can these risks and vulnerabilities be addressed? In this third Part of the study, drawing on our desk analysis of jurisprudence (Annex 1) and prior proposals from the Group of Like Minded States on Targeted Sanctions,

the High Level Review of Sanctions and other experts (Annex 2), and interviews conducted for this study, we lay out three distinct options: a) strengthening existing arrangements; b) judicial review; and c) developing new, context-sensitive non-judicial review mechanisms. Each approach has specific pros and cons, which we canvas. For each approach, we point to several steps that might be taken to address the vulnerabilities that UN sanctions now face from fair process legal challenges. It is important to emphasize, however, that it is not for us to recommend one option over the others. That is ultimately a matter for Member States, consulting with other relevant actors, such as the UN Secretariat and affected implementing partners.

## a. Strengthening existing arrangements

The first, perhaps most obvious, and politically most straightforward way to mitigate risks from fair process legal challenges would be to adjust existing arrangements. As we lay out below, there are five things the Security Council and UN Secretariat can do to achieve this. But, as we then go on to explain, even if all these adjustments are made, this ultimately may not be enough to cure those UN sanctions regimes relying on the Focal Point system from legal challenges.

### i. Defend the independence of the Ombudsperson

Given the growing “climate of interference” in the work of the Ombudsperson,<sup>176</sup> the first step in promoting further due process reforms will be changing this climate by defending the existing procedural safeguards in the Security Council’s IDAQ regime.

The first step must be the appointment of a well-qualified individual who inspires trust and confidence in the regime through his or her reputation for independence, impartiality and professionalism, and a commitment to the international rule of law. Given that the IDAQ regime seems to be here to stay, it is well past time that the Security Council and the Secretary-General fully implemented Resolution 1904 by creating a formal Office of the Ombudsperson, as an Office within the Secretariat (like the new Syria Mechanism) or as a Special Political Mission (like the Counter-Terrorism Committee’s Executive Directorate).<sup>177</sup> While the Ombudsperson is employed as a consultant, the whole IDAQ sanctions regime remains vulnerable to fair process legal challenges, on

the grounds that the Ombudsperson is not sufficiently independent to meet international legal standards. Although this will require financial and human resources, the Secretary-General has demonstrated through his support for the Syria Mechanism that these can be mustered if Member States are willing to step forward in support. Addressing this vulnerability is relatively low-hanging fruit for the Secretary-General and should be a priority. Although the Secretary-General is obliged by the relevant Security Council resolutions to appoint the Ombudsperson “in close consultation” with the relevant sanctions committee, the appointment is ultimately his, not the Security Council’s, to discharge.<sup>178</sup>

### ii. Give clearer reasons for unsuccessful delisting and humanitarian exemption petitions

At the same time, Member States should defend the independent role of the Ombudsperson in the everyday work of the IDAQ Sanctions Committee, in particular by ensuring that the ‘reasons letters’ offered to unsuccessful delisting applicants are robust.<sup>179</sup> The most recent UN Security Council Resolution on the IDAQ regime emphasized the need to provide reasons for retaining on sanctions lists those who unsuccessfully petition to the Ombudsperson for delisting.<sup>180</sup> Similarly, Resolutions pertaining to all other regimes should consistently push for detailed reasons in denying delisting and humanitarian exemption petitions.

The *El-Qaddafi* case makes clear that even in non-IDAQ sanctions regimes, such as the sanctions regime

addressing the situation in Libya, reasons for listing decisions provided to the targeted party must be 'individual, specific and concrete'.<sup>181</sup> This requires not only a textual, but a contextual, analysis of statements of reasons. In *El-Qaddafi*, for example, the Court recognized that "The statement of reasons [must] be appropriate to the measure at issue and the context in which it was adopted... the question whether the statement of reasons is sufficient must be assessed with regard not only to its wording but also to its context."<sup>182</sup> But 'context' cuts both ways: the statement of reasons does not have to spell everything out, if "adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him".<sup>183</sup>

We echo recommendations made in the past on the need to provide targeted persons adequate and substantial reasons for decisions concerning listing, desilting – and humanitarian exemptions.<sup>184</sup> As Figure 5 makes clear, the process for considering humanitarian exemption petitions is rudimentary, when compared to the Ombudsperson arrangements for permanent delisting from the IDAQ sanctions list. The absence of *any* reasons being given for a negative decision by a Sanctions Committee on humanitarian exemptions requests potentially renders those decisions highly vulnerable to litigation. Some elected Council members, notably Australia, have pushed for reform in this area. Sweden has also, recently, pushed for the standardization of humanitarian exemption arrangements across regimes, as have other states before it.<sup>185</sup> And the Group of Like Minded States, and others, have also made various related suggestions.<sup>186</sup> But until they find success, there is a danger of further litigation, and potentially court blockages not only of the decisions on humanitarian exemptions, but the broader sanctions regimes.

### iii. Make better use of open source material

One way to provide greater clarity on the reasons for listing decisions (and de-listing and humanitarian exemption denials) is to make greater use of open source material as a basis for listing in the first place. This allows all affected parties greater access to information than would otherwise be the case and bolsters the perception of the fairness of the sanctions regime. Some actors, such as the UK and the European Union, are turning to open source information as the basis for substantiation of domestic level sanctions designations.<sup>187</sup> The Ombudsperson has also considered open source information when assessing whether a targeted party should be delisted.<sup>188</sup> And some Panels of Experts – such as the Panel dealing with Yemen – have begun to use social media (and commercial satellite imagery and navigation-tracking databases).<sup>189</sup>

The Security Council should consider how it can increase the use of open source information across different sanctions regimes. In armed conflict sanctions contexts, for example, it may be possible to adapt the working methods (and perhaps also the makeup) of Groups of Experts, to foster more sophisticated use of a broader array of open source information. In non-proliferation

contexts, this may prove more difficult, but there may still be useful ways to use open source information to strengthen the reasons given for sanctions listings.

### iv. Automate periodic reviews of sanctions regimes and lists

On average, the Security Council maintains sanctions regimes for approximately 9.7 years<sup>190</sup> with the longest regime still ongoing at 27 years. Old regimes risk being out of date and are thus vulnerable to fair process challenges. Where listing is based on old fact-bases, there is an increased risk that individuals' rights continue to be restricted long after a) they have changed their behaviour, b) they no longer pose a sufficient threat to international peace and security to warrant the temporary restriction of those rights, or c) the circumstances or context have changed, negating the factual basis justifying the restrictive measures. Any one of these circumstances creates a risk of the regime being successfully challenged in a court.

Our interviews for this study suggest that bureaucratic and political inertia are a large part of the explanation for why sanctions regimes linger so long. Interviewees pointed out the difficulty of establishing a regime in the first place and explain how this therefore informs their cautiousness in not wanting to prematurely terminate a regime, especially if they think it is unlikely that Council members would vote for its re-establishment. Second, there is a risk involved in termination; if sanctions are imposed to accomplish a goal, the Council normally likes to see that goal through. Terminating sanctions before a goal has clearly been reached would implicitly be seen as admitting failure. Third and finally, lifting sanctions on a situation that is improving, only to see the situation unravel, could, in turn, reflect poorly on the Council. Therefore, cautiousness tips in favour of keeping the regime in place until the risk of back-sliding has sufficiently abated.

Yet when the Security Council does choose to end a regime, it can do so quite quickly. At the start of 2016, the Security Council had more sanctions regimes in place than in any prior year. Within that same year, the Council subsequently terminated three of those regimes, demonstrating that, where political consensus exists, the Council can make good on its promise to "expeditiously" lift sanctions when they have "achieved their purpose."<sup>191</sup>

Once again, the difference between the IDAQ regime and all other UN sanctions regimes is stark. The IDAQ regime reviews are automatic, whereas there is no automaticity to the review of other regimes. This could be achieved through a cross-cutting Resolution or by incorporating relevant language into resolutions addressing each regime in turn – so long as the Secretariat is provided adequate resources to carry out any resulting review mandates. Failing that, there is an obvious need to review the sanctions relating to Iraq, which one interviewee described to us as "well overdue for an overhaul", and by another as the "lowest hanging fruit".

## v. Strengthen the fairness and clarity of procedures used by the Group of Experts

The UN and Member States have invested a lot in the Groups and Panels of Experts that help to designate individuals and entities for listing under some UN sanctions regimes. A recent review identified more than 70 such experts empanelled, working at a cost of roughly \$32 million per year.<sup>192</sup> How Groups and Panel of Experts (and the Al-Qaida Support and Sanctions Monitoring Team) develop the information underpinning sanctions decisions affects the perception - and thus the effectiveness - of sanctions. In 2006, an Informal Working Group of the Security Council noted that

*“given that the findings of the [sanctions] monitoring mechanisms (either their reports or documents or testimonies of their individual members) may be used by judicial authorities, their methodological standards may affect the credibility of the Organization.”<sup>193</sup>*

The Working Group went on to provide some basic guidance on these standards.<sup>194</sup> Yet, by and large, this guidance remains under-developed, in part because of concern not to interfere with Groups’ and Panels’ Security Council-mandated independence. This is increasingly risky, as the role of Groups and Panels of Experts in sanctions listing decisions begins to come under closer scrutiny by judicial actors, as it has in the last two years (e.g. in *Badica & Kadiam and Uganda Commercial Impex Ltd* - see Annex 1).

Experts on these panels are often highly skilled investigators and intelligence analysts. But they may not be experienced in ensuring respect for fair process during such inquiries. They might benefit from additional guidance, training and ongoing support, to ensure they adopt due process protections into their investigative processes. Strengthening evidentiary standards in the work of these Groups has in fact been recommended for many years.<sup>195</sup> Evidentiary standards, notification systems, and even how these groups approach the ‘right to be heard’ vary significantly across different regimes.<sup>196</sup>

When a new sanctions expert is inducted, she or he receives training from the UN Secretariat’s Office of Legal Affairs (OLA), which includes some guidance on investigative techniques and standards of evidence.<sup>197</sup> Though usually not professionally legally trained, sanctions experts have significant leeway to determine their own groups’ information gathering techniques and evidentiary standards, and to apply them in practice. They are encouraged to reflect their approaches in their periodic public (and internal) reports to their respective Sanctions Committee and, when mandated, directly to the Security Council.<sup>198</sup> These Groups consequently take

quite varying approaches to such questions as whether they will meet in person with individuals they have determined are eligible for designation, to afford them a chance to be heard. Some Groups, we were told, *will* meet in person; others will not; yet others seem to take varying approaches, depending on whether a person has already been listed (meeting possible) or not (no meeting, in order not to undercut the surprise effect of the listing). But how these decisions are made is opaque, raising fairness and clarity concerns, which may be litigable.

Similarly, our desk research and interviews suggest that some groups weigh information against a ‘beyond reasonable doubt’ standard; others ‘on the balance of probabilities’, despite the fact that they are dealing with similarly restrictive measures. The rhyme and reason for their assessment methods is frequently unclear, and therefore risks being perceived as unfair. And since turnover on these panels is high, experts may not at any given point have complete access to or understanding of the historical reasons why specific individuals are on the sanctions list they are managing. This raises clear fairness concerns, since it may not be possible to reliably assess current evidence without understanding the basis for past assessments. As things stand, OLA does provide on-demand guidance and support on legal questions to these Panels. But it is unclear how many of them seek guidance on these issues. Given the recent EU fair process legal challenges focused on Groups of Experts, further strengthening of these arrangements would seem warranted to help protect against fair process challenges.

The Security Council could help protect sanctions regimes against fair process legal challenges by encouraging the UN Secretariat, working with experts, to develop publicly available guidance on the ‘Fair and Clear Procedures During Investigations’ by Groups and Panels of Experts. This guidance would build on existing work in this area, such as the evidentiary standards recommended by the Informal Working Group of the Security Council on General Issues of Sanctions in 2006,<sup>199</sup> or the detailed ‘Opportunity to Reply’ and ‘Investigative’ methodologies set out in Annexes to the 2017 Final Report of the Panel of Experts on Yemen,<sup>200</sup> to clearly set out procedural expectations during the investigation phase that meet international due process standards. This could draw on existing guidance used, for example, by the commissions of inquiry established by the UN Human Rights Council, which are intended to ensure that evidence developed through such inquiries will pass judicial review if the evidence leads to criminal processes. The guidance could form the basis of enhanced - and mandatory - training for these Groups and Panels of experts, going beyond the limited training they currently receive.

## b. International or domestic judicial review

Even those adjustments to existing arrangements may, however, not be adequate to cure them against fair process legal challenges. While the IDAQ regime has developed some immunity to such challenges through the adoption of the Ombudsperson system, the other sanctions regimes remain highly vulnerable, because they lack a system of independent and impartial review of the fact base for listings. The most obvious way to cure this is through judicial review.

At least on one view, there is nothing from a strictly legal perspective preventing the Security Council from creating an international judicial review mechanism for sanctions listing and delisting. That does not, however, necessarily mean that it should do so. Whether framed in liberalist, pluralist or more conservative terms, there are solid arguments that over-reliance on a judicial mechanism would risk making listing and delisting insensitive to the shifting political context and interests at the heart of the Security Council's mandate to maintain international peace and security. (Of course, this argument would seem less rhetorical if the Security Council was doing more to ensure that sanctions regimes were routinely reviewed and that lists were kept perfectly up to date.) Regardless, at this point the idea is a political dead letter in the Council. One Permanent Member told us explicitly that the idea of international judicial review "has gone as far as it can go". Another called the idea "a non-starter." And the former Ombudsperson stated simply that "barring a political sea change... this optimal option [judicial review] is, in fact, no option at all".<sup>201</sup>

What about domestic review? The European human rights system, at least, requires that its Member States take all possible measures to implement sanctions regimes in a manner that respects human rights, including through diplomatic action and dialogue with states that have access to the Sanctions Committee.<sup>202</sup> Arguably, this could extend to domestic judicial review. The UN Charter does not rule this out; it leaves states relatively free to choose how to implement their UN Charter obligations.<sup>203</sup> And on at least one reading, *Al Dulimi* may, absent other sufficient protections of individual process rights, require all ECHR states to provide for a limited judicial review – an 'arbitrariness review'.

But there are strong reasons to think that relying on states to conduct this review is ill-advised. First, for states with monist legal systems that give direct effect to international decisions, it may be legally and constitutionally difficult to organize such domestic reviews. Second, even in dualist states, the effectiveness of even such a limited review will depend on other states, including states proposing designations, and perhaps the relevant UN Sanctions Committee, providing access to information underlying the proposed or current designation.<sup>204</sup> There will be obvious and significant obstacles to such information-sharing, not least the transaction costs involved for the State that proposes designations (or for the Sanctions Committee itself) in replying to numerous, decentralized 'arbitrariness reviews' of the same individual. The Ombudsperson system shows that a centralized node, playing this role on behalf of and for the entire Membership, may be a more efficient and effective way to protect individual rights within a collective security apparatus.

Third, and most importantly, the domestic review approach does not solve the ultimate conundrum that a Member State will face if it is unable to verify the factual basis for an individual decision to list a person. It leaves open the real possibility that the implementing authority may have to distance itself from the decisions of the Sanctions Committee if the decisions are "manifestly erroneous or contradicted by the exculpatory evidence" offered.<sup>205</sup> In that case, the only option that has received any real attention from the courts, is "some sort of dialogue" between the state in question and the Sanctions Committee<sup>206</sup> – hardly a source of confidence or guidance about how such a fundamental conflict of norms could ultimately be resolved. Indeed, as Judge Keller explains in *Al-Dulimi*, by insisting on domestic review without explaining what should happen when a domestic court reaches a different conclusion than was reached by the relevant Sanctions Committee, the European Court of Human Rights provides "states no additional guidance – zero, zilch, Nada – on how to proceed in such situations."<sup>207</sup>

## c. Independent context-sensitive non-judicial review arrangements

A third option to protect UN sanctions regimes against fair process legal challenges would involve context-sensitive non-judicial reviews of sanctions lists, described below.

In the past, UN Member States and external commentators have called for the only existing non-judicial review system – the Ombudsperson – to be extended to all UN sanctions regimes. A notable recent call for this approach came from a Commission of the *Institut de Droit International*, which issued a Resolution in September 2017 on *Review of Measures Implementing Decisions of the Security Council in the Field of Targeted Sanctions*, calling for just this.<sup>208</sup> This suggestion has, as we discussed earlier in the study, met resistance from some Council members, notably Permanent Members. A central objection we heard was the idea that the Ombudsperson was a *sui generis* system designed for the Al Qaida context. This is a system, we were told, that cannot be safely applied wholesale in “distinctly different and State-focused political contexts” such as the DPRK sanctions regimes and the restrictive measures relating to Iran.<sup>209</sup>

It is possible that views may shift, as the risks posed to UN sanctions by the new, ‘third round’ of litigation become clearer to Council members. But there are reasons to believe that the simple extension of the Ombudsperson arrangements, which were developed in the context of UN *counter-terrorism* sanctions, to deal with sanctions imposed in the other contexts the Security Council addresses, may not inspire the trust and confidence of interested parties, and may not, therefore, be effective. What is ‘fair and clear’ may depend on context – especially the specific objective, targets and intended impact of the sanctions regime, and the manner in which an affected party can be assured a ‘meaningful hearing’. EU courts have recently ruled that fair process arrangements *must* take account of the “context in which the measures” were adopted.<sup>210</sup> As a recent, Australian-led assessment of the High-Level Review recommended, it may be wiser to focus “on the expansion of the Ombudsperson’s *functions* to non-counter-terrorism sanctions regimes, rather than seek immediate agreement on an expanded Ombudsperson’s mandate”.<sup>211</sup> (emphasis added)

### i. Different sanctions contexts require different approaches

To be effective, an independent and impartial review needs to create the trust and confidence required to generate a steady flow of information held by Member States, international agencies, private organizations,

and other actors. Yet this information, the entities that hold it, and the factors that will inspire the trust and confidence they need to share it, differ significantly across different UN sanctions contexts. Each sanctions regime develops to fit the particular strategic and political context, emerging “through negotiations seeking a viable balance of the conflicting interests”.<sup>212</sup> As Figure 7 (below) illustrates, different UN sanctions regimes serve different strategic objectives, and rely on different sources of information to construct the fact-bases upon which the Security Council makes its listing and delisting decisions. This may mean slightly different arrangements are needed in each of these contexts.

The central question for any discussion about how to create an effective, independent and impartial review mechanism for the UN’s non-counter-terrorism sanctions regimes is how to inspire the trust and confidence of all relevant parties that have access to the information that the reviewer needs to access and analyse – *in that context*.

In the *counter-terrorism* context, the objective of UN sanctions might be broadly summarized as ‘containment’. The target is an outlawed terrorist group (first Al Qaida, later ISIL/Da’esh) that largely operates outside the Westphalian system, and with whom political reconciliation by the international community seems unlikely. The creation and use of political leverage is thus not necessarily a key goal: the goal is to ensure the effective exclusion of targets from global society, to disrupt and prevent terrorist activity. Eligibility for restrictive measures is generally based on individual behaviour, especially conduct associating a person or entity with a targeted group – though official status within a particular group may also be relevant. (Family status, in contrast, is not on its own (i.e. absent individual conduct) generally seen as a sufficient basis for listing.) And because the groups in question are globally dispersed and clandestine, individuals targeted for sanctions who believe they are wrongly listed will need assistance from an intermediary that both they and affected states trust, who can conduct an impartial inquiry drawing together disparate information to assess their conduct. Much of that information is sourced from national law enforcement and intelligence sources, with support provided by a specially-assembled Monitoring Team at the UN. For that context, the profile of the Ombudsperson – typically a former judge, with some exposure to international law enforcement and international criminal cases – has proven successful in building trust and confidence.

FIGURE 7. THREE SANCTIONS CONTEXTS - AND IMPLICATIONS FOR INDEPENDENT AND IMPARTIAL REVIEW

	COUNTER-TERRORISM CONTEXT	ARMED CONFLICT CONTEXT	NON-PROLIFERATION CONTEXT
Actor that sanctions seek to constrain or influence	Individuals, entities, terrorist groups	Conflict parties (state and non-state)	Government regimes
General objective	Containment	Leverage to generate individual and group behavioural change	Leverage to induce regime-level policy change
Designation	Required 'association' can be conduct or status-based	Both conduct and status-based	Both conduct and status-based
Main proposers of designations	US, UK	Varies	P5
Main source of information	States	States, field experts - especially Groups of Experts	States, technical agencies, private sector
Highly sensitive / classified information involved	Yes	Sometimes	Yes
Profile suitable for independent and impartial reviewer	Former judge	Former judge or diplomat with suitable training, knowledge of conflict contexts	Former or current international technical expert
Actual or potential source of supporting expertise	Analytical Support and Sanctions Monitoring Team	Former Group of Experts members not involved in prior listing (to avoid conflicts of interest)	IAEA/OPCW and UN Secretariat
Nature of investigative process that would be required for independent review of facts	Desk and interview based, some field investigation	Extensive field investigation, including in active conflict theatres	Desk and interview based, investigations in capitals

In contrast, where sanctions are imposed by the UN Security Council in the context of *armed conflict*, the creation and use of political leverage is a central goal of sanctions. And the targets are usually politico-military actors – whether state or non-state – for whom political reconciliation with the international system is itself often a key objective. Designation criteria in these contexts may be status- or conduct-based. Carrying over the functions of the Ombudsperson to this context may actually *help* to generate leverage over individuals and the conflict parties of which they are members. Several interview subjects pointed us to precedents from the counter-terrorism context: situations where individual counter-terrorism sanctions targets had gone through several rounds of engagement with the Ombudsperson, each time changing behaviours specifically identified through the Ombudsperson process as problematic, before ultimately being successful with their delisting requests. Each round of stated ‘reasons’ for retention of the target on the sanctions list thus served, successfully, as a step-by-step guide to behavioural change that led, ultimately, to de-listing. This is exactly the kind of finely-calibrated dialectic approach that could bear fruit in the armed conflict context.

In these cases, an independent and impartial reviewer focused on assessing the eligibility of an individual or entity for continued sanctioning would probably rely heavily on information sourced directly from the field by UN experts – who may have different profiles and skills than the counter-terrorism Monitoring Team members and, indeed, judicial actors. Indeed, EU courts, recognizing this, have explicitly held that in a case relating to a civil war context, or in dealing with an authoritarian regime, review arrangements need “not be assimilated to those of a national judicial authority of a member state in a [domestic] criminal inquiry”.<sup>213</sup> Other types of actors and information will have to be relied upon as sources of information about the context in which restrictive measures are inserted. The courts have begun to turn to UN Group of Experts reports for this information – suggesting that the way in which these reports are compiled may, increasingly, come under judicial scrutiny.<sup>214</sup> Any independent and impartial reviewer of facts will therefore need to be able to engage with sources of information in situations of armed conflict, including existing Groups or Panels of Experts. That may also mean that the reviewer needs the ability and resources to visit conflict theatres, with appropriate security – while maintaining her or his independence, along the lines of existing commissions of inquiry, human rights and humanitarian law fact-finding missions.

Finally, in the *non-proliferation* context, where the vital national security interests of the Great Powers are squarely in play, sanctions logic varies once more. In that context, the target is not necessarily the individual or the entity subjected to restrictive measures, but rather the regime to which they are connected. The aim is to create leverage, but not with a view to individual behavioural change: rather with a view to using that leverage to generate wholesale policy change on the part of a whole regime, in order to deter, prevent and contain nuclear, chemical and biological weapons proliferation. Eligibility for sanctions in these contexts *may* arise from an individual’s or entity’s specific conduct, such as their

participation in clandestine proliferation activities. But it also often turns simply on an individual’s official status or role within the regime, or the family or social ties between an entity and the regime. In those cases, eligibility for listing is not necessarily a product of individual conduct that violates any specific legal or other standard.

In that case, the role of an independent and impartial reviewer is arguably both simpler and more difficult than in the ‘armed conflict’ context. The key factual question to be verified is likely a fairly ‘simple’ question of the individual or entity’s relationship with the regime, not a question of their clandestine conduct. Nonetheless, information about conduct, where it *is* required, is likely to be particularly difficult to access and the trust and confidence of those who hold relevant information hard to win.<sup>215</sup> As things stand in the DPRK Sanctions Committee, for example, listing decisions are frequently made without proposing states sharing more than the most basic information with other Sanctions Committee members or their co-national Group of Expert members.<sup>216</sup> As a result, names put forward for listing in these cases are often based on data that cannot be shared with all experts, the Secretariat, or even all members of the Sanctions Committee. States would presumably be even more reluctant to share such information with an independent reviewer than they are to share counter-terrorism information with the IDAQ Ombudsperson. Still, if states are willing to share some such information with trusted expert organizations such as the International Atomic Energy Agency (IAEA), or the Organization for the Prohibition of Chemical Weapons (OPCW), perhaps they might consider current or former officials from those organizations playing a very limited review role, if appropriately mandated and safeguarded.

## ii. Increasing the strategic utility of sanctions by adjusting designation criteria

What emerges from this discussion of how the objectives and contexts of different sanctions regime function is a recognition that any attempt to adapt the independent and impartial review functions of the Ombudsperson to these different contexts may lead to new forms, or arrangements, for fair and clear procedures. Form should follow function. While the procedural protections offered should be equivalent to those that states offer in applying restrictive measures at the domestic level, they may not take the same institutional shape.

A central consideration that emerges in each context is how the authority of an independent and impartial reviewer of a person’s *eligibility* to be sanctioned, measured against designation criteria freely determined by the Security Council, should fit together with the Council’s political discretion to assent or decline to apply those measures – or, perhaps, to apply them only in part – once that eligibility has been affirmed. Since the strategic objective of armed conflict and non-proliferation sanctions is the creation of political leverage, a system that allowed the Security Council greater control over whether or not to apply sanctions at any point in time would actually *increase* the strategic utility of sanctions and might allow them to be better integrated with the UN’s peace-making and mediation efforts.

This was the very reason for separating the Taliban from the sanctions regime established by Resolution 1267 to its own, new regime (by Resolution 1988) – to allow the Security Council to use the imposition or termination of sanctions as a political lever. This does not have to mean that such political decision-making overrides or violates fair process. On the contrary, as we have seen in this study, there are reasons to think that fair and clear procedures will actually increase the fine-tuning and accuracy of sanctions regimes, making them more responsive to context, and thus better able to generate political leverage for the Council. Yet two structural obstacles stand in the way of such a finely calibrated use of sanctions. They are both obstacles that could – and we believe should – be addressed in any effort to extend the functions of the Ombudsperson to armed conflict and non-proliferation contexts.

First, *listing or designation criteria*. As we began to see in the preceding section, one important distinction here is between *status*-based and *conduct*-based sanctions listings. Status-based listings designate individuals or entities due to their role in a particular organization, regime or implementation of a certain policy. If a person is found to be, for example: associated with ISIL in certain ways;<sup>217</sup> or were senior officials in Saddam Hussein's regime in Iraq;<sup>218</sup> or is a leader of a South Sudanese government, opposition, militia, or other group (that has, or whose members have, engaged in specified conduct);<sup>219</sup> or is a family member of certain DPRK officials;<sup>220</sup> then that status makes them eligible for sanctions. The aim, generally speaking, of status-based listing is to create leverage over those who may be able to influence group or regime activities or policies. Conduct-based listings, in contrast, are based on an assessment of an individual's actual, historical, conduct, against certain defined legal or other standards. In these cases, sanctions eligibility may flow from, for example: prohibited procurement activity;<sup>221</sup> serious violations of international humanitarian law or human rights law, or recruitment or use of child soldiers, or commission of sexual violence;<sup>222</sup> active participation in a coup d'état or 'obstruction of the rule of law';<sup>223</sup> participation in a historical attack on President Hariri of Lebanon;<sup>224</sup> threatening peace and stability, or obstructing the implementation of a peace agreement or political transition;<sup>225</sup> or even obstructing peace talks.<sup>226</sup> Of the fifteen most recent sanctions regimes, two thirds combine status and conduct based listings; four provide only for conduct-based listings; and one (the Iraq regime) only provides for status-based listing.

As the *Al-Dulimi* case shows, status-based listings are more likely to go out of date than conduct-based listings, especially if conduct-based criteria are based on historical, rather than ongoing, behaviour. Where designation is based on past violations of certain legal standards, for example, rather than ongoing political or military affiliations, then once those eligibility criteria have been met, that eligibility endures through time. Eligibility based on ongoing conduct, or indeed on ongoing status, is more likely to 'date'. On the other hand, status is more straightforwardly verified, including often through open source material, as it is often a question of answering a simple binary question: is or was this person an official in a certain regime, or a member of a certain family; or

was a particular entity controlled by or linked in certain ways to other specified actors? In contrast to confirming someone's status, establishing their conduct may be relatively difficult. Independent and impartial reviewers are more likely to face difficulties in accessing information demonstrating that certain conduct has occurred or is occurring, because it may derive from intelligence that Member States are not prepared to share with reviewers or courts. This is not to say that substantiation of someone's status through open source material is always straightforward: European cases make clear that this can be difficult in armed conflict or crisis contexts where a regime is highly closed or secretive and access to the internet is restricted.<sup>227</sup>

The result seems to be not only that conduct-based listings seem more likely to be vulnerable to fair process legal challenges, but also that eligibility decisions and reviews will be slower, more complex, and more costly than those for status-based listings. For status-based listings, challenges are limited to claims that: the person's identity has been mistaken; the person does not belong to, or no longer belongs to, the designated category; or the person's conduct in some other way negates the presumption that their membership in the category makes them eligible for sanctions (for example because their membership is an on-paper fiction). This makes review of status-based listings much more straightforward than those of conduct-based listings. Conduct-based listings may, in turn, be less responsive and manoeuvrable than status-based listings. This may be why, for example, there appears to be a trend in EU autonomous sanctions towards the use of status-based listings. European courts have recognized the legitimacy of this approach, approving sanctions imposed on the basis of an individual's position in a regime or military structure,<sup>228</sup> family membership,<sup>229</sup> and prominent commercial support provided to a regime,<sup>230</sup> even without evidence of specific conduct.

In the process, the courts have acknowledged the broad political discretion this reserves for the Union's political organs in determining which classes of persons should be sanctioned.<sup>231</sup> Applying that model to the UN Security Council would, for example, suggest that the Council could choose, on a case-by-case basis *not* to designate specific individuals that have been determined to be eligible for sanctions, based on their status, because withholding sanctions might better serve a strategic purpose being pursued by the Security Council. In Afghanistan, for example, this might mean that all leaders of the Taliban above a certain level are eligible for designation, but the Council could choose on a case by case basis not to apply those sanctions for so long as an individual is working to promote respect within the Taliban for international humanitarian law, or to promote peace talks with the government. In DPRK, for example, such an approach might render all officials involved in, say, nuclear proliferation activities eligible for sanctions designation, but allow the Security Council to publicly state what kinds of conduct will induce it to suspend application of those sanctions to specific individuals.

Such an approach may give the Security Council a powerful and responsive tool for incentivizing behavioural change by its targets. In their influential

2012 Update to the 2009 'Watson Report', Sue Eckert and Thomas Biersteker called for consideration of just such a 'suspension' mechanism in the context of peace negotiations.<sup>232</sup> Yet it is difficult to achieve this result in the context of *conduct*-based listings, because, although sanctions are not punitive measures, differential treatment of individuals that have committed conduct that similarly violates international standards or law - with some being

sanctioned, and others not, ostensibly for political reasons - risks creating a perception of inequality before the law, disrespect for the principle of legality, and disrespect more broadly for the rule of law. The approach described above, which differentiates between status-based and conduct-based designations, does not produce such a result. And it has the added advantage of already appearing to meet courts fair process expectations.

#### d. Weighing the options

How could or should the Security Council, Member States, the UN Secretariat and other interested parties weigh these three approaches to immunizing UN sanctions from fair process legal challenges - strengthening existing arrangements, judicial review, and context-sensitive non-judicial review? All of them have pros, all of them have cons. And how we assess them will depend in part on the vision of public order by which we measure the Security Council - a liberal, pluralist or conservative one. Those in favour of a more liberal vision might give greater weight to whether or not the approach will lead to effective determination of individual rights claims. Those in favour of a more pluralist vision may give more weight to whether or not the approach creates pathways for different normative and legal orders to find common ground and be reconciled, for example, by acknowledging the primacy of the Sanctions Committees and Security Council proper as venues for negotiation between states. And those in favour of a conservative vision may give greatest weight to whether the approaches are politically feasible, since their infeasibility may be a sign of their incompatibility with the established order.

A final way to weigh the options may be simply to adjudge them against all of these criteria. Figure 8, below, seeks to do this in a rather rudimentary way. It adapts a table in the 2006 Watson Report, which was used to compare various review mechanism options

then under discussion - the status quo, a monitoring team, an ombudsperson, a panel, an arbitral panel, or judicial review.<sup>233</sup> At the helpful suggestion of Professor Thomas Biersteker, we have built upon their table to allow comparison of the three options under consideration in this study. We have adapted the criteria by which the earlier table assessed options to reflect our analysis of how courts assess sanctions procedures against fair process standards. And we have added two more criteria, relating to the political 'realism' of each option.

Comparing the options in this way allows for a very rudimentary aggregate analysis. For each row in the table, we have allocated a score of "1" if the option includes the feature in question, and "0" if it does not; and "0.5" if it partially provides that feature, or the answer is uncertain. We then tally up the score in each of the ten rows to produce an aggregate score for each of the four options (columns). The net result is quite clear. While it is for Member States to assess which of these options best suits their needs, by these criteria of likelihood of passing fair process legal challenge and of political realism, the Focal Point system scores the lowest (2.5/10), while context-sensitive non-judicial review mechanisms score highest (8/10). International judicial review scores well on the legal standards criteria (6/8, but poorly on political realism (0/2). The ombudsperson arrangements score moderately well in both sets of criteria (7.5/10).

FIGURE 8: COMPARING THE OPTIONS FOR EQUIVALENT PROTECTION

	OPTIONS FOR PROVIDING EQUIVALENT PROTECTION	STRENGTHENED EXISTING MEASURES		INTERNATIONAL JUDICIAL REVIEW	INDEPENDENT CONTEXT-SENSITIVE NON-JUDICIAL REVIEW MECHANISMS
		OMBUDSPERSON (IDAQ REGIME)	FOCAL POINT (OTHER REGIMES)		
WILL IT SURVIVE A FAIR PROCESS LEGAL CHALLENGE?	<b>Composition</b> Independently appointed	Yes	No	Yes	Yes (by the SG)
	<b>Authority</b> Independent to make decisions	Yes - on eligibility	No	Yes	Yes - on eligibility
	<b>Power</b> Competence to grant relief	Yes - unless overruled by consensus in sanctions committee, or by Security Council decision	No	Yes	Yes, in concert with Security Council
	<b>Accessibility</b> Is mechanism affordable, easy to understand and able to make timely decisions?	Yes	No (free to access but no strict time frames in place)	Can be costly and timely	Would depend on mandate, methods and resources
	<b>Reasons provided / Transparency</b> Are reasons for decisions provided to petitioner and made public	Usually so	Depends on Sanctions Committee	Yes	Yes
	<b>Investigatory power</b> Access to non-redacted information	Depending on international cooperation, but also has some independent investigative power	No	Depends on international cooperation - and likely to depend on what complaints are brought to it	Depends on international cooperation, but could have some independent investigative power
	<b>Transparency</b> Decision made public	Yes	Not applicable	Yes	Yes
	<b>Preview</b> Assessing eligibility of targeted party to be sanctioned in the first place	No	No	No	Could be given challenge function in pre-listing eligibility process
IS THE PROPOSAL POLITICALLY REALISTIC?	<b>Recognizes UNSC political discretion over listing</b>	No	Yes	No	Yes
	<b>Political feasibility</b>	Already exists	Already exists	Highly unlikely	Unclear
	<b>Aggregate 'score'</b>	7.5 out of 10	2.5 out of 10	6 out of 10	8 out of 10

● 1 for each Yes ● 0.5 for each partial yes ● 0 for No

# 4. Moving forward – recommendations for action

We are currently at a moment when the Security Council is relying on sanctions for the generation of leverage to deal with crises from central Africa to the Middle East to East Asia. At just this moment, a new wave of litigation risks undermining their universal implementation and thus not only their credibility but also their effectiveness. States, especially the members of the Security Council, must come to understand that there are clear legal standards against which the UN's armed conflict and crisis, and non-proliferation sanctions regimes are likely to be measured in the next couple of years, and what the consequences of losses in those legal challenges may be. Amongst them, little noticed, could be the loss not only of leverage over states such as DPRK and Iran, and armed groups from Libya to Yemen, but also of one of the increasingly few remaining areas of clear willingness by Great Powers to cooperate.

The third wave of fair process legal challenges to UN sanctions regimes now unfurling poses fairly clear risks to UN sanctions, because it is testing sanctions regimes that lack the fair and clear procedures that have been developed for the IDAQ regime. The other UN sanctions regimes are highly vulnerable to fair process legal challenges, because the Focal Point system falls well short of the fair process standards reflected in the 47 cases we reviewed, across twelve jurisdictions.

Some of those we interviewed for this study suggested that adjustments to the Focal Point system, like those proposed by the UN Interagency Working Group on Sanctions in 2014, may prevent the realization of these risks.<sup>234</sup> While we believe that strengthening of the Focal Point is a worthwhile undertaking, our study leads us to a different conclusion: that any such adjustments to the Focal Point system are unlikely to inoculate UN sanctions procedures against fair process legal challenges in the courts, unless and until they provide for independent and impartial review that meets the standards discussed in Part 2 of this study. To meet those standards, the Focal Point would have to be made independent and given investigative and review powers. It would not, in other words, be the Focal Point any more.

Instead, for the reasons we set out in Part 3, we believe that the UN system should consider extending and adapting the functions of the Ombudsperson – but not necessarily the office itself – to the other sanctions regimes, by developing new, independent, context-sensitive, non-judicial review mechanisms. This may require careful consideration to identify what kind of mandate, skillset, expertise, profile and resources will be suitable for different contexts, to inspire the trust and confidence states and other interested parties need, before sharing sensitive information. In this report, we have set out some ideas for what the resulting

arrangements might look like, and how they could, if carefully developed and instituted, *increase* the strategic utility of sanctions as a security tool.

How do we get there? How can we encourage the kind of clear-eyed and good faith discussion of these options that is needed, to address the fairly clear risks that the UN sanctions system now faces?

## THE NEED FOR PREVENTIVE ACTION BY THE SECRETARY-GENERAL

States must come together to explore how to develop arrangements that ensure the existence of capable, independent actors empowered to review sanctions eligibility beyond the counter-terrorism context. This will require careful reflection on tailored information-sharing and investigation capacities, and efforts to bring States together around a shared vision of what constitutes free and clear procedures in these different contexts. The Secretary-General, and the Secretariat, have a central role to play, we believe, in raising awareness of the risks sanctions regimes face, of mobilizing support for further developments to ensure fair and clear procedures, and of catalysing action.

Engagement by Secretaries-General past has been crucial to moving this debate forward at key moments. Even today, the analytical framework for discussion of these issues in the Security Council remains the 2004 intervention by the then-Secretary-General. As a broader array of sanctions regimes now face the same fairly clear risks from fair process challenges that the 1267 sanctions regime faced then, a similar intervention by the Secretary-General at this juncture could help steer the Membership's attention and energy towards these issues – and towards effective solutions. A periodic report by the Secretary-General on the effect of sanctions was recommended in Egypt's draft resolution tabled before Council members in August 2017.<sup>235</sup> Such a report could address, *inter alia*, how the absence of fair and clear procedures creates unintended consequences for sanctions implementation. Sanctions Committees are too tied up with the actual work of administering sanctions regimes to have discussions at that level, and the delegates that sit in the Sanctions Committee may not, anyhow, feel empowered to engage in such policy discussions. By raising these issues in a Secretary-General's report, the issues are elevated to policy levels where broader reframing could take place. Likewise, the Secretary-General could propose discussing these issues with the Security Council at its next annual retreat.

Direct engagement by the Secretary-General and Secretariat with the Membership may help reframe this issue and raise awareness of the risks that UN

sanctions now face from fair process legal challenges. This offers an important opportunity to reframe these issues and to engage a broader geographic coalition than is currently active on these issues, for example by highlighting the unintended legal consequences of UN sanctions processes and their implementation. Framing due process questions in these terms may help to catch the attention of a growing and influential coalition of Member States, including states drawn from the Non-Aligned Movement, Group of African States, and various previously or currently sanctioned states who routinely challenge the decision to impose sanctions given their harmful unintended effects. This growing coalition of states are increasingly making their voices heard through lobbying various members of the Security Council.<sup>236</sup>

The Secretary-General could help prevent the realization of the risks discussed in this study by appointing, as soon as possible, an Ombudsperson with the requisite professional skills and reputation for respect for the rule of law. Additionally, in order to shore up the Ombudsperson's independence, he could appoint the next Ombudsperson not as a consultant, but as a staff member (like the Head of the IIIM) – or even encourage the Security Council to turn the Office of the

Ombudsperson into a Special Political Mission, like the Counter-Terrorism Executive Directorate that supports the Council's Counter-Terrorism Committee. Both provide crucial, long-term support to the Council in its counter-terrorism efforts. While one is a full-fledged Special Political Mission, headed by an Assistant Secretary-General, the other is a consultant.

Another important step that the Secretary-General and Secretariat could immediately take would be to initiate the development of guidance on 'Fair and Clear Procedures during Investigations', drawing on existing material such as the guidance used by commissions of inquiry established by the UN Human Rights Council, or the Annexes to the recent 2017 Final Report of the Panel on Yemen. This guidance could be used to enhance fair process training for Groups and Panels of Experts. This may, however, require active encouragement from the Security Council, given that methodological instructions from the Secretariat could be interpreted by some members of the Groups of Experts as interfering with their independence. For that reason, we direct this recommendation towards the Security Council itself, in the first instance.

## Recommendations to the Secretary-General and UN Secretariat:

1. **Take preventive action** to forestall courts finding that implementation of conflict and non-proliferation sanctions regimes falls short of required legal standards: Raise the awareness of the UN Membership of the risks that non-counter-terrorism sanctions regimes face from fair process challenges and the need for preventive action to address these risks. This could be done through:
  - direct engagement with the UN Membership;
  - reporting to the UN General Assembly on the rule of law;
  - discussions on Target 16.3 of the Sustainable Development Goals ('Promote the rule of law at the national and international levels and ensure equal access to justice for all'); and
  - direct engagement with the Security Council, for example at private luncheons or annual retreats.
2. **Protect the ISIL/Da'esh and Al Qaida sanctions regime:** Ensure the regime's legitimacy and effectiveness by protecting the Office of the Ombudsperson, by:
  - appointing, as soon as possible, an Ombudsperson with requisite professional skills and reputation regarding respect for the rule of law;
  - establishing a fully-fledged Office as called for in UNSCR 1904; and
  - appointing the next Ombudsperson as a staff member (not a consultant).

3. **Develop independent, context-sensitive, non-judicial review mechanisms for sanctions regimes adopted in non-counter-terrorism contexts.** This could involve:
  - commissioning an independent analysis of options, reprising the approach taken by Secretary-General Annan and Professor Bardo Fassbender in 2004;
  - encouraging UN inter-agency discussion of ways to strengthen fair and clear procedures in these contexts, for example through the Inter-Agency Working Group on Sanctions, or the Rule of Law Coordination Group;
  - direct engagement with the Group of Like Minded States on Targeted Sanctions, and with other UN Member States.
4. **Develop and publish clear guidance on 'Fair and Clear Procedures during Investigations',** drawing on existing material such as guidance used by commissions of inquiry established by the UN Human Rights Council, and use it to enhance fair process training for Groups and Panels of Experts.

#### THE RESPONSIBILITY OF AND OPPORTUNITIES FOR MEMBER STATES

Even with leadership by the Secretary-General to help reframe the issue, protect the independence of the Ombudsperson, and engage the broader Membership, ultimately the responsibility for addressing the

vulnerabilities of UN sanctions regimes to fair process legal challenges lies with the Membership itself – and especially Members of the Security Council itself. Our study has revealed several opportunities for the Member States to discharge this responsibility, through immediate and longer terms steps:

#### Recommendations to UN Member States, especially the Security Council:

5. **Protect, respect and promote independent review of sanctions eligibility, by:**
  - respecting the independence of the Ombudsperson, including in drafting reasons letters; and
  - exploring options for extending the functions of the Ombudsperson to non-counter-terrorism sanctions regimes, including through the development of new, independent, context-sensitive, non-judicial review mechanisms.
6. **Strengthen statements of reasons and narrative summaries,** especially in unsuccessful delisting and humanitarian exemption petitions. This could include making better use of **open source material** during listing processes.
7. **Explore clearer differentiation between 'status-based' and 'conduct-based' designations,** since different approaches to factual review may be possible in handling delisting petitions in each case. This could create greater efficiencies, fairness and clarity, and strengthen the ability of the Security Council to calibrate the impact of sanctions to help maintain international peace and security.
8. **Automate periodic reviews** of sanctions designation lists and the regimes themselves, and start with a review of the sanctions concerning the situation in Iraq.
9. **Press for preventive action through debates in the Security Council:** Use open debates and closed horizon scanning-style discussions in the Security Council to raise the issue, re-emphasize and reframe the problem, request briefings from the Secretariat on the issue, and develop support for more comprehensive solutions.
10. **Ensure that debates on Working Methods in the Security Council include discussion of working methods of sanctions committees,** given the central role they play in determining the operation, and thus the legitimacy and effectiveness, of this crucial tool for the maintenance of international peace and security.

# Annex I. Overview of relevant jurisprudence concerning current UN sanctions

YEAR CONCLUDED	PROCEEDINGS	JURISDICTION	SANCTIONS REGIME
Ongoing	Litigation by Abdulbasit Abdulrahim, Abdulbaqi Mohammed Khaled and Maftah Mohamed Elmabruk <sup>1</sup>	UK	ISIL (Da'esh) and Al-Qaida
Ongoing	Challenge by a trustee of Pakistan Relief Foundation <sup>2</sup>	Pakistan	ISIL (Da'esh) and Al-Qaida
Ongoing	Challenge by <i>Al-Akhtar Trust</i> <sup>4</sup>	Pakistan	ISIL (Da'esh) and Al-Qaida
Ongoing	<i>Pakistan v. Al-Rashid Trust</i>	Pakistan	ISIL (Da'esh) and Al-Qaida
2017	Joined Cases T-107/15 and T-347/15, <i>Uganda Commercial Impex Ltd v. Council of the European Union</i> (18 September 2017) (General Court of the EU, Sixth Chamber)	EU	DRC
2017	Case T-619/15, <i>Central African Republic Diamond Purchasing Office (Bardica) and Kardiam v. Council</i> (20 July 2017) (General Court of the EU, Ninth Chamber)	EU	CAR
2017	Case C-19/16 P, <i>Al-Bashir Mohammed Al-Faqih and Others v. European Commission</i> (15 June 2017) (CJEU, Eighth Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2017	Case T 681/14, <i>El-Qaddafi v. Council of the European Union</i> (28 March 2017) (General Court of the EU, Third Chamber)	EU	Libya
2016	<i>Al Dulimi and Montana Management Inc. v. Switzerland</i> (2016) (ECtHR, Grand Chamber)	ECtHR	Iraq
2016	Case T-248/13, <i>Mohammed Al-Ghabra v. European Commission</i> (13 December 2016) (General Court of the EU, Third Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2016	<i>Youssef v. Secretary of State for Foreign and Commonwealth Affairs</i> [2016] UKSC 3	UK	ISIL (Da'esh) and Al-Qaida
2015	Case T-134/11, <i>Al-Faqih and Others v. Commission</i> (28 October 2015) (General Court of the EU, Seventh Chamber)	EU	ISIL (Da'esh) and Al-Qaida

YEAR CONCLUDED	PROCEEDINGS	JURISDICTION	SANCTIONS REGIME
2014	Case T-306/10, <i>Hani El Sayyed Elsebai Yusef v. European Commission</i> (21 March 2014) (General Court of the EU, Second Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2013	Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, <i>European Commission and Others v. Yassin Abdullah Kadi (Kadi II)</i> (18 July 2013) (CJEU, Grand Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2013	Case C-239/12 P, <i>Abdulbasit Abdulrahim v. Council of the European Union and European Commission</i> (28 May 2013) (CJEU, Grand Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2012	<i>Nada v. Switzerland</i> (2012) (ECtHR, Grand Chamber)	ECtHR	ISIL (Da'esh) and Al-Qaida
2012	<i>Yassin Abdullah Kadi v. Geithner, Civil Action No. 09-0108</i> (JDB) (D.D.C. Mar. 19, 2012)	USA	ISIL (Da'esh) and Al-Qaida
2012	<i>Al-Haramain Islamic Foundation Inc. v. Obama</i> , 690 F. 3d 1089 - Court of Appeals, 9th Circuit (2012)	USA	ISIL (Da'esh) and Al-Qaida
2011	<i>Pakistan v. Hafiz Saeed</i> <sup>5</sup>	Pakistan	ISIL (Da'esh) and Al-Qaida
2011	Case T-102/09, <i>Elosta v. Council and Commission</i> (1 September 2011) (General Court of the EU)	EU	ISIL (Da'esh) and Al-Qaida
2011	Case T-101/09, <i>Maftah v. Council and Commission</i> (1 September 2011) (General Court of the EU)	EU	ISIL (Da'esh) and Al-Qaida
2010	Joined Cases T-135/06, <i>Al-Faqih v. Council</i> ; T-136/06, <i>Sanabel Relief Agency Ltd v Council</i> ; T-137/06, <i>Abdrabbah v Council</i> ; T-138/06, <i>Nasuf v Council</i> (29 September 2010) (General Court of the EU)	EU	ISIL (Da'esh) and Al-Qaida
2010	<i>Her Majesty's Treasury v. Mohammed Jabar Ahmed and others</i> [2010] UKSC 2	UK	ISIL (Da'esh) and Al-Qaida

<sup>1</sup> See Letter dated 11 January 2017 from the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council, UN Doc. S/2017/35 (13 January 2017), p. 28.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> See Letter dated 13 April 2011 from the Chair of the Security Council Committee established pursuant to resolution 1267 (1999) Concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council, UN Doc. S/2011/245 (13 April 2011), p. 29, para. 8.

YEAR CONCLUDED	PROCEEDINGS	JURISDICTION	SANCTIONS REGIME
2010	<i>Abdelrazik v. Canada (Minister of Foreign Affairs)</i> [2010] 1 F.C.R. 267	Canada	ISIL (Da'esh) and Al-Qaida
2009	<i>Joined Cases C-399/06 P and C-403/06 P, Faraj Hassan v. Council of the European Union and European Commission; and Chafiq Ayadi v. Council of the European Union</i> (3 December 2009) (CJEU, Second Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2009	Case T-318/01, <i>Othman v. Council and Commission</i> (11 June 2009) (General Court of the EU)	EU	ISIL (Da'esh) and Al-Qaida
2009	<i>Hay v. HM Treasury</i> [2009] EWHC 1677	UK	ISIL (Da'esh) and Al-Qaida
2008	<i>Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)</i> (3 September 2008) (CJEU, Grand Chamber)	EU	ISIL (Da'esh) and Al-Qaida
2008	<i>Sayadi and Vinck v. Belgium</i> (2008) (UN Human Rights Committee)	UN HRC'ee	ISIL (Da'esh) and Al-Qaida
2008	<i>Ali Ghaleb Himmat v. Switzerland</i> , Decision of the Federal Tribunal in Lausanne, Case 1A.48/2007, 22 April 2008	Switzerland	ISIL (Da'esh) and Al-Qaida
2008	<i>Al Dulimi and Montana Management Inc</i> (Swiss Federal Court, 23 January 2008)	Switzerland	Iraq
2008	<i>A, K, M, Q and G v. HM Treasury</i> [2008] EWCA Civ 1187	UK	ISIL (Da'esh) and Al-Qaida
2008	<i>Al-Aqeel v. Paulson</i> , 568 F. Supp. 2d 64 (D.D.C. 2008)	USA	ISIL (Da'esh) and Al-Qaida
2007	Bundesgericht [BGer] [Federal Court], Nov. 14, 2007, 133 Entscheidungen des Schweizerischen (Nada case)	Switzerland	ISIL (Da'esh) and Al-Qaida
2007	<i>Al-Qadi v. the State</i> (TK 2007) ILDC 311 (Administrative Appeals Board of the Turkish Council of State)	Turkey	ISIL (Da'esh) and Al-Qaida
2006	<i>Stichting Al Haramain Humanitarian Aid</i> (2006)	Netherlands	ISIL (Da'esh) and Al-Qaida
2005	<i>Nabil Sayadi and Patricia Vinck v. Belgium</i> , Tribunal de Première Instance de Bruxelles, 11 February 2005	Belgium	ISIL (Da'esh) and Al-Qaida

YEAR CONCLUDED	PROCEEDINGS	JURISDICTION	SANCTIONS REGIME
2003	<i>Global Relief Foundation v. O'Neill</i> 207 F. Supp. 2d 779 (N.D. Ill. 2002), aff'd, 315 F.3d 748 (7th Cir.), cert. denied, 540 U.S. 1003 (2003) (United States)	USA	ISIL (Da'esh) and Al-Qaida
2003	<i>Nasco Business Residence Center SAS v. Italian Ministry of the Economy and Finance</i> (2003) (Tribunal of Milan)	Italy	ISIL (Da'esh) and Al-Qaida
2002	<i>R (on the application of Othman) v. Secretary of State for Work and Pensions</i> [2001] EWCH Admin 1022	UK	ISIL (Da'esh) and Al-Qaida

No formal litigation relating to fair and clear procedures was identified for the UN sanctions regimes relating to DPRK, Guinea-Bissau, Lebanon (Resolution 1636), Mali, Somalia/Eritrea, South Sudan, Sudan or Yemen. There is extensive litigation in Europe around its autonomous sanctions regime relating to Iran.

## Annex 2. Overview of prior reform proposals

	HIGH LEVEL REVIEW OF SANCTIONS (2015)	REPORT BY THE GROUP OF LIKE MINDED STATES (2015)	UN IAWG ON SANCTIONS (2014)	WATSON REPORT (2012)	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM (VARIOUS TIMES)	UN HIGH COMMISSIONER FOR HUMAN RIGHTS	FASSBENDER (2004)
Ombudsperson: Making the body permanent or extending period of mandate							
Ombudsperson: Strengthened information sharing							
Ombudsperson: Power to grant or apply for humanitarian exemptions							
Ombudsperson: Power to make binding and final decisions							
Ombudsperson: Power to conduct judicial review							
Ombudsperson: Transparency							
Ombudsperson: Extending mandate to other regimes							
Focal Point: Empowering body to handle requests for humanitarian exemptions							
Focal Point: Information sharing with states and Experts							
Focal Point: Establishing time limits for considering delisting requests							

	HIGH LEVEL REVIEW OF SANCTIONS (2015)	REPORT BY THE GROUP OF LIKE MINDED STATES (2015)	UN IAWG ON SANCTIONS (2014)	WATSON REPORT (2012)	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM (VARIOUS TIMES)	UN HIGH COMMISSIONER FOR HUMAN RIGHTS	FASSBENDER (2004)
Focal Point: Strengthening communication between Focal Point and petitioners							
Focal Point: Giving the Focal Point powers similar to the Ombudsperson							
Develop a standardized listing/de-listing framework							
Sanctions Committees providing clear reasons for listing, delisting and exemption decisions							
Clarifying listing criteria							
Introducing time limits to sanctions designations							
Periodic review of sanctions lists							
Introducing flexibility clauses to listings							
Improving the humanitarian exemptions procedure							
Establishing an independent body with the power to conduct judicial reviews							

# Notes

1. Some sanctions regimes also include prohibitions on arms transfers. This may raise questions around individuals' right to property, but the primary interferences with rights relate to freedom of movement and association, right to family life, and due process rights such as the "right to a court" or "rights of defence", the right to be heard, the right to counsel and the right to effective remedy.
2. See Universal Declaration of Human Rights (UDHR), United Nations, 217 A (III), art. 10; International Covenant on Civil and Political Rights (ICCPR), United Nations, *Treaty Series*, vol. 999, p. 171, art. 14; African Charter on Human and Peoples' Rights (Banjul Charter) CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, arts. 3 and 7; European Convention for the Protection of Human Rights and Fundamental Freedoms. (ECHR) as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, arts. 6 and 8.
3. See, for example, Case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council* [12 December 2006] ECR II-04665 (Court of First Instance).
4. See *Al-Jedda v. United Kingdom* [GC], no. 27021/28, ECHR, 2011, para. 102.
5. See, for example, most recently, S/RES/2368 (2017), preambular paragraph 23 and operative para. 45.
6. UNSC 5474th meeting, UN Doc. S/PV.547, 22 June 2006, pp. 4-5.
7. See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (Grand Chamber), which followed Case T-315/01, *Kadi v. Council* [2005] ECR II-3649 (Court of First Instance).
8. See further *Al-Dulimi* (2016), Concurring Opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, para. 69
9. See especially Case T-248/13, *Mohammed Al-Ghabra v. European Commission*, not published, (General Court), judgment of 13 December 2016.
10. *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, ECHR, 2016.
11. *Al-Dulimi* (2016), para. 147.
12. Austria, Belgium, Chile, Costa Rica, Denmark, Germany, Finland, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.
13. Notably, Devika Hovell, "Due Process in the United Nations", 110 *American Journal of International Law* 1 (2016), discussed further later in this paper.
14. Outgoing Ombudsperson's letter to the Secretary General, 10 July 2017, available from [https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20170710\\_letter\\_to\\_secretary-general.pdf](https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20170710_letter_to_secretary-general.pdf).
15. See, further, on this, Devika Hovell, "The Idea of Global Public Law: Response to Unbound Symposium Essays", *AJIL Unbound* 80 (2016).
16. See for example Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2010); Grainne de Burca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, vol., 51, 1 (Winter 2010); Daniel Halberstam and Eric Stein, "The United Nations, the European Union and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order", *Common Market Law Review*, vol. 46, No. 1, (2009); and Samantha Besson, "European Legal Pluralism After Kadi", *European Constitutional Law Review*, vol., 5, No. 2 (2009).
17. Devika Hovell, "Due Process in the United Nations", 110 *American Journal of International Law* 1 (2016).
18. That regime was originally imposed in Resolution 1267, covering Al Qaida and the Taliban. In Resolution 1989 (2010), a separate regime was spun off for the Taliban, leaving Al Qaida (and its affiliates) under the '1267 regime'. In Resolution 2253 (2015) the Al Qaida regime was expanded to include ISIL (Da'esh). For ease, we refer simply to the '1267 regime'.
19. Resolution 1267 covered a flight ban and assets freeze on the Taliban. Resolution 1333 (19 December 2000) extended the asset freeze to various Al Qaida-associated individuals, and added the arms embargo. The full suite of three measures was set out in Resolution 1390 (2002).
20. Gavin Sullivan and Ben Hayes, "Blacklisted, Targeted Sanctions, Preemptive Security and Fundamental Rights", report of the European Centre for Constitutional and Human Rights (2011), p. 12, available from <https://www.tni.org/files/eu-ecchr-blacklisted-report.pdf>. at [www.ecchr.eu](http://www.ecchr.eu).
21. See Yvonne Terlingen, "The US and the UN's Targeted Sanctions of Suspected Terrorists: What Role for Human Rights?", *Ethics and International Affairs*, vol. 24, no. 2 (Summer 2010).
22. Larissa van den Herik, "The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual", *Leiden Journal of International Law*, vol. 20 (2007), p. 799.

23. See, for example, Elin Miller, "The Use of Targeted Sanctions in the Fight Against International Terrorism – What About Human Rights?", *American Society of International Law*, vol. 97 (2003); Peter Guthrie, "Security Council Sanctions and the Protection of Individual Rights", (2004) *New York University Annual Survey of American Law*, vol. 60 (2004), pp. 491, 503-6; Watson Institute of International Studies, "Strengthening Targeted Sanctions Through Fair and Clear Procedures" (Brown University, March 2006), available from [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf); Ian Johnstone, "The UN Security Council, Counterterrorism and Human Rights" in Andrea Bianchi and Alexi Keller, eds., *Studies in International Law: Counterterrorism: Democracy's Challenge*, (Hart: Oxford, 2008); Michael Boethe, "Security Council's Targeted Sanctions Against Presumed Terrorists, The Need to Comply with Human Rights Standards", *Journal of International Criminal Justice*, vol. 6, issue 3 (2008); Clemens A. Feinaugle, "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Law for the Protection of Individuals", *German Law Journal*, vol. 9, no. 11 (2008); and Carmen K. Cheung, "The UN Security Council's 1267 Regime and the Rule of Law in Canada" Report from the British Columbia Civil Liberties Association (Ottawa, 2010), available from <http://www.statewatch.org/news/2010/oct/bccla.pdf>.
24. This followed the listing, at US request, of three Swedish nationals (Abdirisak Aden, Abdi Abdulaziz Ali and Yusuf Ahmed Ali) in November 2001. Lengthy bilateral negotiations with the U.S. resulted in delisting – in 2006.
25. UNGA, "2005 World Summit Outcome", UN Doc. A/RES/ 60/1, 24 October 2005, para. 109.
26. UNSC 5474<sup>th</sup> meeting, UN Doc. S/PV.547, 22 June 2006, pp. 4-5.
27. See, for example, Bardo Fassbender, "Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006, para. 12.12; Larissa Van den Herik, "The Security Council's Targeted Sanctions Regimes", pp. 806-07; International Commission of Jurists, "Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights" (2009), pp. 116-117, available from <http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2009-ejp-report.pdf>; Erika de Wet, "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection", in Bardo Fassbender, ed., *Securing Human Rights?: Achievements and Challenges of the UN Security Council* (Oxford: Oxford University Press, 2012); Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge: Cambridge University Press, 2011); Grant L. Willis, "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson", *Georgetown Journal of International Law*, vol. 42, Issue. 4 (2011), pp. 737, 743-45; and Lisa Ginsborg and Martin Scheinin, "You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime", *Essex Human Rights Review*, vol., 8, No. 1 (2011), pp. 11-12, 19. This commentary continues – see, for example, United Nations, Human Rights Council, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/34/61, 21 February 2017, para. 20, available from <http://www.ohchr.org/Documents/Issues/Terrorism/A-HRC-34-61.pdf>. For discussion on Article 14 (1) of the ICCPR see: Watson Institute for International Studies, "Strengthening Targeted Sanctions Through Fair and Clear Procedures" (Brown University, March 2006), p. 10, available from [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf).
28. See Rosalyn Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", *American Journal of International Law*, vol., 64, Issue 1 (1970); and Martti Koskenniemi, "The Place of Law in Collective Security", *Michigan Journal of International Law*, vol., 17 (1996), p. 455.
29. Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), p. 26.
30. For an introduction see Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (Oxford: Routledge, 2014).
31. See Antonios Tzanakopoulos, "Falling Short: UN Security Council Delisting Procedural Reforms Before European Courts", Report from the Sanctions & Security Research Program (March 2013), p. 2, available from [https://sanctionsandsecurity.nd.edu/assets/110262/falling\\_short.pdf](https://sanctionsandsecurity.nd.edu/assets/110262/falling_short.pdf).
32. Malik Asad, "Banned organization seeks unfreezing of accounts", *Dawn*, 27 April, 2016, <https://www.dawn.com/news/1254662>. ART brought subsequent litigation in the Pakistani Supreme Court on the basis that the freezing violated its fundamental rights and constitutional guarantees. That case appears to remain pending. Several other Pakistan-based entities and individuals, including Al-Akhtar Trust International, Pakistan Relief Foundation, and Hafiz Saeed have reportedly sought judicial relief in that country, but details are scant.
33. T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3544 (Court of First Instance).

34. See Administrative Appeals Board of the Turkish Council of State in *Kadi v. Prime Ministry, Int'l L. Domestic Cts* 311 (TR 2007) (22 February, 2007).
35. Swiss Federal Court's decisions in *Al Dulimi*, BGE 2A.783/2006; BGE 2A.784/2006; BGE 2A.785/2006 (23 January 2008).
36. Swiss Federal Court's decisions in *Al -Dulimi*, BGE 2A.783/2006 (2008), para. 9.1, distinguishing the case from *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union* [2006]. On latitude see further *Al-Jedda v. United Kingdom* [GC], no. 27021/28, ECHR, 2011, para. 109.
37. *Al -Dulimi*, BGE 2A.783/2006 (2008), para. 10.1.
38. United Nations Security Council resolution 1735 (2006).
39. United Nations Security Council resolution 1730 (2006).
40. United Nations Security Council resolution 1822 (2008).
41. Council of Europe Parliamentary Assembly (PACE), Resolution 1597 (2008), *United Nations Security Council and European Union blacklists*, 23 January 2008, para. 6.1.
42. UN Human Rights Committee, *Sayadi v. Belgium* (, Communication no. 1472/ 2006) (UN Doc. CCPR/C/94/D/1472/2006 (29 December 2008). See, in particular, individual opinion (partly dissenting) of Nigel Rodley, Ivan Shearer, and Iulia Antoanella Motoc, and individual opinion (dissenting) of Ruth Wedgwood).
43. *Sayadi v. Belgium* (2008), paras 10.7- 10.8, 10.13.
44. See *Sayadi v. Belgium* (2008), individual partly dissenting opinion by Sir Nigel Rodley, Mr Ivan Shearer and Ms Iulia Antoanella Motoc; individual dissenting opinion by Ms Ruth Wedgwood.
45. *Abousfian Abdelrazik v. The Minister of Foreign Affairs and the Attorney General of Canada* [2010] 1 F.C.R. 267, para. 51.
46. See Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 (Grand Chamber), which followed Case T-315/01, *Kadi v. Council* [2005] ECR II-3649 (Court of First Instance).
47. *Kadi* [2008], paras 318-326.
48. See, for example, Richard Barrett, "Al-Qaeda and Taliban Sanctions Threatened", *The Washington Institute*, 6 October, 2008, <http://www.washingtoninstitute.org/policy-analysis/view/al-qaeda-and-taliban-sanctions-threatened>.
49. Thirteenth Report of the Analytical Support and Sanctions Implementation Monitoring Team Submitted Pursuant to Resolution 1989 (2011) Concerning Al-Qaida and Associated Individuals and Entities, para. 19, UN Doc. S/2012/968 (31 December 2012); Ninth Report of the Analytical Support and Sanctions Monitoring Team, Submitted Pursuant to Resolution 1822 (2008) Concerning Al- Qaida and the Taliban and Associated Individuals and Entities, para. 16, UN Doc. S/2009/245 (13 May 2009).
50. For a discussion of this process see Katalin Tunde Huber and Alejandro Rodiles, "Counter-Terrorism and the Rule of Law: Issues of Judicial Control", *Anuario Mexicano de Derecho Internacional, Decimo Anniversario*, 2012, pp. 121-127.
51. Watson Institute for International Studies, "Strengthening Targeted Sanctions Through Fair and Clear Procedures" (Brown University, March 2006), available from [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf).
52. United Nations Security Council resolution 1904 (2009).
53. United Nations Security Council resolution 1989 (2011). See also UN Security Council resolution 2368 (2017), Annex II, para. 15. S/RES/1989 (2011).
54. Antonios Tzanakopoulos, "Theorizing or Negotiating the Law? A Response to Devika Hovell", p. 6.
55. Website of the Office of the Ombudsperson, approach and standard, available from <<https://www.un.org/sc/suborg/en/ombudsperson/approach-and-standard>> (last accessed 31 July 2017).
56. Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, UN Doc. S/2015/867, Recommendation III B. And see Letter dated 17 April 2014 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council, UN Doc. S/204/286, 21 April 2014; UNSC 7285<sup>th</sup> meeting, UN Doc. S/PV.7285, 23 October 2014; UNSC 6964<sup>th</sup> meeting, S/PV.6964, 10 May 2013; and Joint Letter Dated 7 November 2012 from the Permanent Representative of Switzerland to the UN addressed to the Secretary-General and the President of the Security Council, UN Doc. A/67/557-S/2012/805.
57. Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex "Compendium of the High-Level Review of United Nations Sanctions", Recommendation 24.
58. See Kimberley Prost, "Righting the Wrongs of UN Sanctions Listings: The Fair Process Debate", on file with the authors, p. 13.
59. Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, p. 12.

60. Website of the Focal Point, statistics on delisting requests, available from <https://www.un.org/sc/suborg/en/sanctions/delisting/de-listing-request-stats> (last accessed 7 September 2017).
61. Website of the Office of the Ombudsperson, status of cases, available from <https://www.un.org/sc/suborg/en/sc/ombudsperson/status-of-cases> (last accessed 7 September 2017).
62. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), p. 2.
63. *HM Treasury v. Ahmed*, [2010] UKSC 2.
64. UNGA, Second Report by Special Rapporteur, Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/67/396 (26 September 2016), paras 14, 20–21, available from [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a\\_67\\_396.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_67_396.pdf).
65. *Nada v. Switzerland* [GC], no. 10593/08, ECHR, 2012.
66. Case T-85/09, *Kadi v. Commission* [2010] ECR II-5177 (General Court).
67. *Kadi II*, para. 133.
68. Tzanakopoulos, "Falling Short", p. 9. See also Organization of African Unity, Declaration of the 34th Ordinary Session of the OAU Assembly of Heads of State and Government on the Dispute Between the Libyan Arab Jamahariya and the United States of America and Great Britain, 18 June 1998; and Tim Niblock, *Pariah States and Sanctions in the Middle East: Iraq, Libya, Sudan* (Boulder, CO: Lynne Rienner, 2001), pp. 46–48.
69. Prost, "Righting the Wrongs", p. 10.
70. See Devika Hovell, "A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making", *Leiden Journal of International Law*, vol. 26, Issue. 3 (2013), p. 579; and see Hovell, "Due Process in the United Nations", *American Journal of International Law* (2016), pp. 16–19.
71. See, for example, Case T 306/10, *Hani El Sayyed Elsebai Yusef v. European Commission*, not published, (General Court of EU), judgment of 21 March 2014.
72. See Opinion of Advocate General Bot in, Joined Cases C584/10 P, C593/10 P and C595/10, paras 85, 113 (19 March 2013); Opinion of Advocate General Maduro, Case C-402/05, para. 44 (16 January 2008).
73. Tzanakopoulos, "Falling Short", p. 10.
74. *Youssef v. Secretary of State for Foreign & Commonwealth Affairs* [2016] UKSC 3, paras 38, 49, 50, 58.
75. *Al-Dulimi* (2016), Concurring Opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, para. 66.
76. Case T-248/13, *Mohammed Al-Ghabra v. European Commission* [13 December 2016], not published, (General Court).
77. *Al-Ghabra* [2016], paras 55, 70, 71.
78. *Al-Ghabra* [2016], para. 179.
79. *Al-Ghabra* [2016], paras 181, 191.
80. Prost, "Righting the Wrongs", p. 10.
81. *Al-Dulimi* (2016), para. 153.
82. *Al-Dulimi* (2016), para. 143. This is contested by Judge Pinto and those joining him – see Concurring Opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, paras 9–12.
83. *Al-Dulimi* (2016), para. 145.
84. *Al-Dulimi* (2016), para. 146.
85. *Al-Dulimi* (2016), para. 147.
86. *Al-Dulimi* (2016), para. 151.
87. *Al-Dulimi* (2016), Partially dissenting opinion of Judge Ziemele, para. 15.
88. *Al-Dulimi* (2016), Dissenting opinion of Judge Nußberger, section D.
89. T-681/14, *Aisha Muammer Mohamed El-Qaddafi v. Council of the European Union*, not published, (General Court of the EU), judgment of 28 March 2017, para. 50, following *Kadi I* [2008], para. 116.
90. *El-Qaddafi* [2017], para. 58; see Case T 545/13, *Al Matri v. Council*, EU:T:2016:376, not published, (General Court of the EU), judgment of 30 June 2016, para. 146.
91. *El-Qaddafi*, paras 63–65, 74.
92. See Case C-176/13 P, *Council of the European Union v. Bank Mellat*, published in the electronic reports of cases, (CJEU), judgment of 18 February 2016; Case C 200/13 P, *Council of the European Union v. Bank Saderat Iran*, published in the electronic reports of cases, (CJEU), judgment of 21 April 2016; and Case T 181/13, *Sharif University of Technology v. Council*, published in the electronic reports of cases, (GCEU), judgment of 3 July 2014.
93. Case T-619/15, *Bureau d'achat de diamant en Centrafrique (Badica) and Kadiam v. Conseil de l'Union européenne*, ECLI:EU:T:2017:532, not published, (General Court of the EU), judgment of 20 July 2017.
94. *Badica* [2017] paras 86, 87.
95. Joined Cases T-107/15 and T-347/15, *Uganda Commercial Impex Ltd v. Council of the European Union*, ECLI:EU:T:2017:628, not published, (General Court of the EU), judgment of 18 September 2017, para. 53.

96. *Uganda Commercial Impex Ltd v. Council of the European Union* [2017], para. 62.
97. *Uganda Commercial Impex Ltd v. Council of the European Union* [2017], paras 62-64.
98. Devika Hovell, "Due Process in the United Nations", pp. 10-14.
99. In *HM Treasury v. Ahmed*, for example, Lord Rodgers describes the challenge as being to protect the Sanctions Committee from making mistakes in listing: see *HM Treasury v. Ahmed*, Lord Rodger, at paras 181-182.
100. Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, available from [https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH\\_EN.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf).
101. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), para. 51.
102. See Catherine Marchi-Uhel, "Letter to the Secretary-General," 10 July 2017, available from [https://www.un.org/sc/suborg/sites/www.un.org/sc.suborg/files/20170710\\_letter\\_to\\_secretary-general.pdf](https://www.un.org/sc/suborg/sites/www.un.org/sc.suborg/files/20170710_letter_to_secretary-general.pdf), and Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), paras 25-29.
103. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), paras 33-40.
104. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), para. 44.
105. Joy Gordon, "Due Process and the Iraq Sanctions: A Response to Devika Hovell", *AJIL Unbound*, vol. 110 (2016), p. 17.
106. Alexandra Huneus, "Introduction to Symposium on Devika Hovell, 'Due Process in the United Nations'", *AJIL Unbound*, vol. 110 (2016), p. 1.
107. Interviews; Prost, "Righting the Wrongs", p. 11.
108. Compare Hovell, "Due Process in the United Nations", pp. 10-14.
109. See in particular *Bosphorus Hava Yolari Turizm ve Ticaret Anonim Şirketi v. Ireland* (GC), App. No 45036/98, ECHR, 2005; *Waite and Kennedy v. Germany*, App. No 26083/94, ECHR, 1999; and *Beer and Regan v. Germany*, App. No 28934/95, ECHR, 1999. The European jurisprudence draws heavily on the German Solange jurisprudence: BVerfG, May 29, 1974, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratstelle für Getreide und Futtermittel*, 37 BVerfG 271, 115, 140-42 (Ger.); BVerfG, Oct. 22, 1986, *Wünsche Handelsgesellschaft v. Federal Republic of Germany*, 73 BVerfG 339 (Ger.). See further Antonios Tzanakopoulos, "The Solange Argument as a Justification for Disobeying the Security Council in the Kadi Judgments", in Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico, eds., *Kadi on Trial: A Multifaceted Analysis of the Kadi Judgment* (Oxford, United Kingdom, Routledge, 2014).
110. See *Waite and Kennedy v. Germany* (2016), paras 68-74; *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, ECHR, 12 July 2001, para. 48; *Chapman v. Belgium*, dec. no. 39619/06, ECHR, 5 March 2013, paras 51-56. And see European Court of Human Rights, "Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)", (Report, 2013), para. 51.
111. The Second Section *did* take this approach in 2013, finding that the Iraq sanctions process failed to 'equivalent protection' to Article 6 ECHR: *Al-Dulimi and Montana Management Inc. v. Switzerland* [dec.], no. 5809/08, ECHR, 26 November 2013. At appeal, the Grand Chamber in *Al Dulimi* (2016) declined to apply the 'equivalent protection' jurisprudence on the basis that there was, in fact, no conflict between Switzerland's sanctions and human rights obligations. The Grand Chamber then goes on, however, to recognize that the Focal Point arrangements do not afford "satisfactory protection" (para. 153). As Judge Pinto de Albuquerque explains at some length, the Court has, in effect, applied a "disguised" equivalent protection text: Concurring Opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov, paras 54-64). That concurring decision explicitly applies the equivalent protection text, as does the separate concurring opinion of Judge Keller (at para. 22). Compare also, in *Nada* (2012), the concurring opinion of Judge Malinverni, para. 22. And see Vassilis P. Tzevelekos, "The Al-Dulimi Case before the Grand Chamber of the European Court of Human Rights: Business as usual? Test of Equivalent Protection, (Constitutional) Hierarchy and Systemic Integration", in *Questions of International Law, Zoom-in*, vol. 38 (30 April 2017); and Assier Garrido Munoz, "License to Presume: The Compatibility Between the European Convention of Human Rights and Security Council Resolutions in Al-Dulimi and Montana Management Inc v. Switzerland", *European Papers*, vol. 1, no. 3, 22 December 2016, pp. 1105-1115.
112. See Opinion of Advocate General Maduro, Case C-402/05, para. 44 (16 January 2008); and Opinion of Advocate General Bot, Joined Cases C584/10 P, C593/10 P & C595/10, paras 85, 113 (19 March, 2013).
113. *Al-Ghabra* [2016], paras 190-194.
114. Maurizio Arcari, "Forgetting Article 103 of the UN Charter? Some perplexities on 'equivalent protection' after Al-Dulimi", *Questions of International Law, Zoom-in*, vol. 6 (2014), p. 37. And see *Bosphorus* (2005), para. 155.

115. *Al-Dulimi* (2016), Concurring opinion of Judge Keller, para. 23. See also *Youssef (Appellant) v. Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 3, paras 55-59.
116. See for example Bardo Fassbender, "Targeted Sanctions and Due Process: The responsibility of the UN Security Council ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Study commissioned by the United Nations Office of Legal Affairs, 20 March 2006.
117. Most of the relevant jurisprudence is European. There is some relevant US caselaw, though US courts tend to a) be more deferential to the executive in this area; b) see due process issues as a more minor concern: see, for example, *American Relief Agency v. Gonzales* 647 F. Supp. 2d 857, 906-08 (N.D. Ohio 2009); *KindHearts for Charitable Humanitarian Dev Inc. v. Geithner*, 647 F. Supp. 2d 857, 906-08 (N.D. Ohio 2009); *Al Haramain Islamic Foundation Inc. v. United States Department of the Treasury* 660 F 3d 1019 (2011); *Zevallos v. Obama*, CV 13-0390 (RC), 2014 WL 197864 (D.D.C. Jan. 17, 2014).
118. Joined Cases C 584/10 P, C 593/10 P and C 595/10 P, *Commission and Others v. Kadi ("Kadi II")* [2013] ECLI:EU:C:2013:518 (Court of Justice), paras 111-119, 135. See also *Al-Ghabra* [2016], para. 188.
119. *Kadi II* [2013], paras 111-112.
120. *Kadi II* [2013], para. 116
121. *Kadi II* [2013], paras 114, 115
122. *Kadi II* [2013], para. 119.
123. See UN Human Rights Committee, General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial) (23 August 2007).
124. See *Van de Hurk v. the Netherlands* [Chamber], no. 16034/90, ECHR, 19 April 1994, para. 45; *Bentham v. the Netherlands* (Plenary Court), no. 8848/80, ECHR, 23 October 1985, para. 40.
125. *Bentham v. the Netherlands* (1985), para. 40.
126. In the European human rights context, see *Okyay and Others v. Turkey* (dec.), no. 36220/97, ECHR, 12 October 2005, para.73; *Brumărescu, v. Romania* [GC], no. 28342/95, ECHR, 23 January 2001, para. 61; *Agrokompleks v. Ukraine* (dec.), no. 23465/03, ECHR, 6 October 2011, para. 148.
127. See *Sovtransavto Holding v. Ukraine* (dec.), no. 48553/99, ECHR, 25 July 2002, paras 74, 77 and 82.
128. *Al-Dulimi* (2016), Concurring opinion of Judge Pinto, para. 27.
129. *Al-Dulimi* (2016), para. 153; Concurring opinion of Judge Pinto, para. 23; and see *Al-Dulimi* (2013), para. 118; see also Briefing of the Ombudsperson at the Security Council's Open Debate on "Working Methods of the Security Council" (S/2014/725) on the topic: "Enhancing Due Process in Sanctions Regimes", 23 October 2014, p. 2.
130. Though see the Concurring opinion of Judge Pinto, para. 73.
131. Anne Peters, "The New Arbitrariness and Competing Constitutionalisms: Remarks on ECtHR Grand Chamber *Al-Dulimi*", *EJIL: Talk!*, 30 June 2016, available at <https://www.ejiltalk.org/the-new-arbitrariness-and-competing-constitutionalisms-remarks-on-ecthr-grand-chamber-al-dulimi/>
132. Case C-176/13 P, *Council of the European Union v. Bank Mellat*, published in the electronic reports of cases, (CJEU), judgment of 18 February 2016, para. 109.
133. *Bank Mellat* [2016], para. 109.
134. See *Al-Dulimi* (2016), Concurring opinion of Judge Keller, para. 24.
135. See Human Rights Comm., Communication No. 1324/2004: Australia, 1 7.2, UN Doc. CCPR/C/88/D/1324/2004 (13 November, 2006) [hereinafter Human Rights Comm., *Shafiq v. Australia*] (detention could be arbitrary if "not necessary in all the circumstances of the case and proportionate to the ends sought"); Human Rights Comm., Communication No. 560/1993: Australia, 7.2, UN Doc. CCPR/C/59/D/560/1993 (3 April, 1997) [hereinafter Human Rights Comm., *A. v. Australia*] (same if "not necessary in all the circumstances of the case"); Human Rights Comm., Communication No. 305/1988: Netherlands, 5.8, UN Doc. CCPR/C/39/D/305/1988 (15 August 1990) (same if not "reasonable in all the circumstances"); see also Jordan J. Paust, "Judicial Power to Determine the Status and Rights of Persons Detained Without Trial", *Harvard International Law Journal*, vol., 44 (2003), p. 507.
136. See, for example, *Islamic American Relief Agency v. Gonzales*, 647 F. Supp. 2d 857, 906-08 (N.D. Ohio 2009).
137. We were told that some Council members recognize that *any* over-turning of a delisting recommendation would likely do the system's credibility serious harm, and so they are likely to block any attempt to undo a delisting recommendation, unless that recommendation is manifestly erroneous.
138. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), paras 25-29, 44-47.

139. See United Nations Security Council resolution 2368 (2017), Annex II, para. 16.
140. Extradition law provides the first example in international law. In Australia, for example, it is a magistrate sitting in an administrative – and explicitly not a judicial – capacity that decides whether the person is eligible for extradition; once that is confirmed, the final decision on extradition is a political one, left to the relevant minister- see *Director of Public Prosecutions (Cth) v. Kainhofer* (1995) 185 CLR 528. Indeed, international extradition treaties (and the UN Model Law) typically recognize that political and diplomatic considerations – such as the need for comity – are factors that *must* be considered, by the executive, when making the final decision regarding whether to grant extradition (once eligibility has been confirmed). The second example can be found in International Humanitarian Law. In situations of international armed conflict and military occupation, individuals can be interned or detained without access to judicial review, so long as they have access to an independent and impartial body, competent to review the continued existence of the factual circumstances justifying the original restrictive measures. This review can be conducted by a non-judicial actor. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1978), art. 75(3); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949), arts 43, 78, 132.
141. See *Le Compte, Van Leuven and De Meyere v. Belgium* (Chamber), nos. 6878/75 and 7238/75, ECHR, 18 October 1982, para. 55; *Cyprus v. Turkey* [GC], no. 25781/94, ECHR, 12 May 2014, para. 233.
142. S/RES/2368 (2017), operative paras 60, 65.
143. Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex “Compendium of the High-Level Review of United Nations Sanctions”, Recommendation 44.
144. Group of Like Minded States on Targeted Sanctions, “Fair and clear procedures for a more effective UN sanctions system”, 12 November 2015, p. 4.
145. Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex “Compendium of the High-Level Review of United Nations Sanctions”. On the recent progress, see the Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), para. 48; and “Identical letters dated 21 June 2017 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. A/71/943-S/2017/534 (23 June 2017), Annex, pp. 10-11.
146. See Christian Wenaweser and James Cockayne, “Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice”, *Journal of International Criminal Justice*, vol. 15, Issue 2 (May 2017), pp. 3-7.
147. Prost, “Righting the Wrongs”, p. 16.
148. See, for example by Ben Emmerson: UNGA, Second Report by Special Rapporteur, Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/67/396 (26 September 2016), para. 22; and UNGA, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/65/258 (6 August 2010), para. 58; See also his model provision on judicial review of terrorist listings in UNGA, Second Report by Special Rapporteur, Ben Emmerson, on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/67/396 (26 September 2016), paras 33-35. For another forceful recent opinion see the Separate Opinion of Judge Pinto in *Al-Dulimi* [2016], paras 28-37. See also *HM Treasury v. Ahmed*, in particular: Lord Hay (Lord Walker and Lady Hale, agreeing), para. 78; and Lord Mance at para. 239. But compare Lord Rodger (with whom Lady Hale also agreed) at paras 181-182, where the judicial status of the mechanism is not identified as problematic. And see U.N. Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), U.N. Doc. CCPRJC/21/Rev.1/Add.II (31 August 2001), para. 16.
149. *Al-Dulimi* (2016), para. 126.
150. *Philis v. Greece (no. 1)* (Chamber), nos. 13780/88, 12750/87 and 14003/88, ECHR, 27 August 1991, para. 59; *De Geouffre de la Pradelle v. France* (Chamber) no. 12964/87, ECHR, 16 December 1992, para. 28; *Stanev v. Bulgaria* [GC], no. 36760/06, ECHR, 17 January 2012, para. 229.
151. *Waite and Kennedy v. Germany* (1999), paras 68-74; *Prince Hans-Adam II of Liechtenstein v. Germany* (2001), para. 48; *Chapman v. Belgium* (2013), paras 51-56. And see European Court of Human Rights, “Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)” (Report, 2013), para. 51.

152. Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Commission v. Kadi II*, ECLI:EU:C:2013:518, para. 134.
153. *Kadi II* [2013], paras 127-128.
154. UN Human Rights Committee, General Comment No. 32: Article 14 (Right to equality before courts and tribunals and to a fair trial) (23 August 2007), para. 18.
155. *Ibid.*
156. *KindHearts* (2009), para. 907-908. See also Lawyers' Committee for Civil Rights of the San Francisco Bay Area, "The OFAC List: Due Process Challenges in Designation and Delisting" (Report, July 2014), available from <<https://www.lccr.com/wp-content/uploads/The-OFAC-List-2014-FINAL.pdf>>.
157. *Kadi* [2008], paras 7, 9, 324, 338.
158. See, for example, e.g. *Al Haramain Islamic Foundation Inc. v. US Department of Treasury* 660 F.3d 1019 (2011). See also UN Human Rights Committee, General Comment No. 8: Article 9 (Right to Liberty and Security of Persons) (30 June 1982), pp. 8-9 (asserting that Article 9(2) of the ICCPR requires States to inform administrative detainees, and not just criminal detainees, of the reasons for detention).
159. See *Kadi* [2008], paras 336, 337. See further Joined Cases C-399/06 P and C-403/06 P, *Hassan and Ayadi v. Council and Commission* [2009] ECR I-11393 (Court of Justice), paras 83, 84, 89.
160. *Kadi II* [2013]; and see Case C-176/13 P, *Council of the European Union v. Bank Mellat* [2016], ECLI:EU:C:2016:96, para. 78. Compare, in the US, *KindHearts for Charitable Humanitarian Dev. Inc. v. Geithner* 647 F. Supp. 2d 857, 906-908 (N.D. Ohio 2009).
161. *Al Haramain* (2011).
162. *Kadi II* [2013], para. 113.
163. *Kadi II*, paras 99, 125-129.
164. *Global Relief Foundation v. O'Neill* 207 F Supp 2d 779 (ND Ill 2002).
165. See, for example, Eighth Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2161, para. 37 (2014), UN Doc. S/2014/553 (2014).
166. See United Nations Security Council resolution 2161 (2014), Annex II, para. 7c; and United Nations Security Council resolution 2368 (2017), Annex II, para. 7c.
167. Hovell, "Due Process in the United Nations", p. 24.
168. See, for example, UNGA, Second Report by Ben Emmerson (, Second Report on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/67/396 (26 September 2016), paras 14, 20-21, 52.
169. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), p. 3.
170. Hovell, "Due Process in the United Nations", p. 28.
171. *Kadi II* [2013], para. 121.
172. These include France, Germany, UK and US. See United Nations Security Council resolution 2368 (2017), para. 66. See also Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, p. 5.
173. Hovell, "Due Process in the United Nations", pp. 25-26.
174. *El-Qaddafi* [2017], para. 50.
175. *El-Qaddafi* [2017], paras 65, 74.
176. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), para. 44.
177. See Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, available from [https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH\\_EN.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf), p. 4.
178. United Nations Security Council resolution 1904 (2009), para. 20.
179. Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017), UN Doc. S/2017/685 (7 August 2017), para 25. And note UN Security Council resolution 2368 (2017), Annex II, para. 16.
180. UN Security Council resolution 2368 (2017), Annex II, para. 16.
181. *El-Qaddafi* [2017], para. 50
182. *El-Qaddafi* [2017], para. 59. And see judgments of T 348/13, *Kadhaf Al Dam v. Council*, not published, EU:T:2014:806, (General Court), judgment of 24 September 2014, para. 66 and the case-law cited; and T 485/15, *Alsharghawi v. Council*, EU:T:2016:520, not published, judgment of 20 September 2016, para. 30 and the case-law cited.
183. *El-Qaddafi* [2017], para. 60; *Kadhaf Al Dam* [2014], para. 67; *Alsharghawi* [2016], para. 31.
184. See for example: Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex "Compendium of the High-Level Review of United Nations Sanctions", Recommendation 20, p. 32; United Nations Interagency Working Group on Sanctions, "High Level Review of UN Sanctions", 20 October 2014, p. 28, available from [http://comcapint.com/pdfs/UN\\_IAWG\\_inputs\\_on\\_HLR\\_Sanctions\\_FINAL\(20Oct14\)](http://comcapint.com/pdfs/UN_IAWG_inputs_on_HLR_Sanctions_FINAL(20Oct14).).

- pdf ; and Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, available from [https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH\\_EN.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf): see Recommendation IE (all decisions with regard to the Al-Qaida regime must be accompanied by adequate and substantial reasons). See also Recommendation IIIA (decisions made about delisting in all non-1267 regimes must include reasons to be provided to petitioners).
185. UNSC 8018<sup>th</sup> meeting, UN Doc. S/PV.8018, 3 August 2017, p. 16.
  186. Group of Like Minded States on Targeted Sanctions, "Fair and clear procedures for a more effective UN sanctions system", 12 November 2015, available from [https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH\\_EN.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/sicherheitspolitik/Vorschlaege-gleichgesinnte-Staaten-UNO-Sicherheitsrat-CH_EN.pdf). See Recommendation I F (recommends OP be empowered to transmit humanitarian exemption request to the Sanctions Committee); and Recommendation III A (extend FP mandate to receive humanitarian exemptions for all regimes); United Nations Interagency Working Group on Sanctions, "High Level Review of UN Sanctions", 20 October 2014, p. 25, available from [http://comcapint.com/pdfs/UN\\_IAWG\\_inputs\\_on\\_HLR\\_Sanctions\\_FINAL\(20Oct14\).pdf](http://comcapint.com/pdfs/UN_IAWG_inputs_on_HLR_Sanctions_FINAL(20Oct14).pdf); and Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex "Compendium of the High-Level Review of United Nations Sanctions", Recommendation 28, p. 34.
  187. For information on UK's use of open source evidence, see: UK House of Lords, "The Legality of EU Sanctions" (House of Lords, European Union Committee Report, February 2017), paras 105-106, available from <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/102/102.pdf>. See also Matthew Happold, "Targeted Sanctions and Human Rights", in *Economic Sanctions and International Law*, Matthew Happold and Paul Eden, eds. (United Kingdom, Hart Publishing, 2016), p. 26.
  188. See Kimberley Prost, "Righting the Wrongs of UN Sanctions Listings: The Fair Process Debate", on file with the authors, p. 7.
  189. See "Final report of the Panel of Experts on Yemen", UN Doc. S/2017/81, 31 January 2017, pp. 7-8.
  190. Graduate Institute of International and Development Studies, "Sanctionsapp", available from <http://sanctionsapp.com/> (last accessed 19 September 2017).
  191. UN press statement on "Security Council Terminates Sanctions Regime on Liberia, Unanimously Adopting Resolution 2288 (2016)", available from <https://www.un.org/press/en/2016/sc12373.doc.htm> (last accessed 19 September 2017), see statement made by David Pressman.
  192. Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex, "Compendium of the High-Level Review of United Nations Sanctions", p. 13.
  193. "Report of the Informal Working Group of the Security Council on General Issues of Sanctions", UN Doc. S/2006/997, Annex, 22 December 2006, pp. 10-11.
  194. "Report of the Informal Working Group of the Security Council on General Issues of Sanctions", UN Doc. S/2006/997, Annex, 22 December 2006.
  195. See Peter Wallensteen, Carina Staibano and Mikael Eriksson, "Making Targeted Sanctions Effective: Guidelines for the Implementation of UN Policy Options" (Report on the results from the Stockholm Process on the implementation of targeted sanctions, 2003), p. 47, para. 103, available from [http://pcr.uu.se/digitalAssets/173/c\\_173853-l\\_1-k\\_final\\_report\\_complete.pdf](http://pcr.uu.se/digitalAssets/173/c_173853-l_1-k_final_report_complete.pdf); Letter dated 18 December 2006 from the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions addressed to the President of the Security Council, UN Doc. S/2006/997 (22 December 2006), Annex, p. 7, para. 9(a); and Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex "Compendium of the High-Level Review of United Nations Sanctions", p. 12.
  196. See "Identical letters dated 21 June 2017 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General and the President of the Security Council," UN Doc. A/71/943-Ss/2017/534 (23 June 2017), Annex, p. 11.
  197. Alix J. Boucher and Victoria K. Holt, "Targeting Spoilers: The Role of United Nations Panels of Experts" (Stimson Center Report No. 64, January 2009), p. 49. Some Panels of Experts, for example, the Panel of Experts on Libya and Sudan, heavily draw on the guidelines recommended by the Informal Working Group of the Security Council on General Issues of Sanctions in its report: Letter dated 18 December 2006 from the Chairman of the Informal Working Group of the Security Council on General Issues of Sanctions addressed to the President of the Security Council, UN Doc. S/2006/997 (22 December 2006), Annex, p. 7, pp. 10-11.

198. See working methods of the Panel of Experts on Libya: Letter dated 1 June 2017 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council, UN Doc. S/2017/466, 1 June 2017, p. 6. See also the working methods of the Panel of Experts on the Sudan: Letter dated 9 January 2017 from the Chair of the Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan addressed to the President of the Security Council, UN Doc. S/2017/22, 9 January 2017, p. 8.
199. "Report of the Informal Working Group of the Security Council on General Issues of Sanctions", UN Doc. S/2006/997, Annex, 22 December 2006.
200. See "Final report of the Panel of Experts on Yemen", UN Doc. S/2017/81, 31 January 2017, Annexes 1 and 2, pp. 62-66.
201. Prost, "Righting the Wrongs", p. 13.
202. *Nada* (2012), paras 187-196.
203. *Kadi* [2008], paras 6, 298.
204. *Al-Ghabra* [2016], paras 72, 74, 77; *Kadi II* [2013], paras 114, 115, 137.
205. *Al-Ghabra* [2016], paras 81, 105 discussing the European Commission's oral argument.
206. *Al-Dulimi* [2016], Concurring opinion of Judge Keller, para. 25.
207. *Al-Dulimi*, Concurring opinion of Judge Keller, para. 27.
208. 9 September 2017, Hyderabad. See Article 2(3).
209. UNSC 7285<sup>th</sup> meeting, S/PV.7285, 23 October 2014, p. 21 (Ms Jones (USA)).
210. Case T-605/13, *Anboubia v. Council* [2015], paras 51-53; Case C-193/15 P, *Akhras v. Council*, EU:C:2016:219 (Court of Justice), judgment of 7 April 2016, para. 57; *Badica and Kardiam* [2017], paras 99, 102 et seq.
211. See "Identical letters dated 21 June 2017 from the Permanent Representative of Australia to the United Nations addressed to the Secretary-General and the President of the Security Council," UN Doc. A/71/943-S/2017/534 (, 23 June 2017), Annex, Recommendation 5, p. 11.,
212. Antonios Tzanakopoulos, "Theorizing or Negotiating the Law? A Response to Devika Hovell", *AJIL Unbound*, vol. 110 (2016), p. 3.
213. *Akhras* [2016], para. 57.
214. The General Court of the European Union relies heavily on such reports in *Badica and Kardiam* [2017]: see paras 103-125.
215. See for example "Report of the Panel of Experts established pursuant to resolution 1874 (2009)", Enclosure to UN Doc. S/2012/422, 14 June 2012, p. 10: "The Panel continues to face unique challenges in the conduct of investigations and drafting of reports. Specifically, the Democratic People's Republic of Korea vehemently rejects all aspects of resolutions 1718 (2006) and 1874 (2009); consequently, the Panel has had no direct access to the State sanctioned. Moreover, there is an almost complete lack of transparency from the Democratic People's Republic of Korea towards the international community. The Panel has encountered significant difficulty in investigating potential violations that occurred before the imposition of a reporting mechanism for cases of interdiction of prohibited cargo to or from the Democratic People's Republic of Korea (June 2009), as well as other previous cases of suspicious activity."
216. *Ibid.*: "10. While observing the principles of objectivity, transparency and accountability in and for its work, the Panel strives to ensure confidentiality. Information provided to the Panel on a confidential or restricted basis is handled in a manner that both respects this basis and is consistent with the responsibilities of the Panel. " That this remains the case was confirmed by interviews for this study.
217. UN Security Council resolution 2368 (2017), 20 July 2017, paras 2-4
218. UN Security Council resolution 1483 (2003), 22 May 2003, paras 23 (a)-(b)
219. UN Security Council resolution 2206 (2015), 3 March 2015, paras 6-8.
220. See UN Security Council resolution 1718 (2006), 14 October 2006, paras 8 (d)-(e); UN Security Council resolution 2087 (2013), 22 January 2013, para. 12; UN Security Council resolution 2094 (2013), 7 March 2013, para. 27.
221. UN Security Council resolution 2231 (2015), 20 July 2015, Annex B, para. 6 (c) (DPRK).
222. See e.g. UN Security Council resolution 2339 (2017), 27 January 2017, paras 16-17 (CAR); UN Security Council resolution 2360 (2017), 21 June 2017, paras 2-3 (DRC).
223. UN Security Council resolution 2048 (2012), 18 May 2012, paras 6 (a)-(b) (Guinea Bissau).
224. UN Security Council resolution 1636 (2005), 31 October 2005, para. 3 (a).
225. See UN Security Council resolution 2093 (2013), 6 March 2013, para. 43; UN Security Council resolution 2060 (2012), 25 July 2012, paras 1-3; UN Security Council resolution 2002 (2011), 29 July 2011, para. 1; UN Security Council resolution 1907 (2009), 23 December 2009, para. 15; UN Security Council resolution 1844 (2008), 20 November 2008, para. 8 (Somalia/Eritrea); and UN Security Council resolution 2216 (2015), 14 April 2015, para. 19; UN Security Council resolution 2140 (2014), 26 February 2014, paras 17-18 (Yemen).
226. UN Security Council resolution 2206 (2015), 3 March 2015, paras 6-8 (South Sudan).

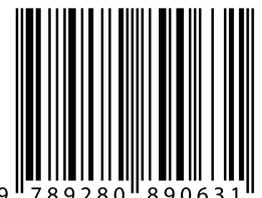
227. See Case T-43, *Hamcho and Hamcho International v. Council*, Judgment of the General Court (Seventh Chamber), 13 November 2014; Case T-653, *Jaber v. Council*, Judgment of the General Court (Seventh Chamber), 13 November 2014; Case T-564/11, *Kaddour v. Council*, Judgment of the General Court (Seventh Chamber), 13 November 2014.
228. See Case T-383/11, *Eyad Makhoul v Council* (2013) (GCEU) and Case T-203/12, *Al Chaar v. Council* (2014) (GCEU).
229. Case T-202/12, *Bouchra Al Assad v Council* (2014) (GCEU).
230. Case T-563/11 and T-592/11, *Anbouba v. Council* (2013).
231. Case C-348/12 P, *Council v Manufacturing Support & Procurement Kala Naft* (2014), para. 120.
232. Sue E. Eckert and Thomas Biersteker, "Due Process and Targeted Sanctions: An Update of the 'Watson Report'", (December 2012), p. 39, available from [http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012\\_12.pdf](http://www.watsoninstitute.org/pub/Watson%20Report%20Update%2012_12.pdf). Further research on the relationship between sanctions and mediation is being undertaken by Biersteker and others in "UN Sanctions and Mediation: Establishing Evidence to Inform Practice," an on-going project, managed by UNU-CPR in collaboration with the Graduate Institute, Geneva and Swisspeace. Results will be forthcoming in Summer 2018.
233. See Watson Institute of International Studies, "'Strengthening Targeted Sanctions Through Fair and Clear Procedures'" (Brown University, March 2006), available from [http://watsoninstitute.org/pub/Strengthening\\_Targeted\\_Sanctions.pdf](http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf)), p. 48.
234. See United Nations Interagency Working Group on Sanctions, "High Level Review of UN Sanctions", 20 October 2014, p. 25, available from [http://comcapint.com/pdfs/UN\\_IAWG\\_inputs\\_on\\_HLR\\_Sanctions\\_FINAL\(20Oct14\).pdf](http://comcapint.com/pdfs/UN_IAWG_inputs_on_HLR_Sanctions_FINAL(20Oct14).pdf), pp. 28-29.
235. Interviews with key Member States; See also Letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the United Nations addressed to the Secretary-General, UN Doc. A/69/941-S/2015/432 (12 June 2015), Annex "Compendium of the High-Level Review of United Nations Sanctions", Recommendation 48, p. 46.
236. See Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, UN Doc. A/AC.182/2017/L.2, 24 February 2017, para. 2; and Panel Discussion at the Human Rights Council on Unilateral Coercive Measures, 10th Meeting, 36th Regular Session Human Rights Council, 14 September 2017, available from <http://webtv.un.org/watch/panel-discussion-on-unilateral-coercive-measures-10th-meeting-36th-regular-session-human-rights-council/5575846618001/>. See also UN Security Council open debates on general issues regarding sanctions, specifically: UNSC 7323rd meeting, UN Doc. S/PV.7323, 25 November 2014; and UNSC 8018th meeting, UN Doc. S/PV.8018, 3 August 2017.





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ISBN 978-92-808-9063-1



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