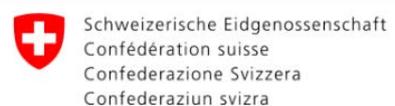


# DUE PROCESS IN UN TARGETED SANCTIONS

## OLD CHALLENGES, NEW APPROACHES

---

Conference Proceeding Paper  
March 2020



---

# Introduction

In November 2019, United Nations University Centre for Policy Research (UNU-CPR), together with the Governments of Switzerland and Belgium, hosted a two-day workshop to discuss how due process challenges continue to impact the effectiveness and legitimacy of UN sanctions, and to consider new approaches to strengthening due process in UN sanctions.

The discussion built on Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures, a 2018 UNU-CPR policy report funded by the Swiss Federal Department of Foreign Affairs. The retreat brought together Member State representatives, UN sanctions officials, practitioners as well as international legal experts to explore if or how these ideas might be realized through action in and around the Security Council.

Thematic discussions were structured around four sessions, from assessing the state of play to exploring solutions and discussing possible next steps. There was particular interest in enhancing protections beyond the counter-terrorism space, both through adjusting current working methods as well as the establishment of a formal independent review capability. This latter option, which received particular attention, would provide for the review of the evidentiary basis for initial listings as well as a review of the eligibility for retaining listings over time.

This brief note summarizes key points and outcomes from the discussions.

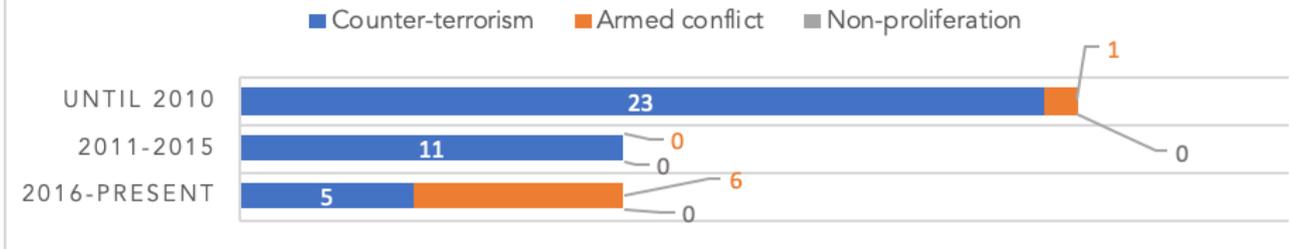
---

## Session I. UN Sanctions and Due Process: Old Challenges, New Threats

The first session provided an overview of past innovations and limitations, and the degree of vulnerability of current regimes to successful legal challenges. When UN sanctions do not comply with due process standards at the national and regional level, their effectiveness is put at risk. While this issue has often been discussed in the counter-terrorism context, the increasing number of legal challenges related to conflict-related and non-proliferation regimes are less well appreciated. Until 2016, 34 out of 35 legal challenges concerned the counter-terrorism regime. By contrast, since then, there have been five suits brought in the context of counter-terrorism sanctions regimes, but six related to armed conflict regimes.

Participants emphasized the importance of sanctions as a tool for the Security Council to achieve its strategic objectives, and the consequent necessity to avoid fragmentation in their implementation. They also pointed out that there has been significant progress in Security Council practice over the last decade, notably through the establishment of the sanctions Focal Point in 2006 and the Ombudsperson for the UN Security Council Resolution 1267 regime in 2009. While there is growing judicial acceptance that the Ombudsperson system provides an adequate review mechanism in the counter-terrorism context, the Focal Point system provides very limited due process protections in armed conflict and non-proliferation contexts.

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



Participants recognized the consequent and apparently growing risks of due process challenges in these other contexts. They contemplated lessons learned in the Security Council's handling of counter-terrorism sanctions, and considered how those lessons might be instructive for other sanctions regimes. Many participants noted that even as there may be a need for equivalent levels of protection in different sanctions regimes, different modalities may be needed to achieve that equivalence – given the different way in which information underpinning listing and relevant to delisting is acquired, shared, analysed and handled, in counter-terrorism, armed conflict and non-proliferation contexts. Concerning the characteristics of the protection individuals should be afforded, participants pointed to the four basic elements identified by Secretary-General Kofi Annan in 2006:

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 periodic review of sanctions by the Security Council.

The discussion also considered the political openings for, and obstacles to, changes to existing sanctions listing and delisting processes that might be undertaken to address these litigation risks. Participants considered the current dynamics within the Security Council, and attitudes to strengthening due process protections. Several participants noted that the United Kingdom's exit from the European Union may occasion further developments in sanctions jurisprudence, as the statutory framework for implementation of UN sanctions changes is tested in British - and potentially Strasbourg - courts.

---

## Session 2. Exploring Solutions – Strengthening the Existing Architecture

The second session focused on strengthening existing due process mechanisms. UN sanctions listing involves both political and legal considerations. Sanctions are political tools intended to achieve strategic objectives; they are not the result of criminal or civil legal process. Nonetheless, they operate within the framework of the international rule of law provided by the UN Charter and foundational norms such as the Universal Declaration of Human Rights.

Participants argued that framing sanctions listing and delisting processes as a 'trade-off' between effectiveness and legitimacy is neither helpful nor accurate. Due process protections should not be seen as infringing on the authority or discretion of the Security Council, but rather as helping to ensure the legitimacy and durability of its decisions. Due process strengthens sanctions decisions.

That said, the form that due process protections take may differ. Several participants noted legal expectations of proportionality between the intrusiveness of sanctions measures and the strategic objective the Security Council sought to achieve. Many participants noted the need to understand that objective in the context of a larger policy framework and diplomatic toolset.

With regard to the existing architecture, some participants voiced concerns about the quality of information provided by Member States and inconsistent standards of evidence used for listing proposals. Others argued, in contrast, that new listings were increasingly well-founded. They stressed that it was mostly old (or 'legacy') listings - such as those still in place from the 1990s - that have proven vulnerable to judicial review.

Others pointed out that recent European litigation deals with much younger sanctions regimes. Several participants suggested that this pointed to a need for periodic reviews of both sanctions regimes and the specific listings adopted under them.

Regarding listing criteria more generally, it was pointed out that while imprecise criteria can lead to variable interpretations and may raise risks of judicial review, a certain margin of appreciation is required from a political perspective. Moreover, it was observed that institutional learning in the Sanctions Committees is hindered by frequent turnover amongst Mission personnel. It was also noted that the contractual status of the Ombudsperson as a consultant hurts his/her independence and makes the establishment of information sharing agreements difficult.

---

## Session 3: Exploring Solutions - Context Based Non-Judicial Review Mechanisms

In a third session, participants turned their attention to new ways to strengthen due process in UN targeted sanctions. Courts have acknowledged the establishment of the Ombudsperson for the counter-terrorism regime as an important effort to ensure due process. However, in the case of the 1267 regime, the objective is to exclude the target from participation in international society, whereas sanctions regimes in the non-proliferation and armed conflict contexts are intended to achieve political leverage aimed at achieving a political settlement or denying a group a technological capacity. Participants noted that whilst having the same mechanism across regimes is desirable from a legal perspective, different modalities might be required for practical reasons, such as different degrees of sensitivity of information.

Some participants noted that due process will mean different things not only in different sanctions regime contexts, but also at different stages of the sanctions process. At the listing stage, where the target's right to be heard may be necessarily limited, due process questions frequently revolve around the source, quality and nature of evidence underpinning listing decisions.

Participants noted that while there are often complaints about the consensus requirements in committees, this modality allows member states to block listings proposals with an insufficient evidence base and helps ensure the evidentiary reliability of listing decisions. Panels of Experts also have a key role to play in ensuring due process at this stage, through respect for high standards in the gathering and documentation of information for a potential listing.

Participants suggested that the guarantees of respect for such standards could be improved, for example through strengthened guidance or training. Sanctions Committees also have an important role to play in ensuring respect for due process; some participants suggested they could take more deliberate steps in this regard, for example through periodic review of sanctions lists to ensure they do not become outdated and thus vulnerable to litigation.

Participants noted a number of challenges to ensuring due process at the delisting stage. One relates to the changing strategic purpose of a sanctions regime. As regimes evolve over time to adapt to a changing situation on the ground, the purpose of an asset freeze might move from sending a signal to a target to desist from a particular illicit activity to concerns about how to stabilize a country and control how assets flow back into an economy, altering the underlying objective of listing. Yet, this may not be reflected in the information underpinning a specific listing. As these objectives shift, different actors may have a stake in delisting decisions, raising questions about voice and the right to be heard during delisting processes.

The impacts of sanctions at the individual level can be severe and ongoing. Several participants pointed out that a review process that is not responsive can thus be rendered ineffective. There were lessons to be learned, some participants noted, from the flexibility in the modalities available to the Ombudsperson, for how responsive review could be organized in other sanctions contexts.

Participants explored a number of potential solutions to these challenges. These included extending the mandate of the Ombudsperson model to other sanctions contexts; developing bespoke forms of independent review for other sanctions regimes; and adaptations of review body models from other contexts, including international extradition and international patent review. The Ombudsperson arrangements are, arguably, superior to those of a court in this regard.

---

## Session 4: Next steps – What Can be Achieved in the Security Council, or Beyond?

The final session of the workshop focused on how the effectiveness and legitimacy of UN targeted sanctions might be advanced in the months and years ahead.

Different operational and technical innovations as suggested by some participants in a range of areas were considered, aimed at:

- improving the quality of information available during listing;
- encouraging Sanctions Committees to see their role as encompassing quality assurance of the evidence underpinning listing decisions;
- mandating a more formal review of the human rights and socioeconomic implications of sanctions listing before its consideration by a Sanctions Committee or the Security Council itself;
- fostering closer interaction between Sanctions Committees and panels of experts; and
- increasing the frequency of review of sanctions regimes and sanctions listings.

One possibility that received particular attention was that of developing a formal independent review capability available to Sanctions Committees to review the initial evidentiary basis for listing and whether this initial basis remained. This might be distinct and separate from the role of the Ombudsperson, and would not deal with the 1267 regime, but with other sanctions regimes. Participants considered how such a mechanism or mechanisms might be designed and composed, exploring how different sources of technical expertise could be incorporated into deliberations in different contexts (armed conflict, counter-proliferation, or where a listing arises from specific types of violations). Reference was made to the review mechanisms used by the European Patent Organisation as an example. While it was agreed that further work is needed to develop more detailed thinking on the design, administrative arrangements and mandate for such a mechanism, it was notable that no participant spoke against the idea. Several spoke with enthusiasm – from the more cautious to the more hearty – of the need to investigate such options.

Participants also noted a range of other developments that could impact perceptions of UN sanctions' legitimacy, which would warrant ongoing attention by the UN sanctions architecture, including:

- a steady broadening of designation criteria and Resolutions;
- the need for more deliberate and targeted communication around sanctions to achieve, sustain and protect the strategic signaling function they play, and prevent targets from using sanctions to generate a 'rally round the flag' effect;
- the growing role of companies in effective implementation of sanctions;
- potential new sanctions modalities, for example around denial of access to social media or digital asset freezes.

In considering how to address these challenges, there was consensus that the issue of due process should remain on the agenda of the Security Council. Participants remarked that there was a need for active engagement on this issue as the legitimacy of sanctions continues to be questioned. There was support from representatives of key Security Council Member States to work on finding innovative solutions, starting in 2020. Participants suggested focusing on the strengthening of the Focal Point, extending or adapting the mandate of the Ombudsperson, and further exploring the utility of other context-sensitive, independent, non-judicial review mechanisms. Representatives of the Group of Like-Minded States on Targeted Sanctions expressed their continued commitment to work on this issue.

# Annex I - Agenda

## Thursday, 21 November 2019

13:45 Departure by bus from the southeast corner from Manhattan

15:00 Arrival at the Greentree Estate's Whitney Centre, greeting from staff

16:30 Welcoming Remarks

**H.E. Mr Jürg Lauber**, Permanent Mission of Switzerland to the United Nations

**H.E. Mr Marc Pecsteen de Buytswerve**, Permanent Mission of Belgium to the UN

**Dr James Cockayne**, United Nations University Centre for Policy Research

16:45 Session 1: UN Sanctions and Due Process: Old Challenges, New Threats

*This session will provide a brief overview of the state of play in due process challenges to UN sanctions and their implementation. It will touch on past innovations, limitations, and political contexts for reform. Panellists will discuss the degree of vulnerability of current regimes to successful legal challenges, particularly those outside of the counter-terrorism context. Implications of these trends for the legitimacy and effectiveness of UN sanctions will be explored.*

Moderator: **Prof. Thomas Biersteker**, The Graduate Institute, Geneva, co-author of the Watson Report on Due Process and UN Sanctions

Presenter: **Dr James Cockayne** and **Dr Rebecca Brubaker**, United Nations University Centre for Policy Research

Discussants: **H.E. Dame Karen Pierce DCMG**, Permanent Mission of the United Kingdom to the United Nations

**ASG Stephen Mathias**, Office of Legal Affairs, United Nations

**Dr Daniel Frank**, Swiss Federal Department of Foreign Affairs, Directorate of International Law

19:00 Reception and Dinner

# Annex I - Agenda (cont.)

Friday, 22 November 2019

- 07:45 Breakfast
- 09:00 Session 2: Exploring Solutions - Strengthening the Existing Architecture
- Moderator: **Dr Celine Glutz**, Swiss Federal Department of Foreign Affairs
- Presenter: **Dr Rebecca Brubaker**, United Nations University Centre for Policy Research
- Discussants: **H.E. Mr Dian Triansyah Djan**, Permanent Mission of the Republic of Indonesia to the United Nations
- The Hon Daniel Kipfer Fasciati**, Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee
- Mr Georg Kerschishnig**, Security Council Affairs Division, Department of Political and Peacebuilding Affairs, United Nations
- 10:45 Session 3: Exploring Solutions - Context Based Non-Judicial Review Mechanisms
- Moderator: **Ms Leah Campbell**, Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee
- Presenter: **Dr James Cockayne**, United Nations University Centre for Policy Research
- Discussants: **Mr John Billow**, Permanent Mission of Sweden to the United Nations
- Dr Anna Bradshaw**, Peters & Peters (VTC)
- Ms Maya Lester QC**, Brick Court Chambers (VTC)
- 12:15 Lunch
- 14:00 Session 4: Next steps - What Can be Achieved in the Security Council, or Beyond?
- This session will consider how discussion on protecting the effectiveness and legitimacy of UN targeted sanctions might be advanced in months and years ahead.*
- Moderator: **Dr James Cockayne**, United Nations University Centre for Policy Research
- Discussants: **Prof. Thomas Biersteker**, The Graduate Institute, Geneva, co-author of the Watson Report on Due Process and UN Sanctions
- Prof. Kristen Boon**, Associate Dean and Professor of International Law, Seton Hall University
- Dr Daniel Frank**, Swiss Federal Department of Foreign Affairs, Directorate of International Law
- Mr Nicolas Fierens Gevaert**, Permanent Mission of Belgium to the United Nations
- Mr Konrad Bühler**, Department for International Law, Federal Ministry for Europe, Integration and Foreign Affairs of the Republic of Austria
- Mr David Lee**, Permanent Mission of the United States to the United Nations
- 15:15 Concluding Remarks and Departure

## Annex II - List of Participants

**Ms Tanahi Al Naser**

Permanent Mission of the State of Kuwait to the United Nations

**Mr Wadid Benaabou**

Permanent Mission of France to the United Nations

**Mr Paul Bentall**

UK Foreign and Commonwealth Office

**Prof. Thomas Biersteker**

The Graduate Institute, Geneva  
Co-author, Watson Report on Due Process and UN Sanctions

**Mr John Billow**

Permanent Mission of Sweden to the United Nations

**Mr Alexey Boguslavskiy**

Permanent Mission of the Russian Federation to the United Nations

**Prof. Kristen Boon**

Seton Hall Law School

**Dr Anna Bradshaw (VTC)**

Peters & Peters

**Dr Rebecca Brubaker**

United Nations University Centre for Policy Research

**Mr Konrad Bühler**

Department for International Law, Ministry for Europe, Integration and Foreign Affairs of the Republic of Austria

**Ms Leah Campbell**

Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee

**Ms Alexandra Cerquone**

United Nations University Centre for Policy Research

**Dr James Cockayne**

United Nations University Centre for Policy Research

**Ms Priscilla de Schatzen**

Permanent Mission of Belgium to the United Nations

**Ms Lila Dell Colle**

Permanent Mission of Germany to the United Nations

**Ms Nesrine Elmansouri**

Permanent Mission of Tunisia to the United Nations

**Mr Nicolas Fierens Gevaert**

Permanent Mission of Belgium to the United Nations

**Ms Erin Flaherty (VTC)**

United States Department of State

**Dr Daniel Frank**

Swiss Federal Department of Foreign Affairs, Directorate of International Law

**Ms Daniela Gauci**

Delegation of the European Union to the United Nations

**Dr Céline Glutz**

Swiss Federal Department of Foreign Affairs  
Ms Isis Gonsalves

**Ms Isis Gonsalves**

Permanent Mission of Saint Vincent and the Grenadines to the United Nations

**H.E. Mr Christian Guillermet-Fernández**

Permanent Mission of Costa Rica to the United Nations

**Ms Therese Johansen**

Permanent Mission of Norway to the United Nations

**Dr Georg Kerschishnig**

Security Council Affairs Division, Department of Political and Peacebuilding Affairs, United Nations

**H.E. Mr Jan Kickert**

Permanent Mission of Austria to the United Nations

**The Hon. Daniel Kipfer Fasciati**

Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee

**H.E. Mr Odd-Inge Kvalheim**

Permanent Mission of Norway to the United Nations

**H.E. Mr Jürg Lauber**

Permanent Mission of Switzerland to the United Nations

**Mr David Y. Lee**

Permanent Mission of the United States to the United Nations

## Annex II - List of Participants (cont.)

**Ms Maya Lester QC (VTC)**

Brick Court Chambers

**Ms Hayley-Ann Mark**

Permanent Mission of Saint Vincent and the Grenadines to the United Nations

**ASG David Stephen Mathias**

Office of Legal Affairs, United Nations

**Ms Niina Nyrhinen**

Permanent Mission of Finland to the United Nations

**H.E. Mr Marc Pecsteen de Buytswerve**

Permanent Mission of Belgium to the United Nations

**H.E. Dame Karen Pierce DCMG**

Permanent Mission of the United Kingdom to the United Nations

**Mr Dmitry Polyanskiy**

Permanent Mission of the Russian Federation to the United Nations

**Ms Luise Quaritsch**

United Nations University Centre for Policy Research

**Mr Vincent Rittener**

Permanent Mission of Switzerland to the United Nations

**Mr Rayyanul Muniah Sangadji**

Permanent Mission of the Republic of Indonesia to the United Nations

**Ms Nathalie Schneider Rittener**

Permanent Mission of Switzerland to the United Nations

**Mr Georg Sparber**

Permanent Mission of the Principality of Liechtenstein to the United Nations

**Mr Timothy Synhaeve**

Belgium Ministry of Foreign Affairs

**H.E. Mr Dian Triansyah Djani**

Permanent Mission of the Republic of Indonesia to the United Nations

**Mr Mungo Woodfield**

Permanent Mission of the United Kingdom to the United Nations