

Columbia University
Graduate School of Arts & Sciences
Human Rights Studies Master of Arts Program

The Evolution of the 1267 Sanctions Regime: Challenges & Prospects

Rebecca N. Marchetti

Thesis Advisor: Professor George Andreopoulos

Submitted in partial fulfillment of the
Requirements for the degree of
Master of Arts

(February 2017)

Table of Contents

Abstract	2
Introduction	3
1267 Sanctions Regime: Past to Present	5
Listing Procedures/Delisting Procedures Refined with respect to Separate Sanctions Regimes: 1988 Taliban Sanctions Regime	11
Listing Procedures/Delisting Procedures Refined with Respect to Separate Sanctions Regimes: 1267/1989/2253 Al-Qaida/ISIL Sanctions Regime	13
Human Rights Deficits	17
Human Rights Deficits: Due Process Rights	18
Human Rights Deficits: Substantive Rights	20
Human Rights Deficits: Equal Protection	22
Challenges/Limited Remedies	24
Criminal Penalties and UN Obligations	60
Conclusions	68
Bibliography	75

Abstract

Due process rights prevent the arbitrary deprivation of all other rights and liberties and ensure that the process undertaken to arrive at the determination of whether or when rights and liberties must be curtailed or deprived, is impartial and consistent. The creation and operation of special courts and due process mechanisms to combat terrorism has facilitated the perpetuation of counterterrorism measures that violate due process and further enabled the erosion of other internationally recognized human rights. Using qualitative methodology such as case analysis, legal research methods, process tracing, and comparative case studies, this thesis will evaluate the 1267 Regime's human rights drawbacks, assess the judicial and institutional challenges brought against the Regime and their limited success but will ultimately conclude that the Regime still falls short of international human rights standards. Special judicial and quasi-judicial institutions maintained for the purpose of countering terrorism, such as the 1267 Regime, are founded on due process exceptionalism, making it impossible for them to carry out the purpose for which they were created while upholding human rights. Thus, such paradigms are incompatible with human rights and must not be tolerated. However, the UN's continued enforcement of the Regime through Resolutions that interrupt states' compliance with their own human rights obligations may only serve to discredit the Regime and deter states from implementing the measures within its borders, which may nevertheless render the Regime ineffective.

Introduction

Due process rights, including the right to an effective remedy by a competent national tribunal, the right against arbitrary arrest, detention or exile, the right to a fair and public hearing by an independent and impartial tribunal, the right to the presumption of innocence until proven guilty, and the right against conviction of an offense that does not constitute one under the law are the most central to the discourse on human rights violations resulting from counterterrorism policies. They exist specifically to prevent the arbitrary deprivation of all other rights and liberties and to ensure that the process, undertaken to arrive at the determination of whether or when rights and liberties must be curtailed or deprived, is impartial and consistent. Yet a brief overview of past and present counterterrorism measures, such as intelligence gathering by torture and mass surveillance, arbitrary detention, extraordinary rendition and drone warfare, listing mechanisms such as the no fly, as well as terrorist watch and sanctions lists reveals that the deprivation of due process rights has quite possibly served as the greatest counterterrorism tool.

The creation and operation of special courts and due process mechanisms to combat terrorism has facilitated the perpetuation of counterterrorism measures that violate due process and further enabled the erosion of other internationally recognized human rights. Often lacking transparency, impartiality and oversight due to overlapping legislative, judicial, and executive functions, as well as blurred intra-judicial roles of accuser, arbiter and jury, these special courts and quasi-judicial regimes run afoul of internationally and domestically recognized human rights standards. This thesis will focus on one particular exceptional paradigm created in the name of counterterrorism and operating outside of internationally recognized human rights, the 1267 Sanctions Regime.

On October 15, 1999, the UN Security Council, following the United States' lead in passing the July 1999 Executive Order 13129 imposing sanctions on the Taliban regime, unanimously adopted Resolution 1267 as a counterterrorism measure with an eye on incapacitating the Taliban by imposing a limited air embargo and assets freeze pursuant to the Security Council's authority under Chapter VII of the UN Charter. Resolution 1267 further established a Committee to oversee the implementation of the sanctions, conduct reviews, and provide annual reports to the Security Council.

The 1267 Regime has evolved and divided as a result of numerous subsequent UN Security Council Resolutions. Today, the Regime is one that imposes targeted asset freezes, travel bans, and arms embargos on those individuals associated with either the Taliban, Al-Qaida, or ISIL, designated by their respective Committees to have met the vague and/or overbroad listing criteria. The Regime has continued to face both institutional (from within the UN) and external judicial challenges. Limited improvements have resulted from said challenges, but ultimately, those placed on the sanctions list continue to experience violations of their internationally recognized human rights and liberties as set forth in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, and further documented in certain country or region specific Covenants such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. Special judicial and quasi-judicial institutions maintained for the purpose of countering terrorism, such as the 1267 Regime, are founded on due process exceptionalism, making it impossible for such institutions to carry out the purpose for which they were created while upholding human rights.

Using qualitative methodology such as case analysis, legal research methods, process tracing, and comparative case studies, this thesis will evaluate the manner by which judicial mechanisms, such as the European Court of Justice, European Court of Human Rights and national courts, as well as non-judicial mechanisms, such as the human rights committee and special procedures, have been used to challenge the 1267 Regime. It will further assess the successful changes stemming from such challenges, but will ultimately detail how despite improvements, the Regime still falls short of international human rights standards.

In detailing both the ongoing human rights failures of the 1267 Regime despite attempts made to bring the Regime in line with international human rights and the repeated judicial challenges brought against the Regime, this work will support the position that international human rights and exceptional/extraordinary judicial/quasi-judicial regimes created to combat terrorism are mutually exclusive concepts, and therefore, 1267 and similar regimes cannot be seen as rights-compatible paradigms.

1267 Sanctions Regime: Past to Present

On October 15, 1999, shortly following the United States' passage of Executive Order 13129, the UN Security Council unanimously adopted Resolution 1267 as a counterterrorism measure with an eye on incapacitating the Taliban. "Recalling" state party obligations to prosecute terrorists, "condemning" the "sheltering and training" of terrorists in Afghan territory, and "deploring" the Taliban's protection of Usama bin Laden as well as his associates and their operation of terrorist training facilities, the Security Council, pursuant to its authority under Chapter VII of the UN Charter, imposed an asset freeze and air embargo on the Taliban, with exception to those funds or flights predetermined by the Security Council to have a humanitarian

need.¹ Resolution 1267 further established a Committee (the “1267 Committee”) comprised of all Security Council members to oversee the implementation of sanctions, conduct reviews, as well as provide reports, observations, and recommendations to the Security Council.²

On December 19, 2000, Resolution 1333 imposed an arms embargo on the Taliban and banned them from any military assistance, making exception for non-lethal materials and assistance necessary for humanitarian purposes, while at the same time subjected Al-Qaida to an asset freeze and financial embargo.³ Resolution 1333 also requested that the Secretary-General consult with the 1267 Committee in appointing an expert committee “to make recommendations” to the Security Council concerning the monitoring of sanctions, “to consult with” and “report on” Member States regarding sanction implementation and enforcement, and “to review the humanitarian implications.”⁴ Finally, this Resolution required the 1267 Committee to maintain lists of parties “designated as being associated with Usama bin Laden” and to consider “requests for exceptions” to the sanctions based on humanitarian or protective need.⁵

An improvement to the Regime came on July 30, 2001 with Resolution 1363, which called for the establishment of a New York based Monitoring Group of up to five experts who would report to the 1267 Committee, as well as a Sanctions Enforcement Support Team that would report to the Monitoring Group at least once a month in order to monitor sanction implementation, assist states bordering Taliban controlled territory, and make recommendations concerning violations of sanctions measures.⁶

¹ See UN Security Council, *Security Council Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 Oct. 1999*, 15 Oct. 1999, S/RES/1267.

² See UN Security Council, *Resolution 1267*, Para. 6.

³ See UN Security Council, *Security Council Resolution 1333 (2000) Adopted by the Security Council at its 4251st meeting, on 19 Dec. 2000*, 19 Dec. 2000, S/RES/1333, Para. 5-6, 8.

⁴ UN Security Council, *Resolution 1333*, Para. 15.

⁵ UN Security Council, *Resolution 1333*, Para 16.

⁶ See UN Security Council, *Security Council Resolution 1363 (2001) on the Situation in Afghanistan*, 30 Jul. 2001, S/RES/1363, Para. 3-5.

Resolution 1390, adopted on January 16, 2002, imposed an arms embargo on Al-Qaida and also imposed a travel ban on both Taliban and Al-Qaida unless travel was determined to be necessary for judicial process or otherwise justified.⁷ Thus, sanctions that were associated only with Afghan territories under the control of the Taliban now covered “Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them.”⁸ Resolution 1617 clarified “associated with” to mean those individuals:

participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of; Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof[.]⁹

Resolutions 1452, 1526, and 1617 were subsequent upgrades to the Regime. The first safeguarded certain funds, assets, or resources from freezing that were necessary to purchase food or housing, or pay utilities, medical expenses, taxes, insurance, professional fees, or other extraordinary expenses.¹⁰ The next created an Analytical Support and Sanctions Monitoring Team, replacing the earlier Monitoring Group, and required periodic reports to the 1267 Committee concerning Member State implementation or non-compliance of sanctions measures while also incorporating recommendations for improvement.¹¹ The last requested that proposals be submitted with a statement of case, in addition to information identifying the individual’s

⁷ See UN Security Council, *Security Council Resolution 1390 (2002) on the Situation in Afghanistan*, 16 Jan. 2002, S/RES/1390, Para. 2.

⁸ UN Security Council, *Resolution 1390*, Para. 2.

⁹ UN Security Council, *Security Council Resolution 1617 (2005) Threats to International Peace and Security Caused by Terrorist Acts*, 29 Jul. 2005, S/RES/1617, Para. 2.

¹⁰ See UN Security Council, *Security Council Resolution 1452 (2002) On the Threats to International Peace and Security Caused by Terrorist Acts*, 20 Dec. 2002, S/RES/1452, Para. 1.

¹¹ See UN Security Council, *Security Council Resolution 1526 (2004) On Improving Implementation of Measures Imposed by Paragraph 4 (b) of Resolution 1267 (1999), Paragraph 8 (c) of Resolution 1333 (2000) and Paragraphs 1 and 2 of Resolution 1390 (2002) on Measures Against Al-Qaida and the Taliban*, 30 Jan. 2004, S/RES/1526, Para. 6, 8, Annex to Resolution 1526 (2004).

association with the Taliban, Al-Qaida, or Usama bin Laden as already required by Resolution 1526. Resolution 1617 also requested that states inform listed parties of the measures against them, the procedures involved in the listing and delisting schemes, as well as the availability of exemptions.¹²

Noticeably, a mechanism for the appeal of listings was absent until 2006, when the Security Council, through Resolution 1730, requested that the Secretary-General establish a “Focal Point” to accept delisting petitions, liaise between Member States and the 1267 Committee, and inform a petitioner of his/her listing status and procedures.¹³ Petitioners could seek delisting through the Focal Point, their state of nationality, or the state in which they resided.¹⁴ Delisting requests made through the Focal Point would be forwarded to the government that designated the listed party, the government where the listed individual lived, and the one in which he/she bore citizenship for appropriate input.¹⁵ The governments’ recommendations for delisting or retention, as well as accompanying rationale, would be presented to the Focal Point or 1267 Committee.¹⁶ If none of the aforementioned governments acted within 3 months, any other member of the 1267 Committee would be able, within the next month, to recommend delisting after checking with the designating government.¹⁷ Inaction by any Committee member would result in rejection.¹⁸

Resolution 1735 affirmed that listing requests be submitted with a standardized cover sheet, a statement of case supporting that the listing criteria had been met, and any information

¹² See UN Security Council, *Resolution 1617*, Para. 4-5.

¹³ See UN Security Council, *Security Council Resolution 1730 (2006) General Issues Relating to Sanctions*, 19 Dec. 2006, S/RES/1730, Para. 1, Annex: De-Listing Procedure.

¹⁴ See UN Security Council, *Resolution 1730*, Annex: De-Listing Procedure.

¹⁵ See UN Security Council, *Resolution 1730*, Annex: De-Listing Procedure.

¹⁶ See UN Security Council, *Resolution 1730*, Annex: De-Listing Procedure.

¹⁷ See UN Security Council, *Resolution 1730*, Annex: De-Listing Procedure.

¹⁸ See UN Security Council, *Resolution 1730*, Annex: De-Listing Procedure.

that demonstrated a link between the proposed individual and an already listed party.¹⁹ Portions of the information suitable for release to listed individuals, entities, or interested states were to be specified as such.²⁰ The Resolution further outlined the following criteria to be evaluated when assessing delisting requests:

(i) whether the individual or entity was placed on the Consolidated List due to a mistake of identity, or (ii) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolution 1617 (2005); in making the evaluation in (ii) above, the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in resolution 1617 (2005), with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List.²¹

Finally, Resolution 1735 extended the Monitoring Team's mandate while outlining its duties to include analyzing reports submitted to it; providing reports and recommendations to the 1267 Committee concerning sanction implementation and non-compliance, changing terrorism threats, and the Team's activities and work; and consulting and information sharing with Member States, relevant organizations, intelligence and security services, as well as relevant UN bodies to strengthen the Regime, coordinate and enhance cooperation among parties while preventing overlap and promoting awareness.²²

Resolution 1822 directed the 1267 Committee to make a summary of listing reasons concerning the listed parties available on its website, and recommended reviewing the list yearly to ensure that the continued presence of specific listings remain justified and accurate.²³

Resolution 1904 established the Office of the Ombudsperson to review delisting requests instead of the Focal Point.²⁴ The Ombudsperson would be an individual "of high moral

¹⁹ See UN Security Council, *Security Council Resolution 1735 (2006) Threats to International Peace and Security Caused by Terrorist Acts*, 22 Dec. 2006, S/RES/1735, Para. 5, 7.

²⁰ See UN Security Council, *Resolution 1735*, Para. 6.

²¹ UN Security Council, *Resolution 1735*, Para. 14.

²² See UN Security Council, *Resolution 1735*, Para. 32, Annex II.

²³ See UN Security Council, *Security Council Resolution 1822 (2008) On Continuation of Measures Imposed Against the Taliban and Al-Qaida*, 30 Jun. 2008, S/RES/1822, Para. 13, 22.

character, impartiality and integrity with high qualifications” that would act independently and impartially “neither seek[ing] nor receiv[ing] instructions from any government.”²⁵ Delisting through the Ombudsperson was a 3-phase process, which began with a two to four month “Information Gathering” stage during which the Ombudsperson confirmed receipt of the petitioner’s delisting requests, advised the petitioner on the process, and conducted preliminary reviews of the request to ensure its sufficiency, only returning it to the petitioner when further information was necessary.²⁶ The Ombudsperson then forwarded the request to the 1267 Committee, the Monitoring Team, relevant states, and UN subsidiaries for review, input, and recommendations.²⁷ Upon completion of this stage, the Ombudsperson provided an update to the 1267 Committee and then endeavored upon a “Dialogue” phase with petitioner for a period of two to four months, during which the Ombudsperson may have requested further information from the petitioner to be sent to requesting parties, and otherwise, facilitated the information sharing process among the relevant parties and petitioner.²⁸ The Ombudsperson, together with the Monitoring Team, then provided a “Comprehensive Report” to the 1267 Committee that synthesized all relevant non-confidential information and delisting arguments, as well as described the Ombudsperson’s work throughout the process.²⁹ The third and final stage was the “Committee Discussion and Decision,” during which the 1267 Committee was given thirty days to review the request and place it on the agenda for consideration, at which time the Ombudsperson and Monitoring Team presented the report and field questions.³⁰ If the Committee granted the request, the Ombudsperson informed the petitioner and the listing was

²⁴ See UN Security Council, *Security Council Resolution 1904 (2009) On Continuation of Measures Imposed Against the Taliban and Al-Qaida*, 17 Dec. 2009, S/RES/1904, Para. 21.

²⁵ UN Security Council, *Resolution 1904*, Para. 20.

²⁶ See UN Security Council, *Resolution 1904*, Annex II, Para. 1, 4.

²⁷ See UN Security Council, *Resolution 1904*, Annex II, Para. 2, 3.

²⁸ See UN Security Council, *Resolution 1904*, Annex II, Para. 5, 6.

²⁹ See UN Security Council, *Resolution 1904*, Annex II, Para. 7.

³⁰ See UN Security Council, *Resolution 1904*, Annex II, Para. 8, 9.

removed. However, if the Committee denied the request, it was required to provide an explanation and updated listing reasons to the Ombudsperson, who in turn, sent a letter to the petitioner within 15 days regarding the decision, while respecting the confidentiality of certain information.³¹ The Ombudsperson was additionally tasked with distributing non-confidential procedural information, apprising individuals or entities of their listing status, and submitting reports of its activities to the Security Council.³²

A major organizational change to the Regime came in 2011 through Security Council Resolutions 1988 (2011) and 1989 (2011). The 1267 Consolidated List no longer covered both Taliban and Al-Qaida individuals and entities, and neither did the 1267 Committee cover sanctions for both groups.³³ Instead, the 1267 Committee became the Al-Qaida Sanctions Committee, while the newly created 1988 Committee covered listings related to the Taliban.³⁴ In 2015, Resolution 2253 expanded the 1267/1989 Al-Qaida Sanctions List to include ISIL (Da'esh) and imposed on them all sanctions that were previously imposed on Al-Qaida.³⁵

Listing Procedures/Delisting Procedures Refined with Respect to Separate Sanctions Regimes: 1988 Taliban Sanctions Regime

Security Council Resolution 2082 further refined the 1988 Taliban Sanctions Regime, once again outlining the listing/delisting procedures, but this time, only as they related to the Taliban. Under the 1988 Sanctions Regime, Member States were to consult with the

³¹ See UN Security Council, *Resolution 1904*, Annex II, Para. 11-14.

³² See UN Security Council, *Resolution 1904*, Annex II, Para. 15.

³³ See UN Security Council, *Security Council Resolution 1988 (2011) On Establishment of a New Sanctions Committee Focusing on the Threat From Those Associated With the Taliban*, 17 Jun. 2011, S/RES/1988, Para. 1, 2, 30; UN Security Council, *Security Council Resolution 1989 (2011) On Expansion of the Mandate of the Ombudsperson Established by the Resolution 1267 (1999) and the Establishment of a New Al-Qaida Sanctions List*, 17 Jun. 2011, S/RES/1989, Para. 2, 3.

³⁴ See UN Security Council, *Resolution 1988*; UN Security Council, *Resolution 1989*, Para. 2, 3.

³⁵ See UN Security Council, *Security Council Resolution 2253 (2015) On Renaming of Al-Qaida Sanctions Committee as "1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee" and the Al-Qaida Sanctions List as "ISIL (Da'esh) and Al-Qaida Sanctions List" and on Extension of the Mandate the Office of the Ombudsperson for a Period of 24 Months From the Date of Expiration of its Current Mandate in Dec. 2017*, 17 Dec. 2015, S/RES/2253, Para. 1-10.

Government of Afghanistan prior to submitting to the 1988 Committee the names of, sufficient identifying information for, and detailed statement of case concerning, those individuals or groups: “[p]articipating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; [s]upplying, selling or transferring arms and related material to; [r]ecruiting for; or [o]therwise supporting acts or activities of those designated and other individuals, groups, undertakings and entities associated with the Taliban...”³⁶ The 1988 Committee, in conjunction with the Monitoring Team and designating states, were required to publish a summary of listing reasons on the Committee’s website when the name was listed.³⁷ Within three days, the 1988 Committee was to provide notice to the Afghanistan Government, the Permanent Missions of Afghanistan, and the states where the listed is located and/or a citizen of.³⁸ The listing procedures were less adequate than the delisting procedures.

In delisting, the 1988 Committee was to remove names that “no longer meet the listing criteria” and give consideration for removal to those who have “reconciled” in accordance with the principles set forth in the 20 July 2010 Kabul Conference Communiqué.³⁹ Reconciliation under the aforementioned principles applied to those who “renounce violence, have no links to international terrorist organizations, respect the Constitution and are willing to join in building a peaceful Afghanistan.”⁴⁰ Consultation and cooperation between Member States and 1988 Committee on the one hand and the Government of Afghanistan on the other, with assistance from the UN Assistance Missions in Afghanistan where appropriate, was encouraged in order to

³⁶ UN Security Council, *Security Council Resolution 2082 (2012) On Implementation of Measures to Implement Sanctions List Concerning Individuals and Entities and Other Groups and Undertakings Associated With the Taliban*, 17 Dec. 2012, S/RES/2082, Para. 3, 11, 12, 16.

³⁷ See UN Security Council, *Resolution 2082*, Para. 13.

³⁸ See UN Security Council, *Resolution 2082*, Para. 17.

³⁹ UN Security Council, *Resolution 2082*, Para. 18.

⁴⁰ *Communiqué*. International Conference on Afghanistan, Kabul. 20 Jul. 2010, Para. 14; see also *Conference Conclusions*. The International Afghanistan Conference in Bonn. 5 Dec. 2011, Para. 18.

facilitate greater information sharing as to the following items: High Peace Council communications or Strengthening Peace Programme documentation supporting “reconciliation”, death certificates, and Afghanistan Government information demonstrating cessation of support or participation in acts threatening Afghanistan’s stability.⁴¹ If the 1988 Committee granted a delisting request, the Secretariat was to inform the Afghanistan Government and the Permanent Missions of Afghanistan, the state where the individual was located, and/or the state of nationality to assist in timely notifying the newly delisted party.⁴² Of course, if a previously delisted individual re-engaged in sanctionable acts, Member States with knowledge updated the 1988 Committee accordingly.⁴³ Further, the Afghanistan Government was to update the Committee yearly regarding those individuals delisted the previous year in accordance with the principles of reconciliation.⁴⁴

Individuals and entities who pursued delisting and who were not sponsored by Member States may have submitted their requests through the Focal Point established in Security Council Resolution 1730 (2006) and discussed above.⁴⁵ Overall, the listing and delisting processes in the 1988 Sanctions List were far more inclusive of the Afghanistan Government than the 1989 Regime was inclusive of any particular government.

Listing Procedures/Delisting Procedures Refined with Respect to Separate Sanctions Regimes: 1267/1989/2253 Al-Qaida/ISIL Sanctions Regime

Security Council Resolution 2083 further refined the 1989 Al-Qaida Sanctions Regime, outlining the listing/delisting procedures applicable to Al-Qaida. However, when Resolution 2253 expanded the authority of the 1267/1989 Al-Qaida Sanctions Committee to include ISIL

⁴¹ See UN Security Council, *Resolution 2082*, Para. 21.

⁴² See UN Security Council, *Resolution 2082*, Para. 24.

⁴³ See UN Security Council, *Resolution 2082*, Para. 22.

⁴⁴ See UN Security Council, *Resolution 2082*, Para. 22.

⁴⁵ See UN Security Council, *Resolution 2082*, Para. 20.

(Da'esh), it also re-outlined an updated version of the listing and delisting procedures as they applied to both Al-Qaida and ISIL.

According to these listing procedures, Member States were to submit listing requests for those “participating, by any means, in the financing or support of acts or activities of ISIL, Al-Qaida, and associated individuals, groups, undertakings, and entities.”⁴⁶ Requests were to include the standard form provided in Resolution 1735, a statement of explanation for the request, information pertinent to identifying the proposed party, and should have further indicated which information was releasable and whether the designating state’s identity was to remain confidential.⁴⁷ The submission of photos was encouraged, when legal, for sharing with INTERPOL.⁴⁸ Member States, relevant organizations, and the Monitoring Team were to share information with the Committee relevant to making decisions on listing requests and maintain accurate listing reasons that would be published simultaneously with a name’s inclusion on the list.⁴⁹ Within three days after publication, the Secretariat was to notify the Permanent Missions of the states where the listed was located and/or a national to facilitate relaying to the listed, the reasons and effects of his/her listing, and the availability of and procedures for delisting and exemptions.⁵⁰

Delisting may have been made through the Ombudsperson in accordance, for the most part, with the procedures set forth in Security Council Resolution 1904 and reiterated, with minor changes, in Annex II of Security Council Resolution 2253. The updated listing procedures increased the Information Gathering phase to 4 months with a 2-month extension, if needed.⁵¹

⁴⁶ UN Security Council, *Resolution 2253*, Para. 43.

⁴⁷ See UN Security Council, *Resolution 2253*, Para. 45, 46.

⁴⁸ See UN Security Council, *Resolution 2253*, Para. 47.

⁴⁹ See UN Security Council, *Resolution 2253*, Para. 49-51.

⁵⁰ See UN Security Council, *Resolution 2253*, Para. 52-53.

⁵¹ See UN Security Council, *Resolution 2253*, Annex II, Para. 1-5.

The Dialogue stage was updated to require the petitioner's signed statement of disengagement and disassociation from Al-Qaida and/or ISIL and to include meetings with petitioner where possible.⁵² The Ombudsperson could request travel and assets freeze exemptions to facilitate meetings.⁵³ The Committee's time to review the Ombudsperson's Comprehensive Report was shortened to 15 days, with no more than 30 days to consider the request.⁵⁴ Where the Ombudsperson recommended retention, the sanctions remained in effect, absent submission of a delisting request by a Committee member, which would have initiated consideration via the Committee's usual decision-making process.⁵⁵ If, however, the Ombudsperson recommended delisting, sanctions ceased 60 days after the Committee reviewed the report, unless the Committee was in consensus that the sanctions should remain.⁵⁶ If the Committee was not able to reach a consensus, the sanctions remained in place while the Chair submitted the delisting request to the Security Council for a decision within 60 days.⁵⁷ Any stage of the process may have been shortened where appropriate.⁵⁸

Member States are to participate in listing and delisting by submitting relevant information, and are additionally encouraged to submit delisting requests on behalf of deceased individuals or entities no longer in existence, and to urge individuals to petition delisting through the Ombudsperson prior to regional courts.⁵⁹ While confidentiality of Member State communications with the Committee and Member States' status as designating states is still respected, the latter is no longer assumed.⁶⁰ Resolution 1904 encouraged designating states to

⁵² See UN Security Council, *Resolution 2253*, Annex II, Para. 7.

⁵³ See UN Security Council, *Resolution 2253*, Para. 74.

⁵⁴ See UN Security Council, *Resolution 2253*, Annex II, Para. 9-11.

⁵⁵ See UN Security Council, *Resolution 2253*, Annex II, Para. 14.

⁵⁶ See UN Security Council, *Resolution 2253*, Annex II, Para. 15.

⁵⁷ See UN Security Council, *Resolution 2253*, Annex II, Para. 15.

⁵⁸ See UN Security Council, *Resolution 2253*, Annex II, Para. 3, 6, 56-57, 63-64.

⁵⁹ See UN Security Council, *Resolution 2253*, Para. 45, 60, 61, 68.

⁶⁰ See UN Security Council, *Resolution 2253*, Para. 46, Annex II, Para. 8, 18.

specify whether the Committee “may make known” the state’s identity as a “designating” state to another requesting Member State,⁶¹ whereas Resolution 2253 required designating states to specify to the Committee or Ombudsperson whether their identity as designating states “may not [be] ma[d]e known”⁶². Within three days of a name’s delisting, the Secretariat must inform the Permanent Missions of the states of residence, location and/or nationality so that the delisted may be notified.⁶³

The Focal Point, though no longer accepting delisting requests in accordance with its initial mandate as set forth in Security Council Resolution 1730, would now receive requests from individuals or entities for exemptions from financial sanctions as permitted by Resolution 1452 and from travel sanctions for religious reasons, judicial processes, or other justified purposes.⁶⁴ Exemptions are first submitted to the requester’s state of residence, then to the Focal Point, and thereafter forwarded to the Committee with relevant states, such as states of entry and travel in the case of travel ban exemption requests.⁶⁵ Decisions on asset freeze exemptions are made within 3-5 days, while those for travel exemptions do not have a specified timeframe.⁶⁶ The Focal Point may also receive and forward to the Committee for assessment with help from the Monitoring Team and relevant states, communications from delisted individuals experiencing sanctions, and those claiming mistaken identity, for a response within 60 days.⁶⁷

Exemption requests in the Al-Qaida/ISIL Sanctions Regime stand in stark contrast to those provided for in the Taliban Sanctions Regime. In the latter, exemptions from financial and asset freezes are to be submitted by Member States to the Committee while exemptions from

⁶¹ UN Security Council, *Resolution 1904*, Para. 12.

⁶² UN Security Council, *Resolution 2253*, Para. 46.

⁶³ See UN Security Council, *Resolution 2253*, Para. 73.

⁶⁴ See UN Security Council, *Resolution 2253*, Para. 10, 75-76.

⁶⁵ See UN Security Council, *Resolution 2253*, Para. 76.

⁶⁶ See UN Security Council, *Resolution 2253*, Para. 10, 74-75.

⁶⁷ See UN Security Council, *Resolution 2253*, Para. 77-78.

travel bans are welcomed from the Afghanistan Government in coordination with the High Peace Council in view of Afghanistan's peace and reconciliation process among its people.⁶⁸ The Committee is to consider travel exemption requests to locations when "necessary [for] participat[ion] in meetings in support of peace and reconciliation," so long as requests are submitted with travel document numbers, points of destination and transit, and a period of travel not to exceed nine months.⁶⁹

The implementation of sanctions pursuant to the Listing schemes above deprive individuals of internationally recognized rights without affording them certain due process guarantees prior to executing such deprivation.

Human Rights Deficits

The 1988 Taliban Sanctions Regime and 1267/1989/2253 Al-Qaida/ISIL Sanctions Regime impact a number of internationally recognized human rights found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as further documented in certain country or region specific Covenants such as the European Convention for the Protection of Human Rights and Fundamental Freedoms. One of the UN's founding principles as stated in its Charter is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."⁷⁰ The Charter reiterates this principle in both Articles 1 and 55, where it states in no uncertain terms that the UN is to promote and encourage "universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or

⁶⁸ See UN Security Council, *Resolution 2082*, Para. 8-10.

⁶⁹ UN Security Council, *Resolution 2082*, Para. 9.

⁷⁰ United Nations, *Charter of the United Nations*, 24 Oct. 1945, 1 UNTS XVI.

religion.”⁷¹

Despite improvements made over the years to mitigate the Sanctions Regime’s impact on human rights, violations still persist. The following is a summary of procedural and substantive human rights that have been at stake from the time of the Regime’s inception, without distinction as to whether the violation of said rights has since been mitigated or eradicated.

Human Rights Deficits: Due Process Rights

No one is to be arbitrarily deprived of rights or liberties.⁷² Rather, everyone has the right to be presumed innocent until he or she is granted, without undue delay, a fair and public trial before a competent, independent, and impartial tribunal in the determination of their rights.⁷³ A fair trial encompasses further minimum guarantees to an individual, such to be apprised of the case, to have the opportunity to obtain interpreters and counsel, to prepare a defense, to attend the proceedings, to confront the witnesses without being compelled to testify against him or herself, and to be protected a second trial for the same case.⁷⁴ Once a tribunal issues a decision, the individual subject to that decision must have the opportunity to appeal⁷⁵ and there must be a remedy available for any unfounded deprivation of rights.⁷⁶

The individuals and entities targeted by the Sanctions Regime are deprived of certain substantive rights through an arguably arbitrary process that does not afford them the basic minimum due process requirements typical of judicial processes considered consistent with internationally recognized human rights. The Sanction Regime’s procedural standards were

⁷¹ United Nations, *Charter of the United Nations*, Art. 1, 55.

⁷² See UN General Assembly, *Universal Declaration of Human Rights (“UDHR”)*, 10 Dec. 1948, 217 A (III), Art. 3; UN General Assembly, *International Covenant on Civil and Political Rights (“ICCPR”)*, 16 Dec. 1966, United Nations, Treaty Series, vol. 999, p. 171, Art. 9; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”)*, as amended by *Protocols Nos. 11 and 14*, 4 Nov. 1950, ETS 5, Art. 5.

⁷³ See *ICCPR*, Art. 14; *UDHR*, Art. 10, 11; *ECHR*, Art. 6.

⁷⁴ See *ICCPR*, Art. 14; *ECHR*, Protocol 7, Art. 4.

⁷⁵ See *ICCPR*, Art. 14; *ECHR*, Protocol 7, Art. 2, Art. 3.

⁷⁶ See *ICCPR*, Art. 2; *UDHR*, Art. 8; *ECHR*, Art. 13.

created by and for the UN without the engagement of the usual legislative or constitutional processes underlying the creation of rights-abiding adjudicative mechanisms applicable to the accused. The justification given by the UN Security Council is that the measures are “preventative in nature and [therefore] not reliant upon criminal standards set out under national law”⁷⁷. Listing designations are not “legal determinations *per se*, but rather political findings of association with [terrorist regimes; and] [d]esignations are intended to be temporary...[thereby] not requir[ing] the same evidentiary standards associated with criminal prosecutions. Nonetheless, the open-ended[ness] of UN sanctions have had serious punitive effects ... leading courts to find violations of due process.”⁷⁸

Since the sanctions have a punitive effect and result in violations of other substantive rights, the decision making process of imposing them should be viewed in light of minimum due process standards afforded to those facing deprivation of rights. In this respect, those parties subject to the Sanctions Regime do not have a proper avenue through which they can be heard prior to the imposition of sanctions. The presumption, therefore, is not one of innocence, but rather, of guilt, in that the Regime imposes sanctions akin to a criminal sentence upon individuals and entities, without ever having afforded them a fair and public trial before a competent, independent, and impartial tribunal. The proceedings are administrative or special in nature and only require the participation of relevant Member States, sanction Committees, and other UN established mechanisms, such as the Monitoring Team, Ombudsperson, and Focal Point. The individual or party subject to the sanctions is unable to select his/her own representative to be present at the proceedings and is not notified of the case against him/her until they are listed. Confronting witnesses is not an option as the process is one of investigation

⁷⁷ UN Security Council, *Resolution 1735*.

⁷⁸ Eckert, Sue E. and Biersteker, Thomas J. *Due Process and Targeted Sanctions: An Update of the “Watson Report.”* Rhode Island: Watson Institute for International Studies, Brown University, 2012. 4.

and data collection, shared only between Member States and UN subsidiaries, leaving the communications and much of the information, confidential, at least as it applies, to the listed party's right to know. The state designating the individual may actually keep its status as a designating state completely confidential. Thus, the decision to impose sanctions is one made through a process that takes place outside of the listed individual's or party's knowledge, awareness, or comprehension. Only after the sanctions are imposed is the listed party able to partake by appealing the decision in the form of a removal request, which although was not even possible until years after the Regime began, lacks the basic structure of a standard judicial appeal. Furthermore, once delisted, individuals and parties may be relisted through a process that remains silent as to whether past actions may contribute to the party's relisting, contributing to a lack of clarity in relation to whether there is adherence to certain double jeopardy standards internationally recognized as befitting of a sound judicial process. Finally, there is no remedy available to those erroneously placed on the sanctions list. As a result of the Regime's lack of due process safeguards, the deprivation of certain substantive rights resulting from imposition of the sanctions can be characterized as arbitrary.

Human Rights Deficits: Substantive Rights

All individuals are entitled to certain civil, political, economic, social, and cultural liberties, including the right to freedom of movement and right to leave one's country;⁷⁹ the right to own property without arbitrary deprivation of same;⁸⁰ the right to self-determination, which incorporates freely pursuing economic development, freely disposing of wealth and resources, and not being deprived of subsistence;⁸¹ the right to work and earn an adequate standard of living

⁷⁹ See *ICCPR*, Art. 12; *UDHR*, Art. 13.; *ECHR*, Protocol 4, Art. 2.

⁸⁰ See *UDHR*, Art. 17; *ECHR*, Protocol, Art. 1.

⁸¹ See *ICCPR*, Art. 1; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*"), 16 Dec. 1966, United Nations, Treaty Series, vol. 993, p. 3, Art. 1.

that includes food, clothing, housing, medical care;⁸² the right against interference with privacy, family,⁸³ home, and correspondence and against attacks upon honor and reputation;⁸⁴ and the freedom to associate⁸⁵.

A travel ban certainly restricts one's right to freely move⁸⁶ within territories or leave one's state. An asset or financial freeze directly impacts one's individual right to the property frozen⁸⁷ and arbitrarily does so without the minimum standards of due process discussed above. Financial freezes further prohibit one from disposing of his/her wealth and resources in a manner of their choosing. Sanctions in general harm one's reputation,⁸⁸ limiting their ability to procure employment, and thereby, deprive them of economic development. While certain exemptions were added to the regime to limit the restrictive nature of sanctions on funds considered necessary to secure a home, food, medical care, and the likes, the imposition of sanctions may still adversely affect one's subsistence and ability to maintain an adequate standard of living, or at the very least, the standard of living the party had maintained prior to the sanctions. The effects on the listed individual's reputation certainly trickles down into the individual's family life and privacy,⁸⁹ impacting the family's, third party civil, political, economic, cultural, and social rights, and causes undue psychological distress in certain situations, leading to eventual destruction of the family unit⁹⁰. Freedom of association is another third party right affected.⁹¹

⁸² See *UDHR*, Art. 23, 25; *ICESCR*, Art. 6, 11.

⁸³ See *ICESCR*, Art. 10.

⁸⁴ See *ICCPR*, Art. 17; *UDHR*, Art. 12; *ECHR*, Art. 8.

⁸⁵ See *ICCPR*, Art. 21, 22; *UDHR*, Art. 20; *ECHR*, Art. 11.

⁸⁶ See Fassbender, Bardo. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations." *International Organizations Law Review*, 3.2 (2006): 437-485, n. 63.

⁸⁷ See Eckert, Sue E. and Biersteker, Thomas J. *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report."* Rhode Island: Watson Institute for International Studies, Brown University, 2009. 15; Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights," n. 63.

⁸⁸ See Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights," n. 63.

⁸⁹ See Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights," n. 63.

⁹⁰ See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin, 3 Aug. 2009, A/64/211, Para. 40.

Questionable association is a crucial prerequisite to the imposition of sanctions. Thus, individuals may avoid even harmless associations with those, be it friends or family, who may be subject to scrutiny for their own associations with certain terrorist regimes. This association, specifically when it involves a husband and wife, may also come into question with respect to a wife's ownership of property or bank accounts with her husband, such that these rights may be deprived from her arbitrarily.

Human Rights Deficits: Equal Protection

All are born equal, must be seen as equal before the law, and are entitled to the applications and protections of the law, without distinction as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁹² Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination recognizes “the right of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the ... right to equal treatment before the tribunals and all other organs administering justice.”⁹³

In his 2007 Report addressing racial profiling while countering terrorism, Special Rapporteur Martin Scheinin cited the Committee on the Elimination of Racial Discrimination's call on states to ensure that counter terrorism measures do not discriminate in purpose or effect.⁹⁴ Differentiation based on national origin, ethnicity or religion must serve a legitimate aim and the treatment of individuals differentiated must be proportionate to that aim.⁹⁵ Though fighting terrorism is a legitimate aim, proportionality must still be assessed in light of whether the

⁹¹ See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin, 16 Aug. 2006, A/61/267.

⁹² ICCPR, Art. 2, 3, 14, 16, 26; UDHR, Art. 1, 2, 6, 7; ICESCR, Art. 2, 3; ECHR, Art. 14 and Protocol 12, Art. 1.

⁹³ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 Dec. 1965, United Nations, Treaty Series, vol. 660, p. 195, Art. 5.

⁹⁴ See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin, 29 Jan. 2007, A/HRC/4/26, Para. 42-58.

⁹⁵ *Report of the Special Rapporteur*, Martin Scheinin, A/HRC/4/26, Para. 42-58.

practice is a “suitable and effective means of countering terrorism” and what adverse affects flow from the practice.⁹⁶

To be suitable and effective, the practice must be broad enough to include potential terrorists but narrowly tailored to exclude those who do not pose a threat.⁹⁷ Scheinin found ethnicity, national origin, and religion to be “inaccurate indicators because the initial premise on which they are based, namely that Muslims and persons of Middle Eastern and South Asian appearance or origin are particularly likely to be involved in terrorist activities, is highly doubtful.”⁹⁸ In support of his position, he cited to a study concluding that less than half of Islamic terrorists arrested or killed in Western states were born in the Middle East, and the Report of the Official Account of the London Bombings that confirmed the absence of a consistent profile when identifying those “vulnerable to radicalization.”⁹⁹ Scheinin also posited that using ethnicity or national origin to determine religious affiliation is ineffective as “only 24 per cent of all Arab Americans are Muslims [and] [i]n the United Kingdom, where Muslim religion is often associated with ‘Asian’ appearance, only half of those belonging to this ethnic group are in fact Muslims.”¹⁰⁰ Thus, Scheinin concluded that such profiles are over-inclusive as “many of those matching [them] will not be, for example, Muslims [and] the overwhelming majority of those who are Muslims, for example, have of course nothing to do with terrorism.”¹⁰¹ Since the practice is over-inclusive, it is also unsuitable and ineffective, and therefore, disproportionate in that it affects innocent people without producing tangible counter-terrorism results.¹⁰²

⁹⁶ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

⁹⁷ *See Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

⁹⁸ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

⁹⁹ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

¹⁰⁰ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

¹⁰¹ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

¹⁰² *See Report of the Special Rapporteur, Martin Scheinin, A/HRC/4/26, Para. 42-58.*

Even if justified, the practice's adverse effects must still be assessed to determine their proportionality.¹⁰³ In this respect, Scheinin offers that profiling practices have a severe emotional toll on those affected and “translate into negative group effects [as they] single out persons for enhanced law-enforcement attention simply because they match a set of group characteristics, thus contributing to the social construction of all those who share these characteristics as inherently suspect.”¹⁰⁴ He argued that “victimization and alienation” will result in distrust of law enforcement, citing the negative impact on community relations experienced by the UK Metropolitan Police Authority for their stop-and-search powers in the form of police distrust, racial and ethnic tension, and severance with valuable sources of intelligence.¹⁰⁵

The early version of the 1267 Sanctions Regime applied to Afghan territories under Taliban control, later expanding through Security Council Resolution 1390 to include “Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them.”¹⁰⁶ The early version, therefore, used national origin and ethnicity as indicators of terrorist threat, exposing those subject to the Regime to the abbreviated version of justice due thereunder. The post Resolution 1390 Regime, seemingly unintentionally, cured the discriminatory use of unsuccessful indicators by expanding the Regime to any individuals associated with the above-referenced terrorist groups, regardless of territory. The impact of the rights outlined above has not gone unnoticed.

Challenges/Limited Remedies

As a result of the negative impact that the Regime has had and continues to have on the above-referenced human rights, non-judicial and judicial challenges have been brought against

¹⁰³ See *Report of the Special Rapporteur, Martin Scheinin*, A/HRC/4/26, Para. 42-58.

¹⁰⁴ *Report of the Special Rapporteur, Martin Scheinin*, A/HRC/4/26, Para. 42-58.

¹⁰⁵ *Report of the Special Rapporteur, Martin Scheinin*, A/HRC/4/26, Para. 42-58.

¹⁰⁶ UN Security Council, *Resolution 1390*, Para. 2.

the Regime to affect change. The non-judicial challenges often come from within the UN through the Focal Point, the Ombudsperson, the Monitoring Team, the Human Rights Council's Special Procedures, and the Human Rights Committee. Listed individuals have also utilized judicial means, such as national and regional courts, to take the Regime to task. The challenges brought by these mechanisms have been the impetus behind the progressive Security Council Resolutions passed to modify the regime in favor of a more fair, transparent, and consistent one. Overall, the current Regime is one that is far more in line with international human rights standards than the Regime of the past.

The Regime now has an Analytical Support and Sanctions Monitoring Team to monitor sanction implementation and non-compliance, as well as make recommendations for improvement of the Regime. The Resolutions have also refined listing/delisting criteria and procedures. Listing requests are now submitted with uniform cover letters, statements of case, supporting documentation, identifying information, and publicly releasable information, such as reasons for listing. Delisting is now possible through the relevant Committee, or if requested by the listed individual or party, through the Focal Point and Ombudsperson. Listed parties can also request exemptions to financial and travel sanctions. Greater information sharing is evident between the Committees, Focal Point, Ombudsperson, other UN bodies, relevant Member States, organizations, intelligence and security agencies, and the listed individuals or groups. This facilitates cooperation while preventing overlap. Confidentiality of designating states is no longer assumed, and now, such states must specify if they wish to remain confidential. More diligent efforts are made to keep listed parties apprised of their listed/delisted status, the reasons for their listing, and the status of their requests for delisting, as well as to involve them in the

delisting process by giving them an opportunity to respond and be heard. Routine list reviews are conducted even if not prompted by a party's request to keep lists updated.

Certainly, the challenges brought through the Focal Point, Ombudsperson, Monitoring Team, Human Rights Council's Special Procedures, Human Rights Committee, and national and regional courts are not the only impetuses behind the Regime's positive changes; however, their simultaneous challenges, together, served as significant contributors, and therefore, the ones focused on here.

Notably, human rights were not an issue of concern at the inception of the 1267 Sanctions Regime.¹⁰⁷ They did not come to the forefront until the post 9/11 application of targeted sanctions.¹⁰⁸ Immediately after 9/11, there was conspicuous complicity in passing nearly every designation made by the U.S. through to the List, even if they were based on unavailable classified information.¹⁰⁹ Though this resulted from a combination of "sympathy and support" for the U.S., political scientist and professor of international security Thomas Biersteker thought this "relative lack of due diligence in this rather unusual period" set the stage for subsequent legal challenges.¹¹⁰ However, this uptick in caseload first brought with it an effort to secure commensurate resources for the 1267 Committee, particularly in the form of the Analytical Support and Sanctions Monitoring Team created in 2004 pursuant to Resolution 1526.¹¹¹

The Monitoring Team would submit periodic reports to the 1267 Committee concerning Member State implementation or non-compliance of sanctions measures, and incorporate

¹⁰⁷ See Biersteker, Thomas J. "Targeted Sanctions and Individual Human Rights." *International Journal* 65.1 (Winter 2009-10): 99-117. 101.

¹⁰⁸ See Biersteker. "Targeted Sanctions and Individual Human Rights," 101.

¹⁰⁹ See Biersteker. "Targeted Sanctions and Individual Human Rights," 102; Foot, Rosemary. "The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas." *Human Rights Quarterly* 29.2 (May 2007): 489-514. 498; Rosand, Eric. "The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions." *The American Journal of International Law* 98.4 (Oct. 2004): 745-763. 749.

¹¹⁰ Biersteker. "Targeted Sanctions and Individual Human Rights," 102.

¹¹¹ See Foot, 493.

recommendations for improvement. Today, the Monitoring Team greatly assists the 1988 and 1989 Committees, as well as the Ombudsperson, in the listing and delisting processes, issues reports on Member State implementation, non-compliance with sanction measures, and the changing terrorist threat, makes recommendations for improvement to the Regimes incorporating information gathered from outside organs, UN subsidiaries, legal, and academic scholars, contributes to the information sharing and transparency among, and consults with UN subsidiaries, relevant states, outside organizations, and listed parties. Perhaps most significant is that the Team's reports summarize litigation brought by individuals in regional and national courts that challenge the Regime, and have therefore, greatly contributed to the discussion of human rights in the context of the Sanctions Regime and marked improvements to the Regime.

Such litigation commenced by individuals and parties grieved as a result of the 1267 Sanctions Regime played a major role in altering the landscape of the Regime. It forced relevant players in the Regime to recommend positive changes in order to avoid the risk that "state criticism of the 1267 Committee [would] taint...[its] work, undermining global support for its objectives."¹¹² Al Barakaat International and Yassin Abdullah Kadi brought the most significant judicial challenges. Al Barakaat argued that the Council of the European Union ("EU Council") did not examine the underlying reasons for imposition of financial sanctions, thereby violating the claimant's right to a fair trial.¹¹³ Kadi similarly argued that the EU Council and Commission of the European Communities violated his right to fair trial, as well as the principle of proportionality and his rights to property and judicial review, by imposing sanctions against him of which he could not challenge the evidentiary basis.¹¹⁴ In September 2005, the Court of First

¹¹² Foot, 505.

¹¹³ See UN Security Council, *Second Report of the Analytical Support and Sanctions Monitoring Team*, 15 Feb. 2005, S/2005/83, Annex II, Para. 1-13.

¹¹⁴ See *Second Report of the Team*, S/2005/83, Annex II, Para. 1-13.

Instance of the European Communities denied the claims, affirmed the sanctions, and upheld the superseding authority of the Security Council's Chapter VII powers,¹¹⁵ reasoning that asset freezes did not violate fundamental rights or proportionality because they were precautionary, temporary, important to fighting terrorism, and permitted exemptions.¹¹⁶ The Court added that listed individuals were not due Security Council hearings as they could submit delisting through national authorities to forward to the Committee and that the court had already completely reviewed their claims.¹¹⁷ The court noted, however, that "courts could review Security Council decisions to ensure that they comply with internationally recognized fundamental norms of human rights from which neither Member States nor the United Nations may derogate."¹¹⁸ The claimants appealed to the Court of Justice of the European Communities ("ECJ").¹¹⁹ Though Kadi and Al Barakaat would carry on for years, their initial challenges set the precedent for regional and national judicial review of measures implemented by states to give effect to Security Council Resolutions pertaining to sanctions, and indirectly charged certain UN Security Council resolutions with violating fundamental rights.¹²⁰ Their cases were the driving force behind many subsequent challenges that would combine to transform the Sanctions Regime.

In another case, Ireland resident Chafiq Ayadi claimed that the EU Council misused its powers by freezing his assets, arguing that Security Council sanctions did not impose a duty on Member States to apply them.¹²¹ He further claimed that the sanctions violated principles of

¹¹⁵ See UN Security Council, *Fourth Report of the Analytical Support and Sanctions Monitoring Team*, 10 Mar. 2006, S/2006/154, Annex, Para. 4-5.

¹¹⁶ See *Fourth Report of the Team*, S/2006/154, Annex, Para. 6-7.

¹¹⁷ See *Fourth Report of the Team*, S/2006/154, Annex, Para. 6-7.

¹¹⁸ *Fourth Report of the Team*, S/2006/154, Annex, Para. 4-5.

¹¹⁹ See *Fourth Report of the Team*, S/2006/154, Annex, Para. 6-7.

¹²⁰ See Michaelsen, Christopher. "Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees." *Melbourne Journal of International Law* 10.1 (May 2009): 329-345, 343.

¹²¹ See *Second Report of the Team*, S/2005/83, Annex II, Para. 5.

subsidiarity and proportionality, as well as respect for human rights.¹²² UK resident Faraj Hassan challenged his asset freeze, claiming the EU Council's violations of fundamental rights to property, family, privacy and a fair hearing, as well as the principle of proportionality.¹²³ The Court of First Instance of the European Court of Justice dismissed their claims in 2006, upholding the sanctions, in part, on the availability of exemptions and delisting procedures.¹²⁴ However, the Court noted that national courts must afford listed individuals the opportunity to argue their case, must present their cases to the Sanctions Committee, may not refuse to do so based on lack of evidence due to confidentiality restrictions, and can be sued for their wrongful refusal.¹²⁵

Nabil Sayadi and his wife Patricia Vinck, both officers of the European branch of Global Relief Foundation, who were listed as a result of the organization being listed, brought suit against Belgium to request that it seek their delisting by the UN and EU.¹²⁶ In 2005, the Brussels Court of First Instance concluded that Brussels did not have jurisdiction over UN decisions and could only delist if the UN and EU had already done so.¹²⁷ The court ultimately determined that the claimants only requested that Belgium submit a delisting request to the UN, and therefore, it obligated Belgium to comply as the couple had not been indicted since their 2003 listing.¹²⁸ In December 2005, the criminal case and related investigation against the couple was dismissed by judicial decision.¹²⁹ As of March 2006, the Sanctions Committee had not acted on Belgium's

¹²² See *Second Report of the Team*, S/2005/83, Annex II, Para. 5.

¹²³ See *Second Report of the Team*, S/2005/83, Annex II, Para. 6.

¹²⁴ See UN Security Council, *Fifth Report of the Analytical Support and Sanctions Monitoring Team*, 20 Sept. 2006, S/2006/750, Annex III, Para. 2-3.

¹²⁵ See *Fifth Report of the Team*, S/2006/750, Para. 43.

¹²⁶ See UN Security Council, *Third Report of the Analytical Support and Sanctions Monitoring Team*, 9 Sept. 2005, S/2005/572, Annex, Para. 3-4.

¹²⁷ See *Third Report of the Team*, S/2005/572, Annex, Para. 3-4.

¹²⁸ See *Third Report of the Team*, S/2005/572, Annex, Para. 3-4.

¹²⁹ See *Fourth Report of the Team*, S/2006/154, Annex, Para. 3.

delisting petition,¹³⁰ demonstrating that a national or regional merits-based review does not necessarily pressure the Sanctions Committee to act on a delisting request¹³¹. These cases explicitly demonstrate that there was a need for a review mechanism in the Regime and that there were human rights issues that necessitated a complete inventory of the current Regime, which would come courtesy of Martin Scheinin, the first Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. Scheinin was appointed in 2005, some six years after the Sanctions Regime was first established and around the same time as the judicial challenges detailed above. He served for eleven years until his replacement by Mr. Ben Emmerson on August 1, 2011. Over the eleven years, these special rapporteurs worked with governments, UN bodies, outside agencies, and other relevant actors to gather information and make recommendations via periodic reports to the Human Rights Council and General Assembly concerning the human rights issues posed by the Sanctions Regime. Martin Scheinin's 2006 report is among the most robust in its criticism of the 1267 Regime. In that report, Scheinin highlighted the need for a uniform definition of terrorist acts, groups, and entities, as well as a clear pronouncement of what constitutes the link between a terrorist regime and terrorist act in order to be listed.¹³² Such parameters would eliminate the varying interpretations of what it meant to be associated with, involved in, or provided support to a terrorist regime.¹³³ Scheinin also stressed the importance of conducting periodic reviews to ensure that listings remained temporary measures and that retained listings were based on an evidentiary finding that they remained necessary.¹³⁴ Such review prevents temporary sanctions

¹³⁰ See *Fourth Report of the Team*, S/2006/154, Annex, Para. 3.

¹³¹ See De Wet, Erika. "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protections." *Securing Human Rights? Achievements and Challenges of the UN Security Council*. Ed. Bardo Fassbender. New York, NY: Oxford UP, 2011. 141-71. 160.

¹³² See *Report of the Special Rapporteur, Martin Scheinin*, A/61/267, Para. 32.

¹³³ See *Report of the Special Rapporteur, Martin Scheinin*, A/61/267, Para. 32.

¹³⁴ See *Report of the Special Rapporteur, Martin Scheinin*, A/61/267, Para. 34.

from becoming open-ended or permanent, and effectively, criminal punishment, the imposition of which would necessitate different procedures and standard of proof.¹³⁵ Scheinin's report cited a number of procedural safeguards basic to operating the Regime in accordance with human rights, among them, the right to be informed of inclusion on the list and the grounds therefor, as such are prerequisites to availing oneself of the right to be heard on his or her case.¹³⁶ The right to be informed extends to apprising the listed of avenues for delisting and exemptions.¹³⁷ Access to evidence is tantamount to appealing inclusion and should be provided even where evidence is classified through alternative means such as special counsel.¹³⁸ When suggesting that there be the right to judicial review at least by the states applying sanctions, as none was available at the international level, Scheinin made reference to the cases of *Kadi* and *Al Barakaat* to demonstrate that there has been judicial review at the national level.¹³⁹ In the cases of wrongful listings, he proposed that a remedy such as restitution be made available to those affected.¹⁴⁰ Finally, humanitarian exemptions to asset freezing must be available to sustain organizations existing to protect basic economic and social rights.¹⁴¹

The Security Council did not immediately address all of Scheinin's 2006 report recommendations, but it did hear his calls, as well as the repeated calls of the regional and domestic courts involved in *Kadi* and *Al Barakaat*, *Ayadi* and *Hassan*, and *Sayadi* and *Vinck*, for an independent review or appeal mechanism. Notably, the Security Council responded by adopting Resolution 1730 in December 2006, which created the Focal Point mechanism that would receive delisting requests and act as the liaison between Member States and the 1267

¹³⁵ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 34, 35.

¹³⁶ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 38.

¹³⁷ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 38.

¹³⁸ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 38, 39.

¹³⁹ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 39.

¹⁴⁰ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 40.

¹⁴¹ See *Report of the Special Rapporteur, Martin Scheinin, A/61/267*, Para. 41.

Committee. The Focal Point would also keep the petitioner apprised of his/her listing status, a specific request made by Scheinin in his 2006 report. Also passed that same month was Resolution 1735, directly responding to concerns raised by both *Kadi* and *Ayadi*, as well as Scheinin, over access to evidence – a prerequisite to both a sound defense and delisting request that was not afforded to the petitioners in *Kadi* and *Ayadi*. Resolution 1735 required that listing proposals be submitted with a standardized cover sheet, a case statement with noted publicly releasable portions, and documentary or informational support that a proposed individual meets the listing criteria. These requirements also somewhat satisfied Scheinin's expressed desire for uniformity in what constitutes terrorist groups and sufficient links to terrorist acts. Resolution 1735 also reflected Scheinin's advice to keep listings temporary through periodic review by incorporating, as criteria to be considered in delisting requests, whether the listed party no longer meets listing criteria, such that he/she is deceased or dissociated. Resolution 1822, adopted in June 2008, went a step further in achieving Scheinin's vision for periodic review by requiring annual review of all those listed to confirm that they still meet the criteria. Resolution 1822 also made an additional stride towards achieving the access to information sought by the petitioners in *Kadi* and *Ayadi*, as well as by Rapporteur Scheinin, by calling for internet publishing of listing reason summaries.

Developments occurring post Resolution 1822 further contributed to the transformation of the Regime. In August of 2008, Scheinin released another report, confirming that the Regime's grave impact on certain due process rights resulting from indefinite asset freezing without a right to be delisted amounts to criminal punishment.¹⁴² It follows that certain minimum rights must be afforded throughout the listing process, such as the right to be informed

¹⁴² See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 6 Aug. 2008, A/63/223, Para. 16.

of the case, the right to a timely hearing and an independent review, the right to counsel, and the right to an effective remedy.¹⁴³ If not provided at the UN level, Scheinin urged that there must be domestic judicial review.¹⁴⁴

Shortly thereafter, in September 2008, the ECJ issued its decision in the *Kadi* appeal, “arguably the most significant legal development to affect the regime since its inception,” which held that the EU had violated claimants’ rights to be heard and to effective judicial protection by withholding the evidentiary basis for the sanctions, thereby precluding their defense.¹⁴⁵ The court further annulled the regulation that implemented the asset freeze against the claimants.¹⁴⁶ Thereafter, the Committee’s listing reasons were communicated to the claimants, the claimants commented, and the European Commission reviewed those comments and enacted a new regulation to continue the sanctions against the claimants.¹⁴⁷ The claimants again challenged the sanctions.¹⁴⁸ Later in October 2008, the Civil Division of the Court of Appeal for England and Wales issued a decision in line with the ECJ’s in *Kadi* concerning a listed individual in which it held that the UK must conduct a merits-based review of listing reasons when the UK had designated the individual for listing.¹⁴⁹

Finally, in December 2008, the Human Rights Committee (“HRC”) issued a decision on a complaint brought by Sayadi and Vinck while they awaited the Sanctions Committee’s decision on Belgium’s delisting request, in which the HRC concluded that Belgium had violated certain articles of the ICCPR, namely Article 12, which guarantees freedom of movement, and

¹⁴³ See *Report of the Special Rapporteur, Martin Scheinin, A/63/223*, Para. 16.

¹⁴⁴ See *Report of the Special Rapporteur, Martin Scheinin, A/63/223*, Para. 16.

¹⁴⁵ UN Security Council, *Ninth Report of the Analytical Support and Sanctions Monitoring Team*, 13 May 2009, S/2009/245, Para. 19 and Annex I, Para. 2.

¹⁴⁶ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 2.

¹⁴⁷ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 2.

¹⁴⁸ See UN Security Council, *Tenth Report of the Analytical Support and Sanctions Monitoring Team*, 2 Oct. 2009, S/2009/502, Annex I, Para. 2.

¹⁴⁹ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 10.

Article 17, which guarantees the right to privacy that incorporates a right against attacks on honor and reputation.¹⁵⁰ The HRC reasoned that travel restrictions were no longer justified upon conclusion of the investigation and after petitioners' names and identifying information had been published in connection with terrorist sanctions.¹⁵¹ Sayadi and Vinck were finally delisted in 2009 – a move that demonstrated “recognition of the Human Rights’ Committee’s ability to conduct indirect quasi-judicial review over the consequences of [Security Council] listing,” where a Member State to the ICCPR significantly contributed to said listing.¹⁵² Perhaps most importantly, the case illustrated that even though Belgium implemented sanctions measures in accordance with international law and the primacy of UN Security Council resolutions pursuant to UN Charter’s Article 103,¹⁵³ and had submitted the delisting request when prompted, the HRC could still find it in violation of petitioners’ human rights, as it is Belgium’s obligation to strike a balance with their own obligations to international covenants and national constitutions.¹⁵⁴ Here, Belgium’s submission of a delisting request indicated that the travel restrictions were no longer necessary, and though it may not have been within Belgium’s authority to remove petitioners from the list, it could have refrained from submitting their names to the Sanctions Committee before the outcome of the national investigation.¹⁵⁵ “[The] decision was widely received as an authoritative and damning commentary on the inadequacy and illegitimacy of the UN blacklisting regime.”¹⁵⁶

¹⁵⁰ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 6.

¹⁵¹ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 6.

¹⁵² Scheinin, Martin. “Is the ECJ Ruling in Kadi Incompatible with International Law?” *Yearbook of European Law* 28.1 (2009): 637-53, 639.

¹⁵³ See United Nations, *Charter of the United Nations*, Art. 103.

¹⁵⁴ See Eckert and Biersteker. *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report,”* 45; Keller, Helen, and Fischer, Andreas. “The UN Anti-terror Sanctions Regime Under Pressure.” *Human Rights Law Review* 9.2 (2009): 257-66.

¹⁵⁵ See Eckert and Biersteker. *Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report.”* 45; Keller and Fischer, 257-66.

¹⁵⁶ Sullivan, Gavin and Hayes, Ben. *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights.*

By likening the sanctions to criminal penalties due to their severity, impact, and indefinite nature, Scheinin was effectively forcing a solution, given that criminal penalties necessitate human rights befitting of fair criminal process and review, if not at the UN level, then domestically, whereas temporary administrative measures do not necessarily. The ECJ in *Kadi* found violations of certain due process rights and the Civil Division of the Court of Appeal for England and Wales followed the ECJ'S lead by confirming the existence of regional and national responsibility in providing merit-based reviews of listings. Sayadi and Vinck demonstrated that the HRC could still find a Member State to be in violation of human rights, even where it rightfully follows the primacy of UN decisions, and therefore, the HRC acted as yet another form of review where one was absent at the UN level.

These challenges were reminiscent of those brought before the Focal Point had been instituted, demonstrating that the Regime continued to lack an adequate review mechanism despite the Focal Point's implementation, which in turn, forced listed individuals to continue seeking alternative avenues for review. The Focal Point's relative failure in carrying out its mandate only strengthened the credence of the challenges. Up until 2009, the Focal Point had received delisting requests for removal from the 1267 Sanctions List from 18 individuals granting only 3, and 22 entities, granting 17.¹⁵⁷ The 1267 Committee delisted 2 individuals and 2 entities in separate processes while the Focal Point review was still underway.¹⁵⁸ In apparent response to the aforementioned, the Security Council passed Resolution 1904 in 2009, creating the Office of the Ombudsperson, which would independently and impartially review delisting requests through a 3-stage process incorporating information gathering, time limits, petitioner

Berlin: European Center for Constitutional and Human Rights, 2009. 57.

¹⁵⁷ See "De-listing Requests | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 04 Oct. 2016. <<https://www.un.org/sc/suborg/en/sanctions/delisting/de-listing-request-stats>>

¹⁵⁸ See "De-listing Requests | United Nations Security Council Subsidiary Organs."

involvement and notification, and collaboration with states and other UN bodies.

In its current form, the Ombudsperson is tasked with receiving delisting requests from those on the 1267/1989/2253 Sanctions List. Through Resolution, Member States are requested to urge individuals to submit their delisting requests first through the Ombudsperson prior to regional courts. The Office of the Ombudsperson has procedurally improved and somewhat standardized the delisting process. The delisting process takes place in three phases as discussed above, the information gathering stage, the dialogue and report stage, and finally, the committee discussion and decision.¹⁵⁹ Delisting requests must be submitted with certain standardized information.¹⁶⁰ The Ombudsperson assesses the requests according to “whether there is sufficient information to provide a reasonable and credible basis for the listing.”¹⁶¹ The Ombudsperson devised this standard of review after considering the Security Council’s intention “that the [sanctions] measures...are preventative in nature and are not reliant upon criminal standards set out under national law,”¹⁶² and concluding that the standard applicable in criminal proceedings is not appropriate as “sanctions are not intended to punish for criminal conduct. Rather, [they aim] to hamper access to resources in order to impede ... and incapacitate threat[s] ...and to encourage a change of conduct.”¹⁶³ In assessing the information, the Ombudsperson must draw conclusions as to the petitioner’s association with and/or membership in the terrorist entities, the petitioner’s actions and/or acts of support, the petitioner’s dissociation, where

¹⁵⁹ See “Procedure | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/procedure>>

¹⁶⁰ See “For Future Petitioners | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/application>>

¹⁶¹ “Approach and Standard | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/approach-and-standard>>

¹⁶² “Approach and Standard | United Nations Security Council Subsidiary Organs.” citing UN Security Council, *Resolution 1989*.

¹⁶³ “Approach and Standard | United Nations Security Council Subsidiary Organs.”

applicable, and the petitioner's mental state.¹⁶⁴ The mental element requirement to retain a listing need not be one of specific intent, rather, "when considering an individual's acts of support," it is sufficient that "the individual knew or should have known" that his acts were in support.¹⁶⁵

The petitioner is kept apprised of the delisting request's status throughout the process.¹⁶⁶ To date, there are 6 cases pending in the Ombudsperson's Office, while 67 cases have already been considered.¹⁶⁷ Of those 67, there have been 13 denials, 15 delistings, 1 withdrawal by petitioner, and 1 amended case.¹⁶⁸ Some of these cases have more than one individual/entity involved.¹⁶⁹ The timeline summaries and determinations of each case are available on the Ombudsperson Office's website.¹⁷⁰ The process, however, continues to lack transparency and certain fair procedures consistent with international human rights.

The Ombudsperson's Office has issued 12 reports since 2011, each detailing issues and/or impediments evident in the listing/delisting process, periodic improvements, and recommendations towards achieving a more transparent, just, and procedurally sound Regime. In its very first report, the Ombudsperson addressed the notion of due process, a notion that would be revisited in later reports. Now, the Ombudsperson's challenges to the Regime by way of its reports would accompany and intensify those of the Special Rapporteur, judicial, and quasi-judicial bodies. However, the creation of Ombudsperson's Office in and of itself as a

¹⁶⁴ See "Approach to Analysis, Assessment and Use of Information | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/assessment-information>>

¹⁶⁵ "Approach to Analysis, Assessment and Use of Information | United Nations Security Council Subsidiary Organs."

¹⁶⁶ See "Procedure | United Nations Security Council Subsidiary Organs."

¹⁶⁷ See "Status of Cases | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/sc/ombudsperson/status-of-cases>>

¹⁶⁸ See "Status of Cases | United Nations Security Council Subsidiary Organs."

¹⁶⁹ See "Status of Cases | United Nations Security Council Subsidiary Organs."

¹⁷⁰ See "Status of Cases | United Nations Security Council Subsidiary Organs."

remedy to the lacking review mechanism did not eradicate all of the procedural pitfalls present in the Sanctions Regime prior to 2009.

In a 2010 decision concerning the cases of Hani al-Sayyid al-Sebai and Mohammed al Ghabra, the Supreme Court of the UK, though welcoming the newly created Ombudsperson's Office, determined it to be an insufficient judicial remedy thereby rendering the order implementing sanctions against al-Sebai and al Ghabra, *ultra vires*, or beyond the government's authority.¹⁷¹

Scheinin's next substantial report would also arrive in 2010. In it, Scheinin expressed concern that Resolution 1390 transformed the Sanctions Regime from one that dealt in temporary emergency measures to address threats to peace and security to one that yields sanctions unlinked to territories, unlimited in time, and perhaps beyond the Security Council's Chapter VII powers.¹⁷² Scheinin, like the UK Supreme Court in the *al-Sebai* and *al Ghabra* cases, found the Ombudsperson's Office to be insufficient. He opined that the Regime still lacked procedural fairness and an effective mechanism to challenge decisions that imposed indefinite asset freezes comparable to criminal penalties.¹⁷³ The delisting scheme did not meet the requirements of "a fair and public hearing by a competent, independent and impartial tribunal established by law."¹⁷⁴ The Ombudsperson could not overturn the Committee's listing decision, could not make its own recommendations, and its access to information was dependent on state willingness to disclose.¹⁷⁵ The delisting process was confidential, lacked transparency with respect to providing the Ombudsperson's report and other information to the petitioner, and the

¹⁷¹ See UN Security Council, *Eleventh Report of the Analytical Support and Sanctions Monitoring Team*, 13 Apr. 2011, S/2011/245, Annex, Para. 9.

¹⁷² See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin, 6 Aug. 2010, A/65/258, Para. 52.

¹⁷³ See *Report of the Special Rapporteur*, Martin Scheinin, A/65/258, Para. 53, 54.

¹⁷⁴ *Report of the Special Rapporteur*, Martin Scheinin, A/65/258, Para. 56.

¹⁷⁵ See *Report of the Special Rapporteur*, Martin Scheinin A/65/258, Para. 56.

decisions were politically determined by the Security Council rather than based in judicially reviewed evidence.¹⁷⁶ Ultimately, the Ombudsperson could not qualify as a tribunal without having decision-making authority, and therefore, the Security Council was operating in a judicial or quasi-judicial capacity, yet lacked the fundamental procedures befitting of the right to fair trial as known to and practiced by other rights-abiding judicial and quasi-judicial institutions around the world.¹⁷⁷ In this respect, the Security Council's imposition of sanctions, Scheinin concluded, exceeded its Chapter VII powers.¹⁷⁸ Scheinin cited both the HRC's decision in *Sayadi and Vinck* and the ECJ's decision in *Kadi* to support the notion of "indirect review" over Security Council decisions and make the point that states should implement sanctions "not blindly, but subject to adequate human rights guarantees."¹⁷⁹

Scheinin released another report in 2010, reiterating his concern that the Sanctions Regime exceeds the Security Council's powers and calling for a paradigm whereby Member States would accomplish listings through sound procedures compatible with their own legal systems, while still accepting the UN's advice and assistance.¹⁸⁰ He explained that the best practice in any terrorist listing regime would incorporate the following elements: (1) requirement that listing be based on "reasonable grounds" that the listed "knowingly carried out, participated in or facilitated a terrorist act"; (2) a right to be informed of inclusion on the list, the grounds therefore and the consequences thereof; (3) an avenue to request a delisting and to appeal decision to retain the listing that incorporates due process standards and appropriate burdens of proof; (4) an opportunity to reapply for delisting upon a change in circumstance or new

¹⁷⁶ See *Report of the Special Rapporteur, Martin Scheinin, A/65/258, Para. 56.*

¹⁷⁷ See *Report of the Special Rapporteur, Martin Scheinin, A/65/258, Para. 56, 57.*

¹⁷⁸ See *Report of the Special Rapporteur, Martin Scheinin, A/65/258, Para. 57.*

¹⁷⁹ *Report of the Special Rapporteur, Martin Scheinin, A/65/258, Para. 58.*

¹⁸⁰ See UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin: Ten Areas of Best Practices in Countering Terrorism*, 22 Dec. 2010, A/HRC/16/51 Para. 11, 33.

evidence; (5) auto-cessation of listings and sanctions after 12 months absent a determination that the individual/entity still meets the listing criteria; and (6) a remedy for those wrongfully affected.¹⁸¹

The *Kadi* case reappeared in 2010 when the General Court of the European Union (“EGC”) issued a decision on Kadi’s last challenge, in which the court confirmed the ECJ’s previous finding that Kadi had been deprived access to evidence and the EU had merely adopted the Committee’s “vague” and “unsubstantiated” summary of listing reasons, precluding effective legal review.¹⁸² Therefore, Kadi’s fundamental rights to a defense, judicial review, and property had been violated.¹⁸³ Notwithstanding its confirmation of the ECJ’s ruling, the EGC recited certain criticisms in its rationale, specifically that the Sanctions Regime would be “disrupted” and the Security Council’s powers “encroached” by national or regional review, and that such review may be inconsistent with international law.¹⁸⁴ Yet, the EGC determined that such review was justified in light of “the draconian nature and long-lasting effects of fund-freezing measures on fundamental rights.”¹⁸⁵

The effectiveness of the review, however, relies on the court’s ability to establish whether the evidence underpinning the sanctions is “factually accurate, reliable and consistent,” whether it “contains all the [necessary] relevant information,” and “whether it is capable of substantiating the conclusions drawn from it.”¹⁸⁶ Confidentiality restrictions on state-held information encumber effective review, leaving decisions to be based on empty allegations and undisclosed

¹⁸¹ *Report of the Special Rapporteur, Martin Scheinin, A/HRC/16/51, Practice 9: Core elements of best practice in the listing of terrorist entities.*

¹⁸² *Eleventh Report of the Team, S/2011/245, Annex, Para. 3.*

¹⁸³ See *Eleventh Report of the Team, S/2011/245, Annex, Para. 3.*

¹⁸⁴ Ginsborg, Lisa, and Martin Scheinin. *Judicial Powers, Due Process and Evidence in the Security Council 1267 Terrorist Sanctions Regime: the Kadi II Conundrum.* Working Paper No. RSCAS 2011/44. Florence: European University Institute, Robert Schuman Center for Advanced Studies, 2011. 7.

¹⁸⁵ Ginsborg and Scheinin, 7.

¹⁸⁶ Ginsborg and Scheinin, 8 citing Case T-85/09, Para. 142, *n.* 36.

intelligence shared only between Member States.¹⁸⁷ Thus, the dilemma extends beyond mere EU cooperation with courts, as neither the EU nor the Sanctions Committee has unfettered access to evidence.¹⁸⁸

In January 2011, the Ombudsperson, Kimberly Prost, issued her first report, expressing concern over issues of transparency and fair process, such as the insufficiency of certain information shared by states regarding the petitioners, and the Committee's lack of obligation to communicate its delisting decisions making precedent-setting difficult.¹⁸⁹ Additionally, states were under no obligation to disclose whether they had designated parties for listing, impeding a petitioner's ability to respond to the case.¹⁹⁰ The Ombudsperson also found problematic circumstances in which delisted individuals and individuals with similar names to those listed experienced misapplied sanctions, and therefore, suggested an expansion in its mandate to examine these matters.¹⁹¹ Finally, Prost thought it logical for the Ombudsperson to be authorized to notify individuals of their delisting in cases where the Committee made the determination without the Ombudsperson's involvement, rather than only being permitted to do so in cases where the Ombudsperson had a role.¹⁹²

The aforementioned challenges, centered mainly on the need for an effective review mechanism and increased access to evidence and information, gained enough momentum to garner another reaction by the Security Council, expressed through Resolutions 1988 and 1989. Resolution 1989, in particular, called for the Ombudsperson to make recommendations on delisting cases that could only be overlooked through Committee consensus or Security Council

¹⁸⁷ See Ginsborg and Scheinin, 8-10.

¹⁸⁸ See Ginsborg and Scheinin, 8-10.

¹⁸⁹ See UN Security Council, *First Report of the Office of the Ombudsperson, Pursuant to Paragraph 15 (c) of Annex II to Security Council Resolution 1904 (2009)*, 24 Jan. 2011, S/2011/29, Para. 47, 50.

¹⁹⁰ See *First Report of the Ombudsperson*, S/2011/29, Para. 51, 52.

¹⁹¹ See *First Report of the Ombudsperson*, S/2011/29, Para. 48.

¹⁹² See *First Report of the Ombudsperson*, S/2011/29, Para. 49.

decision.¹⁹³ This strengthened the Ombudsperson’s authority to act independently and minimized the Security Council’s review of its decisions, a direct response to Scheinin’s position that the Ombudsperson lacked decision making power and the court’s view in the *al-Sebai* and *al Ghabra* case that the Ombudsperson was yet an insufficient judicial remedy. Furthermore, Resolution 1989 provided that the Ombudsperson’s recommendation to delist would “trigger” cessation of sanctions 60 days after the Committee completed consideration of the recommendation, absent consensus opposition or referral to the Security Council.¹⁹⁴ This again enhanced the Ombudsperson’s authority by giving its decisions force of application absent opposing action. Moreover, the “triggering” mechanism, coupled with Resolution 1989’s two month extension of the information gathering stage¹⁹⁵ and obligation that the Ombudsperson abide by certain confidentiality restrictions on state-provided information,¹⁹⁶ could be seen as a corrective measures to the issues of states’ reluctance to provide information and petitioners’ bridled access to evidentiary support underpinning listing decisions – matters that somewhat took center stage in the Ombudsperson’s first report, Scheinin’s 2010 reports, and even the *Kadi* case. Along the same lines of furthering transparency, Resolution 1989 imposed a duty on the Committee to provide reasons for its denials to petitioners¹⁹⁷ and urged designating states to

¹⁹³ See UN Security Council, *Resolution 1989*, Para. 23; UN Security Council, *Second Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 22 Jul. 2011, S/2011/447, Para. 43.

¹⁹⁴ See UN Security Council, *Resolution 1989*, Para. 23; *Second Report of the Ombudsperson*, S/2011/447, Para. 16; UN Security Council, *Third Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 20 Jan. 2012, S/2012/49, Para. 12.

¹⁹⁵ See UN Security Council, *Resolution 1989*, Annex II, Para. 1-4; UN Security Council, *Fourth Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 30 Jul. 2012, S/2012/590, Para. 36.

¹⁹⁶ See UN Security Council, *Resolution 1989*, Para. 25; *Second Report of the Ombudsperson*, S/2011/447, Para. 41.

¹⁹⁷ See UN Security Council, *Resolution 1989*, Para. 33, Annex II, Para. 13; *Second Report of the Ombudsperson*, S/2011/447, Para. 44.

disclose their identities,¹⁹⁸ as both are necessary to inform the petitioners so that they may prepare a defense.

It should be noted that the most significant change stemming from Resolutions 1988 and 1989 was the division of the 1267 Sanctions List and overseeing Committee into two distinct lists with separate committees. After the division, the 1267 Sanctions Regime would only cover Al-Qaeda, while the 1988 Sanctions would cover the Taliban. Taliban delisting petitions would therefore be submitted directly to the 1988 Committee by Member States, or to the Focal Point in cases where individuals were submitting on their own behalf, while the Ombudsperson would only accept delisting petitions pertaining to the Al-Qaeda Sanctions list. This comprehensive division, rather than resulting from the challenges mentioned above, was purportedly a political move meant to defer authority over the Taliban to the Afghan government in furtherance of that government's peace efforts with the Taliban.¹⁹⁹ The Afghan Ambassador thought the change would "have a psychological effect on Taliban members considering laying down arms," while U.S. Ambassador, Susan Rice, believed it would send "a clear message to the Taliban that there is a future for those who separate from Al Qaida, renounce violence and abide by the Afghan constitution."²⁰⁰ In sum, the move would transfer more authority to the Afghan government over its own people.²⁰¹ Consequently, and as stated above, the 1988 Sanctions Regime, pursuant to Resolution 1988, encouraged consultation and cooperation with, and required listing notification to, the Government of Afghanistan, the Permanent Mission of Afghanistan, and/or the UN Assistance Missions in Afghanistan. Furthermore, the 1988 Sanctions Regime considered for

¹⁹⁸ See UN Security Council, *Resolution 1989*, Para. 29; *Second Report of the Ombudsperson*, S/2011/447, Para. 46.

¹⁹⁹ See Fink, Naureen Chowdhury. "Al-Qaida Analytical Support and Sanctions Monitoring Team." *Meeting the Challenge: A Guide to United Nations Counterterrorism Activities*. New York, NY: International Peace Institute, 2012. 38-43, 39-40.

²⁰⁰ Fink, 39.

²⁰¹ See Fink, 40.

delisting those who “reconciled” in accordance with the Kabul Conference principles²⁰² in that they had broken ties with terrorism, renounced violence, and respected the Constitution²⁰³.

Some seven years after the commencement of the first judicial challenge brought by Kadi and Al Barakaat, and four years after the ECJ’s pivotal decision in that case, the European Court of Human Rights (“ECHR”) issued a decision in a challenge brought by Youssef Nada against the Swiss prosecutor’s office that demonstrated the ever-enduring nature and extensive application of the *Kadi* decision. Nada had been listed and his assets frozen in 2001 due to suspicious links to terrorist organizations.²⁰⁴ In 2005, Nada requested that the investigation against him be dropped.²⁰⁵ Upon the court’s order that criminal charges be brought or the case dropped, the authorities dropped the case for lack of evidence.²⁰⁶ Nada continued to file federal judicial challenges and appeals for removal from the UN Consolidated list, but the federal authorities rejected his efforts, citing the binding authority of Security Council decisions and lack of Swiss authority to submit delisting petitions on behalf of non-residents.²⁰⁷ Nada finally brought his case to the ECHR, claiming violation of the Convention for the Protection of Human Rights and Fundamental Freedoms’ Article 6 guarantee to fair trial.²⁰⁸ In September 2012, in keeping with the ECJ’s decision in *Kadi*, the ECHR determined that Nada had been deprived of an effective avenue to challenge the sanctions against him.²⁰⁹ The Nada decision was far-

²⁰² See UN Security Council, *Resolution 1988*, Para. 18.

²⁰³ See *Communiqué*. International Conference on Afghanistan, Kabul. 20 Jul. 2010, Para. 14; *Conference Conclusions*. The International Afghanistan Conference in Bonn. 5 Dec. 2011, Para. 18.

²⁰⁴ See *Third Report of the Team*, S/2005/572, Annex, Para. 9-10.

²⁰⁵ See *Third Report of the Team*, S/2005/572, Annex, Para. 9-10.

²⁰⁶ See *Third Report of the Team*, S/2005/572, Annex, Para. 9-10.

²⁰⁷ See *Fifth Report of the Team*, S/2006/750, Annex III, Para. 8-10; UN Security Council, *Sixth Report of the Analytical Support and Sanctions Monitoring Team*, 8 Mar. 2007, S/2007/132, Annex I, Para. 7; UN Security Council, *Seventh Report of the Analytical Support and Sanctions Monitoring Team*, 20 Nov. 2007, S/2007/677, Annex I, Para. 5; UN Security Council, *Eighth Report of the Analytical Support and Sanctions Monitoring Team*, 14 May 2008, S/2008/324, Annex I, Para. 5.

²⁰⁸ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 5.

²⁰⁹ See UN Security Council, *Thirteenth Report of the Team Analytical Support and Sanctions Monitoring Team*, 31 Dec. 2012, S/2012/968, Annex I, Para. 9.

reaching, applying to some 47 states in the Council of Europe.²¹⁰ Significantly, years after *Kadi* began, and after the establishment of the Focal Point and the later Ombudsperson's Office, listed parties were still resorting to national and regional judiciaries to challenge their sanctions, demonstrating that an independent, impartial, and effective judicial review mechanism was still lacking in the Sanctions Regime.

Another reverberating defect in the Regime that was not solved by Resolution was a petitioner's lack of access to evidence. Al-Haramain Foundation brought suit in a U.S. Federal Court, arguing that U.S. imposition of sanctions violated due process because the listing was based on classified information and other information not provided to the claimant.²¹¹ The claimant also argued violation of its right against unreasonable search and seizure, among other violations.²¹² The court decided in favor of the government in 2008.²¹³ In 2011, the Ninth Circuit Court of Appeals upheld the lower court's determination that the designation was proper, but found violations of the U.S. Constitution's Fifth Amendment due process rights deemed harmless error.²¹⁴ The case was remanded for Fourth Amendment violations because the government had not obtained a judicial warrant prior to the designation, but this too was deemed harmless in a December 2012 decision.²¹⁵ Though the violations of due process and search and seizure were found to be harmless, they were violations nonetheless, and spoke to the continued inadequacy of the Regime well after creation of the Ombudsperson's Office.

²¹⁰ See UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Ben Emmerson, 26 Aug. 2012, A/67/396, Para. 21.

²¹¹ See *Seventh Report of the Team*, S/2007/677, Annex I, Para. 9.

²¹² See *Seventh Report of the Team*, S/2007/677, Annex I, Para. 9.

²¹³ See *Eleventh Report of the Team*, S/2011/245, Annex, Para. 9, 10.

²¹⁴ See UN Security Council, *Twelfth Report of the Analytical Support and Sanctions Monitoring Team*, 1 Oct. 2012, S/2012/729, Annex, Para. 5.

²¹⁵ See *Twelfth Report of the Team*, S/2012/729, Annex, Para. 5; UN Security Council, *Fourteenth Report of the Analytical Support and Sanctions Monitoring Team*, 2 Aug. 2013, S/2013/467, Annex I, Para. 9.

Following these judicial decisions, Martin Scheinin's successor, Ben Emmerson, issued a 2012 report that offered an in depth review of the Ombudsperson's Office as it operates in the Al-Qaeda Regime, particularly with respect to its compatibility with human rights. He expanded on certain judicial decisions concerning the Regime's inadequacy of judicial review and restrained access to evidence, making particular reference to the *Sayadi*, *Nada* and *Kadi* cases. Rather than adopting Scheinin's position that domestic judicial oversight must be in place absent independent review at the UN level, Emmerson was of the view that domestic judicial review is inadequate as it creates a scenario where the petitioner lacks access to evidence because it is unavailable to the court or because the court is unauthorized to provide it.²¹⁶ Furthermore, though the Ombudsperson was armed with more decision making power via its recommendations that would automatically take effect absent Committee or Security Council action, the Committee or Security Council could still effectuate a different result. Citing an ECHR holding, Emmerson submitted, "that a requirement for quasi-judicial determinations to be ratified by an executive body with power to vary or rescind it contravenes the 'very notion' of an independent tribunal."²¹⁷ When state listing proposals are adopted absent Committee objection, they are typically only subject to designating state review of the underlying evidence which can be tainted with diplomatic negotiations and selectively disclosed information while lacking any obligation to disclose exculpatory information.²¹⁸ The risk here is that the Regime will be used as a political tool.²¹⁹

The scheme, as it was, obligated states, pursuant to the UN Charter, to impose open-ended sanctions without independent judicial review, despite any other human rights obligations

²¹⁶ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 22

²¹⁷ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 34 citing European Court of Human Rights, *Findlay v. United Kingdom* (1997), 24 EHRR 221.

²¹⁸ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 26.

²¹⁹ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 26.

those states may have had pursuant to treaty or covenant.²²⁰ As a political body, the Security Council was to issue only temporary measures intended to thwart imminent threats to international peace and security, yet was carrying out law enforcement, legislative, judicial and even executive functions without the strictures typically associated with human rights-abiding legal systems.²²¹ Emmerson therefore suggested transforming the Ombudsperson's Office into that of an "independent designations adjudicator" with the authority "to review and overturn" Committee decisions, preside over exemption requests, and issue final decisions, unreviewable by the Committee or Security Council.²²²

Emmerson had additional criticisms. The "associated with" listing criteria left too much room for judgment and the listing narrative summaries lacked sufficient evidentiary detail.²²³ Confidential information not provided to the Ombudsperson could not be prevented from otherwise making its way into the process, and therefore, should be released to Ombudsperson on the condition of confidentiality.²²⁴ Lawyers, petitioners, and at times, the Ombudsperson, were left in the dark with respect to information underlying delisting requests, and thus, Emmerson recommended that the Ombudsperson inform petitioners and the public of its decisions, and that the Committee too provide its reasons for delisting and retention alike to both petitioners and the public.²²⁵

Emmerson's other recommended changes to the regime included eliminating the requirement of obtaining consent prior to disclosing designating state identities, excluding information obtained via torture, obligating release of exculpatory information, implementing

²²⁰ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 12-20.

²²¹ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 12-20, 34.

²²² *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 23, 35, 37 and 59.

²²³ *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 24, 25.

²²⁴ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 38-40, 59.

²²⁵ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 43, 59.

time limits on designations, providing funded legal representation for indigent individuals, and allowing for translation services to enable communications in petitioner's language.²²⁶

The Ombudsperson's second, third and fourth reports reflected the same defects as those in Emmerson's 2012 report and the judicial decisions up until 2012, such that they expressed dissatisfaction with the absence of transparency in the Regime, as well as the parameters of the Ombudsperson's mandate. States remained reluctant to provide confidential and classified information concerning the petitioner, and the information states did share was untimely and lacked specificity.²²⁷ Disclosing designating state identities remained problematic, and as such, the Ombudsperson requested that the requirement to obtain state permission prior to disclosure of its identity be eliminated.²²⁸ To further improve transparency in information and evidence, the Ombudsperson suggested that the Committee provide decisions to the Ombudsperson, who would then provide it to the petitioners.²²⁹ The Ombudsperson also recommended that she be authorized to disclose to petitioner and interested states, upon the Committee's completion of case review, the comprehensive report, including how a decision was attained, whether that be through the Ombudsperson's recommendation, Committee consensus, or Security Council vote.²³⁰ These measures, if implemented, also would have somewhat expanded the role of the Ombudsperson by giving her greater flexibility to share information freely. Additionally, the Ombudsperson explicitly sought greater authority by requesting an expansion in mandate to

²²⁶ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 44-49, 52-53, 58-59.

²²⁷ See *Second Report of the Ombudsperson, S/2011/447*, Para. 16-19, 39-41; *Third Report of the Ombudsperson, S/2012/49*, Para. 16-19, 38-41; *Fourth Report of the Ombudsperson, S/2012/590*, Para. 12-14, 34-37.

²²⁸ See *Second Report of the Ombudsperson, S/2011/447*, Para. 46; *Third Report of the Ombudsperson, S/2012/49*, Para. 48-49; *Fourth Report of the Ombudsperson, S/2012/590*, Para. 45.

²²⁹ See *Second Report of the Ombudsperson, S/2011/447*, Para. 47; *Fourth Report of the Ombudsperson, S/2012/590*, Para. 40-43.

²³⁰ See *Second Report of the Ombudsperson, S/2011/447*, Para. 47; *Fourth Report of the Ombudsperson, S/2012/590*, Para. 40-43.

address wrongfully applied sanctions, transmit exemption requests to the Committee, and request exemptions itself when necessary for petitioner interviews.²³¹

The ECHR's 2012 decision in *Nada*, the U.S. courts' holdings in *Al-Haramain*, Emmerson's comprehensive 2012 report, and the Ombudsperson's second, third and fourth reports all served to bring attention to the power struggle between the Security Council and the Ombudsperson's Office, the insufficiency of both the Ombudsperson's Office and domestic/national courts as judicial review mechanisms, and the transparency issues related to evidence that stymied the petitioner's rights to be informed, to prepare a case, to be heard, and to be judicially reviewed. The Security Council was once again compelled to deliver improvements.

Resolution 2083 responded to the ongoing transparency concerns in a number of ways that worked to better standardize the Regime's information sharing and eliminate evidentiary speculation and the potential misuse of the Regime as a political tool. The Resolution required listing requests to be submitted using a standard form in place of the cover sheet once required by Resolution 1735, and also required a publicly releasable case statement incorporating underlying reasons for the request.²³² Absent specific objection, disclosure of designating state identities became permissible.²³³ Translation services were called for.²³⁴ The Resolution further urged information sharing among Member States, relevant organizations, the Committee, and Monitoring Team in an effort to keep the listing summaries accurate and promote proper

²³¹ See *Second Report of the Ombudsperson*, S/2011/447, Para. 50-52; *Third Report of the Ombudsperson*, S/2012/49, Para. 50-52; *Fourth Report of the Ombudsperson*, S/2012/590, Para. 46-49.

²³² See UN Security Council, *Resolution 1735*, Para. 7, Annex I; UN Security Council, *Security Council Resolution 2083 (2012) On Extension of the Mandate of the Office of the Ombudsperson and the Implementation of Measures Relating to the Al-Qaida Sanctions List*, 17 Dec. 2012, S/RES/2083, Para. 11, 13.

²³³ See UN Security Council, *Resolution 2083*, Para. 12, 28; UN Security Council, *Fifth Report of the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jan. 2013, S/2013/71, Para. 31.

²³⁴ See UN Security Council, *Resolution 2083*, Para. 22.

decision making on the requests.²³⁵ The Ombudsperson became authorized to disseminate information related to the stage reached in the process and its recommendation to the petitioner and relevant and/or interested states, while the Committee was to communicate the rationale for its decisions to the petitioner.²³⁶ Again, the expansion in Ombudsperson's mandate not only increased transparency, but also acted as a step towards delegating greater powers to the Ombudsperson. It was not the only step provided for in Resolution 2083 that would advance the Ombudsperson's role in the Sanctions Regime.

The Ombudsperson could now seek travel ban exemptions on behalf of petitioners to facilitate interviews necessary for the delisting process, though it still could not preside over exemption requests itself.²³⁷ Rather, the Focal Point would respond to exemption requests after they were first submitted to the petitioner's state of residence – a requirement the Ombudsperson then recommended removing.²³⁸ More importantly, the Ombudsperson's recommendations to delist or retain would stand, absent Committee action through its now shortened review and consideration stages of 15 and 30 days, respectively.²³⁹

By this point, onus of ardently criticizing began shifting to the Ombudsperson, whereas before, the challenges against the Regime more prevalently appeared through judicial decisions and Special Rapporteur reports. The Ombudsperson's fifth through seventh reports expressed ongoing issues, highlighted certain improvements made from one report to the next, and raised some new issues. Overall, the timeliness of information supplied by states concerning the petitioner somewhat improved by the sixth and seventh reports, but specificity of the state-

²³⁵ See UN Security Council, *Resolution 2083*, Para. 13-18, 42.

²³⁶ See UN Security Council, *Resolution 2083*, Para. 11, 14-17, 33; *Fifth Report of the Ombudsperson*, S/2013/71, Para. 40.

²³⁷ See UN Security Council, *Resolution 2083*, Para. 8, 36-37; *Fifth Report of the Ombudsperson*, S/2013/71, Para. 36-38.

²³⁸ See UN Security Council, *Resolution 2083*, Para. 8, 36-37; *Fifth Report of the Ombudsperson*, S/2013/71, Para. 36-38.

²³⁹ See UN Security Council, *Resolution 2083*, Annex II, Para. 8-13.

supplied supporting evidence remained lacking in all three reports.²⁴⁰ States were mainly reluctant to supply specific evidence due to its classified or confidential information.²⁴¹ Recall that Emmerson too believed that narrative summaries lacked detail and feared that classified information, despite being withheld from the Ombudsperson, could still unfairly infiltrate the decision-making process.²⁴² He therefore recommended releasing classified information to the Ombudsperson on the condition of confidentiality.²⁴³ Positively, states began entering into agreements with the Ombudsperson, whereby the state would supply the necessary information on the condition that the Ombudsperson would be bound to maintain its confidentiality.²⁴⁴ The improved timeliness of state-supplied information and the advent of confidentiality agreements entered into between states and the Ombudsperson could be traced back to the combined result of Resolution 1989's "triggering" mechanism,²⁴⁵ two month extension of the information gathering stage,²⁴⁶ and obligation that the Ombudsperson abide by certain confidentiality restrictions on state-provided information²⁴⁷. The Security Council, in Resolution 2083, welcomed the confidentiality arrangements being entered into.²⁴⁸ By the Ombudsperson's eighth report, Resolution 2161 had been passed, giving the Ombudsperson discretion to abbreviate the information-gathering stage where there was no objection to delisting, likely as a result of the

²⁴⁰ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 33, 34; UN Security Council, *Sixth Report of the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jul. 2013, S/2013/452, Para. 45-49; UN Security Council, *Seventh Report of the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jan. 2014, S/2014/73, Para. 61-62.

²⁴¹ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 34; *Sixth Report of the Ombudsperson*, S/2013/452, Para. 48; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 62.

²⁴² See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 25, 38-40.

²⁴³ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 59.

²⁴⁴ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 10-11, 26; *Sixth Report of the Ombudsperson*, S/2013/452, Para. 11-12, 27, 30; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 11-12, 29.

²⁴⁵ See UN Security Council, *Resolution 1989*, Para. 23; *Second Report of the Ombudsperson*, S/2011/447, Para. 16; *Third Report of the Ombudsperson*, S/2012/49, Para. 12.

²⁴⁶ See UN Security Council, *Resolution 1989*, Annex II, Para. 1-4; *Fourth Report of the Ombudsperson*, S/2012/590, Para. 36.

²⁴⁷ See UN Security Council, *Resolution 1989*, Para. 25; *Second Report of the Ombudsperson*, S/2011/447, Para. 41.

²⁴⁸ See UN Security Council, *Resolution 2083*, Para. 23.

ever-increasing cooperation of states in supplying information.²⁴⁹ However, as of the Ombudsperson's most recent 2016 report, there is no indication that the Regime has completely overcome the hurdle confidentiality restrictions pose to accessing information,²⁵⁰ neither has there been any signal that the Security Council will adopt a more forceful resolution requiring states to provide classified information or enter into agreements with the Ombudsperson.

The Ombudsperson's reports also cited ongoing delays in the Committee's communication of the reasons behind its decisions to petitioners.²⁵¹ To remedy these delays, the Ombudsperson suggested imposing time constraints or being responsible herself to communicate reasons to the petitioner when the decision was based on the Ombudsperson's recommendation, while leaving the Committee and Security Council to communicate the reasons when they were responsible for the final determination through, for example, Committee reversal or Security Council decision.²⁵² In addition to perhaps resolving the delays in communication, the Ombudsperson believed this plan would be fairer as the reasons given would reflect the decision-maker's analysis.²⁵³ The Security Council reacted to these delays, the Ombudsperson's request for remediation in Resolution 2161, when it imposed a 60-day limit during which the Committee

²⁴⁹ See UN General Assembly, *Security Council Resolution 2161 (2014) On Threats to International Peace and Security Caused by Terrorist Acts by Al-Qaida*, 17 Jun. 2014, S/RES/2161, Annex II, Para. 3; UN Security Council, *Eighth Report of the Office of the Ombudsperson, Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 31 Jul. 2014, S/2014/553, Para. 35-36.

²⁵⁰ See *Eighth Report of the Ombudsperson*, S/2014/553, Para. 36-38; UN Security Council, *Ninth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 2 Feb. 2015, S/2015/80, Para. 13-14, 34, 48-49; UN Security Council, *Tenth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 14 Jul. 2015, S/2015/533, Para. 13-14, 49; UN Security Council, *Eleventh Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2253 (2015)*, 1 Feb. 2016, S/2016/96, Para. 16-17; UN Security Council, *Twelfth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2253 (2015)*, 1 Aug. 2016, S/2016/671, Para. 13-14.

²⁵¹ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 39; *Sixth Report of the Ombudsperson*, S/2013/452, Para. 32-42; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 39-48.

²⁵² See *Sixth Report of the Ombudsperson*, S/2013/452, Para. 36-42; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 39-48.

²⁵³ See *Sixth Report of the Ombudsperson*, S/2013/452, Para. 36-42; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 39-48.

was obligated to communicate reasons for its decisions.²⁵⁴ Such a provision was indeed reflective of Emmerson’s position in his 2012 report that “[a]s a ‘core irreducible minimum’ the individual must be provided with sufficient information to enable him or her to give an effective answer to the allegations.”²⁵⁵ The content of the Committee’s communications concerning its decision-making slowly improved over the course of the Ombudsperson’s ninth through twelfth reports,²⁵⁶ with her twelfth report promisingly stating “[t]he Committee’s consistency and reliability in transmitting extensive reasons to petitioners are a major step towards making the process more transparent and fair.”²⁵⁷ Her expressed hope that the “positive trend” continues,²⁵⁸ however, signifies that the problem, at least in part, remains.

Throughout reports five through seven, the Ombudsperson directed attention to transparency issues beyond the Committee’s communication of its reasoning to petitioners. The petitioner and relevant or requesting states lacked access to the comprehensive report, the petitioner was not privy to the Ombudsperson’s recommendation and analysis, and the public was uninformed of nearly everything save for general procedural information and case statistics.²⁵⁹ These transparency issues surrounding access to evidence were not new, of course. As evident above, they had been around, and in fact, brought up more generally in past judicial challenges and Special Rapporteur reports. Now, however, with the help of the Ombudsperson and the new Rapporteur, the more general issue of access to evidence was broken down into specifics. Emmerson too had mentioned that petitioners, their lawyers, and even the

²⁵⁴ See UN Security Council, *Resolution 2161*, Para. 16; *Eighth Report of the Ombudsperson*, S/2014/553, Para. 39-40.

²⁵⁵ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 42 citing *European Court of Human Rights, A. v. United Kingdom* (2009) 49 EHRR 29, Para. 218.

²⁵⁶ See *Ninth Report of the Ombudsperson*, S/2015/80, Para. 40-46; *Tenth Report of the Ombudsperson*, S/2015/533, Para. 41-47; *Eleventh Report of the Ombudsperson*, S/2016/96, Para. 38-42.

²⁵⁷ See *Twelfth Report of the Ombudsperson*, S/2016/671, Para. 30.

²⁵⁸ *Twelfth Report of the Ombudsperson*, S/2016/671, Para. 30.

²⁵⁹ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 40-45, 53; *Sixth Report of the Ombudsperson*, S/2013/452, Para. 50-52; *Seventh Report of the Ombudsperson*, S/2014/73, 49-52, 55-59.

Ombudsperson, at times, are left speculating over supporting evidence, and thus, the Ombudsperson and the Committee should better inform the petitioners and the public of its decisions and the reasons therefore.²⁶⁰ By specifying the areas where improvement was needed, for example, with regards to the Committee's communication of reasons for decisions, the Ombudsperson's comprehensive reports, and confidentiality restrictions on state-supplied information, the Security Council was better able to devise solutions that would in turn address the more general defect, transparency in evidence, as a whole. The challenges were becoming more nuanced and the Regime, via Resolutions, was becoming more sophisticated. Prior to the Ombudsperson's eighth report, Resolution 2161 had been adopted, allowing the Ombudsperson to provide the comprehensive report to interested states after Committee approval and appropriate redactions.²⁶¹ The Ombudsperson, however, was not satisfied, believing that the Resolution failed to provide for delivery of the Comprehensive Report, the Ombudsperson's reasons and analyses, to the petitioner and the public, and therefore, she has continued to request greater access for the same in her reports to date.²⁶² The Ombudsperson's website now offers a window into the rationale of decision making by communicating how certain information is used and analyzed to reach determinations concerning association with or dissociation from terrorist groups, the mental element required for acts of support and appropriateness of inferences, but nevertheless, it is far from comprehensive.²⁶³

²⁶⁰ See *Report of the Special Rapporteur, Ben Emmerson, A/67/396*, Para. 43, 59.

²⁶¹ See UN Security Council, *Resolution 2161*, Annex II, Para. 13; *Eighth Report of the Ombudsperson, S/2014/553*, Para. 43.

²⁶² See *Eighth Report of the Ombudsperson, S/2014/553*, Para. 44, 45, 55; *Ninth Report of the Ombudsperson, S/2015/80*, Para. 9:40-46; *Tenth Report of the Ombudsperson, S/2015/533*, Para. 38-47; *Eleventh Report of the Ombudsperson, S/2016/96*, Para. 36-42; *Twelfth Report of the Ombudsperson, S/2016/671*, Para. 48.

²⁶³ See *Ninth Report of the Ombudsperson, S/2015/80*, Para. 27; *Tenth Report of the Ombudsperson, S/2015/533*, Para. 35; *Eleventh Report of the Ombudsperson, S/2016/96*, Para. 29, 36, 52; *Twelfth Report of the Ombudsperson, S/2016/671*, Para. 27, 29.

The Ombudsperson's fifth through seventh reports, like those before, continued to bring light to misapplied sanctions that extended beyond listings.²⁶⁴ Finally, the Security Council responded through Resolution 2161 when it authorized the Focal Point to receive and submit to the Committee, for a response within 60 days, communications from individuals claiming wrongfully applied sanctions.²⁶⁵ Though the Ombudsperson appreciated the effort, she remained wary. She cloaked what seemed to be her attempt at securing more independence and authority over the Focal Point's responsibilities in a more pragmatic argument. Pointing to already existing deficiencies in the Focal Point exemption request schema, the Ombudsperson suggested that the use of separate avenues in the same regime to accomplish similar tasks, here specifically, the Focal Point and Ombudsperson's Office, would result in confusion and overlap.²⁶⁶ The Ombudsperson's argument was strengthened by the Focal Point's relative failure compared with the Ombudsperson's success. In theory, the Focal Point was to improve the Sanctions Regime, serving as an avenue for individuals on the 1988 Sanctions List to request delisting and for individuals on the 1267/1989/2253 Sanctions List to request exemptions from sanctions. To date, the Focal Point has received a total of 3 requests from individuals seeking removal from the 1988 Sanctions List.²⁶⁷ While the Focal Point has not granted any of the requests, the Committee has delisted 1 of these individuals through a separate process.²⁶⁸ Additionally, the Focal Point received its first travel ban exemption request from an individual on the 1267/1989/2253 Sanctions List in 2013, but denied the request.²⁶⁹ In 2015, the Focal Point similarly received and

²⁶⁴ See *Fifth Report of the Ombudsperson*, S/2013/71, Para. 46-49; *Sixth Report of the Ombudsperson*, S/2013/452, Para. 53-55; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 63-64.

²⁶⁵ See UN Security Council, *Resolution 2161*, Para. 63-64; *Eighth Report of the Ombudsperson*, S/2014/553, Para. 47-48.

²⁶⁶ See *Eighth Report of the Ombudsperson*, S/2014/553, Para. 47-48

²⁶⁷ See "De-listing Requests | United Nations Security Council Subsidiary Organs."

²⁶⁸ See "De-listing Requests | United Nations Security Council Subsidiary Organs."

²⁶⁹ See *First Informal Report of the Focal Point for De-listing Established Pursuant to Resolution 1730 (2006)*, 20 Jan. 2014, SCSOB/SCAD/DPA.

denied two travel ban requests from individuals on the 1267/1989/2253 Sanctions List.²⁷⁰ The details of these requests and their denials are unknown but for the Focal Point merely stating in one of its informal annual reports that the denial of two of the three exemption requests was due to the destination state's lack of agreement.²⁷¹ The informal annual reports offered no further information beyond basic statistical information.²⁷² Despite the Ombudsperson's repeated efforts to secure control over exemptions and misapplied sanctions, the Focal Point remains in charge of these responsibilities.²⁷³

Along the same lines of misapplied sanctions to individuals no longer listed or to mistaken individuals were those names that remained on the list longer than necessary. Emmerson's proposed solution was to institute a time limit on designations.²⁷⁴ The Ombudsperson suggested an upgrade to the Committee's yearly review of names that had not been reviewed in three years – a review already in place pursuant to Security Council Resolution 1822.²⁷⁵ The upgrade would provide for Committee referral to the Ombudsperson for information gathering those cases in which states neither objected to nor supported delisting, or where information was insufficient.²⁷⁶ The Ombudsperson believed this would “strengthen the effectiveness of the review process.”²⁷⁷

²⁷⁰ See *Third Informal Report of the Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006)*, 31 Dec. 2015, SCSOB/SCAD/DPA.

²⁷¹ See *Third Informal Report of the Focal Point for De-listing*.

²⁷² See *First Informal Report of the Focal Point for De-listing*, *Second Informal Report of the Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006)*, 13 Feb. 2015, SCSOB/SCAD/DPA; *Third Informal Report of the Focal Point for De-listing*.

²⁷³ See *Ninth Report of the Ombudsperson*, S/2015/80, Para. 50; *Tenth Report of the Ombudsperson*, S/2015/533, Para. 50-54; *Eleventh Report of the Ombudsperson*, S/2016/96, Para. 50-54; *Twelfth Report of the Ombudsperson*, S/2016/671, Para. 46.

²⁷⁴ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 58, 59.

²⁷⁵ See UN Security Council, *Resolution 1822*, Para. 26; *Seventh Report of the Ombudsperson*, S/2014/73, Para. 65-68.

²⁷⁶ See *Seventh Report of the Ombudsperson*, S/2014/73, Para. 65-68.

²⁷⁷ *Seventh Report of the Ombudsperson*, S/2014/73, Para. 68.

In her eighth report, the Ombudsperson reframed the judicial review mechanism issue. She would continue to build upon it until her most recent 2016 report. Of course, the issue was an old one, having been present since the early days of *Kadi*. Indeed, Emmerson’s 2012 report suggested that the conflict between the Security Council’s authority and Ombudsperson’s review necessitated transforming the latter into an “independent designations adjudicator.”²⁷⁸ In her seventh report published in January 2014, the Ombudsperson foreshadowed the in-depth review of the Office’s independence and autonomy that she would conduct in later reports when she detailed an influential decision by the Secretariat. The Secretariat determined that any person travelling with the Ombudsperson in fulfillment of the latter’s mandate must submit a report.²⁷⁹ The conflict here was that at times, the Legal Officer would often assist the Ombudsperson, specifically with petitioner interviews.²⁸⁰ Therefore, any report the Legal Officer submitted to the Secretariat, an executive arm of the UN, concerning the Ombudsperson’s mandated duties would “represent a direct and significant incursion into the independence of the Office.”²⁸¹ Seemingly a result of the Ombudsperson’s representation of the Secretariat’s decision, Resolution 2161, adopted in June 2014, when mentioning the mandate of the Ombudsperson stated that the Office should “carry out its mandate in an independent, effective and timely manner.”²⁸² In her eighth report, the Ombudsperson characterized the Security Council’s addition of the term “independent” in describing the Ombudsperson’s mandate, as somewhat of an intentional emphasis.²⁸³ Prost offered a deeper analysis of the minutiae underlying the Ombudsperson’s lack of authority in her eighth and coming reports in which she cited to

²⁷⁸ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 12-20, 23, 34-35, 37 and 59.

²⁷⁹ See *Seventh Report of the Ombudsperson*, S/2014/73, Para. 70.

²⁸⁰ See *Seventh Report of the Ombudsperson*, S/2014/73, Para. 70.

²⁸¹ *Seventh Report of the Ombudsperson*, S/2014/73, Para. 70.

²⁸² UN Security Council, *Resolution 2161*, Para. 46.

²⁸³ *Eighth Report of the Ombudsperson*, S/2014/553, Para. 49-51.

logistical impediments to the independence and autonomy envisioned by the mandate that gave birth to the Office. More specifically, the Ombudsperson's consultancy contract prevents it from self-managing its budget, resources, and staffing.²⁸⁴ Worse yet, the Office does not actually have its own budget and certification of its performance falls under the direction of a division related to the Sanctions Regime.²⁸⁵ Furthermore, the Office lacks sole responsibility and authority for its travel to interview petitioners and over access to its information.²⁸⁶ Yet in the same report citing these issues, the Ombudsperson boldly, but prematurely, asserted that the Ombudsperson mechanism was one "designed by the Council [that] provides for an independent review process that comports with the principles of fairness and is able to deliver an effective remedy."²⁸⁷ The Ombudsperson continued that the practice of imposing sanctions under this regime "comports with fundamental human rights principles and international law as envisaged in Article 1 of the Charter of the United Nations."²⁸⁸

If this was the case, however, the Security Council would not have sought to force a cure for the Office's lack of independence through Resolution 2253, in which it requested that the Secretary-General provide the Security Council with an update in six months on steps taken to ensure that the Ombudsperson operates "in an independent, effective and timely manner."²⁸⁹ As of the twelfth and last report, the Ombudsperson had discussed various options with the Security Council Affairs Division on how to best achieve this aim and agreed with the Secretariat's proposal that the Ombudsperson's office "be established as a stand-alone special political

²⁸⁴ See *Eighth Report of the Ombudsperson*, S/2014/553, Para. 49-51; *Ninth Report of the Ombudsperson*, S/2015/80, Para. 51-53; *Tenth Report of the Ombudsperson*, S/2015/533, Para. 55-93.

²⁸⁵ See *Tenth Report of the Ombudsperson*, S/2015/533, Para. 55-93.

²⁸⁶ See *Tenth Report of the Ombudsperson*, S/2015/533, Para. 55-93.

²⁸⁷ *Tenth Report of the Ombudsperson*, S/2015/533, Para. 26.

²⁸⁸ *Tenth Report of the Ombudsperson*, S/2015/533, Para. 26.

²⁸⁹ UN Security Council, *Resolution 2253*, Para. 59; see also *Eleventh Report of the Ombudsperson*, S/2016/96, Para. 49.

mission with a dedicated budget.”²⁹⁰ The success of implementing this new structure remains to be seen.

Certainly, the timing of and interplay among the judicial challenges, Special Rapporteur reports, Ombudsperson’s reports, and Security Council resolutions, demonstrate that the challenges were the driving force behind subsequent remedial Security Council resolutions. Arguably, the Security Council would not have adopted such resolutions had it legitimately believed it was acting within its authority by issuing preventative temporary administrative sanctions that did not demand adjudicatory procedures consistent with internationally recognized human rights.

“While the Security Council has assumed a judicial or quasi-judicial role in imposing sanctions on individuals and entities under the 1267 sanctions regime, its procedures continue to fall short of guaranteeing due-process related rights for individuals suspected of terrorism.”²⁹¹ Though some of the human rights violations have been addressed, others persist. Significantly, petitioners and their lawyers are still denied access to crucial determinations concerning their listing status and factual evidence used to come to those determinations. States are still under no obligation to disclose their identities as designating states, nor are they required to release evidence deemed confidential, yet this evidence cannot technically be withheld from making its way into the decision to list the individual. The public has no access at all to anything other than basic statistics. Finally, the Ombudsperson’s Office has not yet achieved the autonomy and independence called for by its mandate, leaving the Regime lacking of the fundamental right to effective judicial review. Professor of International Relations Rosemary Foot quoted a 2005 report by Robert K. Goldman, then UN independent expert on the protection of human rights and

²⁹⁰ *Twelfth Report of the Ombudsperson*, S/2016/671, Para. 33-45.

²⁹¹ Ginsborg and Scheinin, 3.

fundamental freedoms while countering terrorism, in which he stated that “no relevant Security Council resolution establishes precise legal standards governing the inclusion of persons and groups on lists or the freezing of assets, much less mandates safeguards or legal remedies to those mistakenly or wrongfully included on these lists.”²⁹² Startlingly, this statement is no less true today than it was in 2005.

As mentioned above, the Security Council and Ombudsperson maintain that the sanctions measures are preventative, not punitive, of criminal behavior, and therefore, national and international criminal standards, which would include effective judicial review, are inapplicable to the Sanctions Regime. Their reports and resolutions, however, indicate otherwise, such that if their position was sound, these mechanisms would neither have continuously challenged the Regime nor remedied any of the challenges discussed above through resolutions in an effort to make the Regime more, fair, transparent, and consistent with internationally recognized due process standards. Their position is therefore more in line with that of the Special Rapporteur, who proceeds from the view that the indefinite nature of sanctions and their consequences on those upon which they are imposed makes them akin to criminal charges, thereby requiring a procedure consistent with the due process, evidentiary and transparency standards befitting of an international human rights-compatible judicial regime.

The question then becomes, are the sanctions akin to criminal penalties so as to warrant the fundamental human rights standards befitting of a criminal adjudicatory process? If so, is the UN, as an international organization and not a Member State, obligated to enforce these rules?

Criminal Penalties and UN Obligations

The Human Rights Committee, in Comment No. 32, explained that the right to a fair trial

²⁹² Foot, 497 citing UN Commission on Human Rights, *Report of the Independent Expert on the Protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman*, 7 Feb. 2005, E/CN.4/2005/103, Para. 63.

pursuant to the ICCPR's Article 14 is guaranteed in "cases regarding the determination of criminal charges."²⁹³ The Committee defined criminal charges as those that "relate in principle to acts declared to be punishable under domestic criminal law [or] to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity."²⁹⁴

In the *Kadi* case, the General Court's Seventh Chamber determined, after 10 years of Kadi's assets being frozen, that it was time to call into question the court's previous judgment that the freeze was a "temporary precautionary measure which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof."²⁹⁵ The court went on to state that "[i]n the scale of a human life, 10 years in fact represent a substantial period of time and the question of the classification of the measures in question as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one."²⁹⁶ The court also referred to a 2009 report by the UN High Commissioner for Human Rights in which the Commissioner took a similar position when it suggested that the open ended nature of listings causes the temporary asset freeze to become permanent, and therefore, severe enough to constitute criminal punishment.²⁹⁷ The Commissioner went on to offer that decisions resulting in criminal punishment should either be judicially made or judicially reviewed.²⁹⁸

The Sanctions Monitoring Team in its Ninth Report suggested that the Sanctions Committee do more to make certain that the sanctions "do not rise to the level of the deprivations

²⁹³ UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, 23 Aug. 2007, CCPR/C/GC/32, Para. 15.

²⁹⁴ UN Human Rights Committee (HRC), *General Comment No. 32*, Para. 15.

²⁹⁵ Case T-85/09, *Yassin Abdullah Kadi v European Commission*, General Court of the European Union (Seventh Chamber), 30 Sept. 2010, Para. 150.

²⁹⁶ Case T-85/09, Para. 150.

²⁹⁷ See Case T-85/09, Para. 150.

²⁹⁸ See Case T-85/09, Para. 150.

of life, liberty and property that can result from criminal conviction under national jurisdiction,”²⁹⁹ – a statement that indirectly indicated the Monitoring Team’s view that the sanctions were criminal in nature.

In his 2012 *Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Ben Emmerson, concluded that although the 1267 sanctions are intended as “preventative and deterrent,” their “indeterminate nature” coupled with their severity “gives them the colour of a penal sanction.”³⁰⁰ In justifying his position, Emmerson cited to the Human Rights Committee’s observation “that certain measures must be regarded as penal, regardless of their formal classification, because of their ‘character or severity’.”³⁰¹ Emmerson additionally referred to the European Court of Human Rights’ position “that preventative and deterrent objectives ‘may be seen as constituent elements in the very notion of punishment’.”³⁰² He further pointed to the General Court of the European Union’s reflection in *Kadi*,³⁰³ as mentioned above. In short, Emmerson adopted the opinion that the sanctions are “drastic and oppressive” and “paralyzing.”³⁰⁴

In determining whether a criminal charge exists, the European Court of Human Rights looks at: “1) the state legal system’s categorization of the offense; 2) the nature of the offense and penalty; 3) the severity of the penalty.”³⁰⁵ The Security Council determined that the act of

²⁹⁹ *Ninth Report of the Team*, S/2009/245, Para 34.

³⁰⁰ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 55, 58.

³⁰¹ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 55 citing to UN Human Rights Committee (HRC), *General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial*, 23 Aug. 2007, CCPR/C/GC/32, Para. 15.

³⁰² *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 55 citing *European Court of Human Rights, Welch v. United Kingdom*, (1995) 20 EHRR 247, Para. 30.

³⁰³ See *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 58.

³⁰⁴ *Report of the Special Rapporteur, Ben Emmerson*, A/67/396, Para. 55 citing *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others; Her Majesty's Treasury v. Mohammed al-Ghabra; R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury*, [2010] UKSC 2, United Kingdom: Supreme Court, 27 Jan. 2010, Para. 6, 38.

³⁰⁵ Gutherie, Peter. “Security Council Sanctions and the Protection of Individual Rights.” *NYU Annual Survey of American Law*, 60.3 (2005-2006): 491-542. 503-04.

financing terrorism is criminal in nature.³⁰⁶ However, the sanctions are intended to prevent terrorist financing, and therefore, can be considered protective.³⁰⁷ The sanctions are disproportionate in that they implement freezes on “all assets regardless of ... amount or [the target’s] relative culpability.”³⁰⁸ They are severe and “undeniabl[y] punitive” in that they “stigmatize” individuals as terrorists, resulting in the “loss of livelihood” and other “dire economic consequences.”³⁰⁹

In summary, the indefinite time, which individuals and entities are listed, and therefore, subject to sanctions; the severity of the measures imposed such as asset bans and travel freezes; and their societal and economic consequences, make the sanctions akin to criminal penalties.³¹⁰ It follows that due process rights must be afforded to the individuals and entities subject to these “pseudo” criminal penalties in the determination of whether to institute or remove the sanctions against them, or innocent people may be made to suffer without redress.³¹¹ But is the UN obligated to provide these guarantees?

Though due process rights are now standard guarantees in human rights instruments, constitutions, and statutes that apply to many states, the obligations of states arising from these aforementioned instruments may not apply to the UN as a non-party and “autonomous subject of international law.”³¹² Moreover, the UN is not obligated to these instruments merely as a result of its constituents’ obligations.³¹³ Additionally, customary international law is not exactly clear

³⁰⁶ See Guthrie, 504.

³⁰⁷ See Guthrie, 504.

³⁰⁸ Guthrie, 504.

³⁰⁹ Guthrie, 504-505.

³¹⁰ See Willis, Grant L. “Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson.” *Georgetown Journal of International Law* 42.3 (Spring 2011): 673-745. 695-97.

³¹¹ See Willis, 695-697.

³¹² Fassbender. “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations,” 444-45.

³¹³ See Fassbender. “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations,” 445.

on international/intergovernmental organizations' commitments to guaranteeing due process rights to individuals; however, the trend is moving towards placing obligations on international organizations to uphold due process rights when "exercise[ing] governmental authority over individuals."³¹⁴

In fact, the drafters of the UDHR incorporated language broad enough to guarantee the rights encompassed therein to individuals even by international organizations carrying out official actions.³¹⁵ For example, the UDHR guarantees rights to everyone, but does not specify limitations on who or what must provide said rights, advancing the principle that the rights must be guaranteed to individuals, no matter whether by their state, another state, national, or international organs. The UDHR explicitly states that human rights should be protected by the "rule of law", considered by "every organ of society", ensured through "national and international [measures]" and a conducive "social and international order".³¹⁶ The 1993 World Conference on Human Rights declared the promotion and protection of human rights to be "a matter of priority" for both the UN and the entirety of the international community, while the Vienna Declaration confirmed a need "for States and international organizations ... to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights."³¹⁷

³¹⁴ Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations," 445.

³¹⁵ See Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations," 470-71.

³¹⁶ Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations," 470-71 *citing UDHR*.

³¹⁷ Fassbender. "Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of legal Affairs and Follow-Up Action by the United Nations," 470-71 (*internal citations omitted*).

Finally, the UN Charter is the constitution of the UN, and therefore, all UN organs “when exercising the functions assigned to them, [must] respect human rights and fundamental freedoms of individuals to the greatest possible extent.”³¹⁸

The Human Rights Committee has shed light on this issue. In the *Sayadi and Vinck* case before the Human Rights Committee, Belgium argued, in part, that listing individuals could not violate certain human rights because listing was an administrative measure, not a criminal sanction.³¹⁹ The Committee obviously did not find this line of argument persuasive when it concluded that Belgium had violated Articles 12 and 17 of the ICCPR.³²⁰ In *Perterer v. Austria*, a municipal employee brought a complaint to the Human Rights Committee alleging violation of ICCPR Article 14’s fair trial rights resulting from a disciplinary complaint brought against him in the Disciplinary Commission for Employees of Municipalities of the Province of Salzburg.³²¹ The Committee recognized that disciplinary measures imposed against municipal employees “does not ... necessarily constitute a determination of one’s rights and obligations in a suit at law, nor does it, except in cases of sanctions that...are penal in nature, amount to a determination of a criminal charge within the meaning of ...[A]rticle 14.”³²² It then concluded that while a disciplinary decision need not be decided by a court or tribunal, when “a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in Article 14 ... and the principles of impartiality, fairness and equality of arms implicit in this guarantee.”³²³ Thus, in *Perterer*, first the Committee stated that sanctions akin to criminal penalties, by

³¹⁸ Fassbender. “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations,” 471.

³¹⁹ See Sullivan and Hayes, 56-57.

³²⁰ See *Ninth Report of the Team*, S/2009/245, Annex I, Para. 6; Sullivan and Hayes, 56-57.

³²¹ See *Paul Perterer v. Austria*, Communication No. 1015/2001, U.N. Doc. CCPR/C/81/D/1015/2001 (2004).

³²² *Perterer v. Austria*, Communication No. 1015/2001, Para. 9.2.

³²³ *Perterer v. Austria*, Communication No. 1015/2001, Para. 9.2.

exception, are afforded Article 14 protections, and then it further qualified that where this exception does not apply, judicial bodies taking disciplinary action must respect the rights enshrined in Article 14.

The ICJ has opined that the UN has an “international legal personality” in that it may bring suit against states for breaches of international law. This carries with it an implied obligation of the UN to abide by the international norms pursuant to which it brings suits and “relevant to its constitutional purposes and functions.”³²⁴

It follows from the above that the UN is obligated to uphold human rights, more specifically, due process rights, in the determination of sanction imposition on individuals and entities as a result of its obligations under the UN Charter, its “legal personality,” and its exercise of judicial and quasi-judicial functions no matter whether the action is considered administrative. Surely the subsidiary organs of the UN agree, as they have irrefutably made strides toward achieving a more procedurally fair regime that comports with human rights despite pronouncements by certain organs that they are not obliged to do so. Notwithstanding the improvements, professor of international law, Jose Alvarez, in 2003, offered insight ahead of his time regarding a plausible explanation for why the 1267 Regime, with its obscure procedures and lack of appeal process, has been able to operate in exception of international law for so long.

Alvarez classified the Regime as an instrument of hegemonic international law “characterized by indeterminate rules -- whose vagueness benefits primarily (if not solely) the hegemon.”³²⁵ “Global HIL results from the privileged position accorded to the hegemon under the existing rules and institutions of international law.”³²⁶ With respect to the 1267 Regime, he

³²⁴ Willis, 697-701.

³²⁵ Alvarez, Jose E. “Hegemonic International Law Revisited.” *The American Journal of International Law* 97.4 (2003): 873-88. 873.

³²⁶ Alvarez, 886-87.

indicated that the U.S. and UK were the hegemons.³²⁷ As evidence for this assertion, he submitted that they proposed individuals for designation to which the other less powerful, less resourceful members could not easily object.³²⁸ They blocked delisting requests submitted by other members by creating procedural hurdles.³²⁹ Even the lists are “limited to alleged members of the Taliban or Al Qaeda, ... respond[ing] primarily to the terrorist threats posed to the hegemon and its allies but not to other such threats.”³³⁰ Indeed, as already mentioned above, Biersteker noted that in the Regime’s infancy, U.S. proposals for designation were adopted nearly without question. Thus, the Security Council action that gave rise to the Regime was “quite plausibly lawful,” “quite plausibly necessary” and not “manifestly illegitimate in a political sense,”³³¹ but it did blend “hegemonic power with law.”³³² In this respect, the failure to robustly address human rights concerns along the way could be credited to the lack of attention paid to them by the hegemonic U.S. For example, rather than criticizing violations of human rights in the Regime, the U.S. spent more time stressing the importance of state compliance and implementations of sanctions measures and pushing for consequences for their failures, disregarding the possibility that state failures resulted from their hesitation to abide by rights-conflicting measures.³³³ Ultimately, the U.S. position that human rights were a necessary casualty of the “global war on terror” and the willingness of other states to follow suit might have not only perpetuated the existence and continuance of a rights-violating Regime, but likely also irreparably damaged the credibility and effectiveness of the Regime, with the minor

³²⁷ See Alvarez, 876.

³²⁸ See Alvarez, 876.

³²⁹ See Alvarez, 876.

³³⁰ Alvarez, 878.

³³¹ Alvarez, 886-87.

³³² Alvarez, 886-87.

³³³ See Foot, 508-509.

improvements along the way not significant enough to have repaired the damage already done.³³⁴

Conclusions

The 1267 Sanctions Regime began as one whose noncompliance with internationally recognized human rights was a non-issue. Its increasing use post 9/11, however, brought certain issues to the forefront through judicial challenges and corresponding intra-UN challenges, which combined to compel Security Council action. The Security Council actions transformed the Regime into one that was more transparent and overall more rights abiding despite its position that the Regime was inherently sound because it was carrying on administratively and enforcing only temporary precautionary measures. In contradicting its position, the Security Council's actions demonstrated its knowledge that it was acting *ultra vires*.

Notwithstanding, the current Regime still lacks the rights necessary to operating a quasi-judicial process that results in penalties akin to criminal punishment. The deprivation of substantive rights accomplished through the deprivation of procedural rights has, as stated above, acted as one of the great counter-terrorism tools. Special judicial and quasi-judicial institutions maintained for the purpose of countering terrorism, such as the 1267 Regime, are founded on due process exceptionalism, making it impossible for such institutions to both carry out the purpose for which they were created while upholding human rights.

The problem has been characterized as a failure to distinguish between times of peace and times of war, an issue that yields exceptional international law to govern “the middle ground.”³³⁵ Such law operates outside of “traditional diplomatic settings,” “overlook[s]... the domestic/international divide” and includes various actors, therefore “serv[ing] not as [a] limit of

³³⁴ See Foot, 510-511.

³³⁵ Uruena, Rene. “International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror.” *International Organizations Law Review* 4.2 (2008): 321-342. 331-32.

power, but as ...constitut[ive of it].”³³⁶ It delegates power to international organizations and “non-representative functionaries” “to make decisions, impose sanctions and affect lives,” and “defines procedures, competences and draws frontiers of possibility.”³³⁷

One author, drawing on professor of law and philosophy David Dyzenhaus’ conceptions of legal black and grey holes, concluded that the Regime operates in a “legal grey hole” or a “space where there is a façade or form of the rule of law but no substantive constitutional protections in place.”³³⁸ Such can be found “in the 'imaginative experiments in institutional design' developed in the national security context that are nominally 'designed to uphold the rule of law [but] run the risk of undermining it'.”³³⁹ “Legal grey holes” along with “legal black holes” sit at the “rule by law” end of Dyzenhaus’ continuum of how law operates in times of exception, with “rule of law” at the other end.³⁴⁰

A paradigm operating in a space of exception in international law cannot be compatible with human rights. This is not limited to the 1267 Sanctions Regime. The English Star Chamber was established in the 15th century by King Henry VII to try those so prominent that ordinary courts would render bias decisions. Its enchanting name, derived from the stars on its ceiling, was not suggestive of its administration of justice. Rather, its “enduring legacy” is one of “secrecy, severity and extreme injustice.”³⁴¹ The Court’s increasing self-conferred jurisdiction came to extend over ordinary civil and criminal misdemeanor cases,³⁴² which it decided without a jury, delivering punishments ranging from fines and public humiliation to life sentences and

³³⁶ Uruena, 331-32.

³³⁷ Uruena, 331-32.

³³⁸ Sullivan, Gavin and DeGoede, Marieke. “Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise.” *Leiden Journal of International Law* 26.4 (Dec 2013): 833-854. 838-39, 852.

³³⁹ Sullivan and DeGoede, 839 citing Dyzenhaus, David. *The Constitution of Law: Legality in a Time of Emergency*. Cambridge: Cambridge UP, 2006. 211, 215.

³⁴⁰ Sullivan and DeGoede, 838-39 citing Dyzenhaus, 201.

³⁴¹ Vande Zande, Daniel L. “Coercive Power and the Demise of the Star Chamber.” *The American Journal of Legal History* 50.3 (July 2008-2010): 326-349. 326.

³⁴² See Vande Zande, 331, 334.

physical harm, but stopping short of death.³⁴³ The court's proceedings were arbitrary. Its judgments, made by those closest to the King, were merely extensions of the King's will, leaving the proceedings open to abuse as "political tools" to "quell constitutional and religious dissent" during a time of economic strife.³⁴⁴ Court officials conducted interrogations of witnesses and defendants, in secret, and outside of the presence of representative legal counsel.³⁴⁵ Judgments were based entirely on documentary evidence and the only time the defendant was brought before the Chamber was when judgment was entered, or when he was obligated to appear in his own defense, without legal counsel, to accept judgment after having confessed, remained silent, or incriminated himself.³⁴⁶

One author suggested that the court's abolition in 1641, rather than resulting from a "failure in the administration of justice," was one of a "decline in legitimacy" resulting from the court's coercive enforcement.³⁴⁷ Invoking the ideas of philosopher, sociologist, jurist and political economist Max Weber, the author offered that legitimacy in this context derives from "the belief that there is a moral obligation to obey authority whether that belief is rooted in tradition, normative conviction, or legal-rational principles. Because [it] derives from one's own beliefs and judgments, it ...must be voluntarily given, not forcibly seized."³⁴⁸ Thus, when authority's directives are seen as illegitimate, challenging "tradition, normative convictions or legal-rational principles" it decreases willingness to obey.³⁴⁹ The resistance, in turn, incites

³⁴³ See Vande Zande, 340.

³⁴⁴ Vande Zande, 333-35.

³⁴⁵ See Vande Zande, 337-38.

³⁴⁶ See Vande Zande, 337-40.

³⁴⁷ Vande Zande, 327.

³⁴⁸ Vande Zande, 328.

³⁴⁹ Vande Zande, 327-329, 346.

coercive enforcement by those in authority to maintain compliance.³⁵⁰ Eventually, the paradigm yields to increasing resistance and illegitimacy, ending in its destruction.³⁵¹

In the case of the Star Chamber, England's economic downturn, coupled with "attacks on its economic well-being, the historic and traditional values of worship, the basis of ecclesiastical authority, and the royal prerogative power," increased opposition to the Crown resulting in its diminished authority.³⁵² In an effort to recoup its power, the Crown took coercive measures via the Star Chamber to silence opposition and enforce the Crown's religious position.³⁵³ Rather than "reinforce[ing] obedience, [this reinforced] resistance" ending in the inevitable abolition of the Star Chamber.³⁵⁴

The modern day 1267 Regime is startlingly similar to the Star Chamber of the 15th century. It should be noted that the objections to and eventual abolition of the Star Chamber came during a time in England during which there was a public push for greater recognition of due process guarantees and individual liberties.³⁵⁵ The U.S. Supreme Court has cited the Star Chamber in multiple decisions relevant to due process rights, specifically, the privilege against self-incrimination. In *Ullmann v. United States*, 350 U. S. 422 (1956), the Court insinuated that the privilege originated to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality."³⁵⁶ The modern day exceptional courts that bear due procedural defects similar to the Star Chamber exist despite the already accomplished achievement of internationally recognized due process rights and individual liberties that the people of the 15th century were still only hoping for. There is no place for such paradigms in the 21st century.

³⁵⁰ See Vande Zande, 327-329, 346

³⁵¹ See Vande Zande, 327-329, 346

³⁵² Vande Zande, 329.

³⁵³ See Vande Zande, 327.

³⁵⁴ Vande Zande, 329.

³⁵⁵ See Vande Zande, 338.

³⁵⁶ *Ullmann v. United States*, 350 U. S. 422, 428 (1956).

Nonetheless, one should take note of the relationship between legitimacy and coercion expressed above. Weber used it in the context of states, the author applied it to a time of kingdoms, but it can equally be applied here to the relationship between the UN and states. In the context of the 1267 Regime, coercing states to comply with Security Council measures seen as *ultra vires* and violative of the human rights that states are obligated to protect through their own conventions has only resulted in repeated judicial and institutional challenges which yield decisions that reduce the legitimacy of the Regime. Continued challenges may generate state reluctance to propose names or implement sanctions measures, an avenue the HRC already intimated when it found Belgium violated Sayadi's and Vinck's human rights because it could have refrained from designating them until the national investigation was through. Escalating futility of the Regime, in turn, may cause it to suffer the same fate as the Star Chamber.

Other similar paradigms include Ireland's Special Criminal Court created in 1972 by the powers vested in the Assembly of Ireland through Article 38 of Ireland's Constitution and Part V of the Offences against the State Act, 1939, to handle terrorism-related crime.³⁵⁷ The court operates without a jury and over the years, has only expanded the scheduled offenses it is able to hear.³⁵⁸ Dissent and calls for abolition from the Irish Council for Civil Liberties, the Irish Human Rights Committee, Amnesty International, and the UN Human Rights Committee have been ignored.³⁵⁹ A second special criminal court has recently been established to deal with the

³⁵⁷ See *Constitution of Ireland (last amended Jun. 2004)* [Ireland], 1 Jul. 1937, Article 38; Offences Against the State Act, 1939, Part V, Articles 35-53.

³⁵⁸ See Greene, Alan. "We seem to have forgotten the Special Criminal Court is supposed to be exceptional." *thejournal.ie*. 10 Feb. 2016. Web. 16 Dec. 2016. <<http://www.thejournal.ie/readme/special-criminal-court-2595467-Feb2016/>>; "Fact Check: Who wants to get rid of the Special Criminal Court?" *thejournal.ie*. 10 Feb. 2016. Web. 16 Dec. 2016. <<http://www.thejournal.ie/ge16-election-2016-ireland-fact-check-special-criminal-court-2594422-Feb2016/>>

³⁵⁹ See "Fact Check: Who wants to get rid of the Special Criminal Court?"

first SCC's backlog.³⁶⁰ A similarly exceptional court in the U.S., the Foreign Intelligence Surveillance Court, was established pursuant to Foreign Intelligence Surveillance Act (1978) to assess and rule on warrant requests submitted by law enforcement agencies in the name of combatting terrorism.³⁶¹ The court has been criticized for having no oversight or public pressure because it functions secretly. The court permanently sits ex parte, hearing arguments only from government attorneys without public participation³⁶² in contravention of the U.S. Constitution's due process provisions. Both the proceedings of the FISC and the records thereof are kept secret from the public, with few exceptions.³⁶³ Since its inception, the FISC has granted tens of thousands of warrants, denying only few,³⁶⁴ indicating the court enforces a lesser burden than that typically preceding constitutionally consistent searches and seizures. Guantanamo Military Commissions established post 9/11, re-authorized via the Military Commissions Act ("MCA") of 2006 and its progeny MCA 2009, similarly took an abbreviated route to so-called justice. Despite some improvements to the Commissions along the way, they typically operated in a manner that deprived the defendants of selecting their representation, made use of evidence obtained through torture or coercion, and denied access to witnesses.³⁶⁵ In 1996, U.S. Alien Terrorist Removal Court was created pursuant to legislation. Modeled after the FISC, this court provided a forum to try suspected terrorists for the purpose of deportation without exposing

³⁶⁰ See "First sitting of second Special Criminal Court." *The Irish Times*. 6 May 2016. Web. 16 Dec. 2016. <<http://www.irishtimes.com/news/crime-and-law/courts/first-sitting-of-second-special-criminal-court-1.2636993>>

³⁶¹ See "Foreign Intelligence Surveillance Act (FISA)." *Epic.Org*. Web 16 Dec. 2016. <<http://epic.org/privacy/terrorism/fisa/>>

³⁶² See "Foreign Intelligence Surveillance Court (FISC)." *Epic.Org*. Web 16 Dec. 2016. <<https://epic.org/privacy/surveillance/fisa/fisc/>>

³⁶³ See "Foreign Intelligence Surveillance Court (FISC)." *Epic.Org*.

³⁶⁴ See "Foreign Intelligence Surveillance Act Court Orders (1979-2015)." *Epic.Org*. Web 16 Dec. 2016. <<https://www.epic.org/privacy/surveillance/fisa/stats/>>

³⁶⁵ See Glazier, David. "Destined for an Epic Fail: The Problematic Guantanamo Military Commissions." *Ohio State Law Journal* 75.5 (2014): 904-967. 929-936, 939-942.

classified national security information.³⁶⁶ To date, the court has not been used but remains prepared.³⁶⁷ In January 2016, Egypt's parliament ratified an anti-terror law that established special courts and provided extra protection against legal recourse for law enforcement officers that use force.³⁶⁸

In consideration of the creation, existence, and progression of the 1267 Regime as outlined above, it can be concluded that the 1267 Regime and other similar extraordinary judicial/quasi-judicial institutions, such as those mentioned above, can never be compliant with human rights because these institutions inherently employ shortcuts in due process to carry out their intended purpose, which is typically serious, permanent, or criminally punitive in nature.

³⁶⁶ See Yu, Jonathan H. "Combating Terrorism with the Alien Terrorist Removal Court." *American University National Security Law Brief* 5.2 (2015): 1-22. 4-5.

³⁶⁷ See Yu, 4-5.

³⁶⁸ See "Egypt's parliament endorses controversial anti-terrorism law." *Reuters*. 17 Jan. 2016. Web. 16 Dec. 2016.

Bibliography

Alvarez, Jose E. "Hegemonic International Law Revisited." *The American Journal of International Law* 97.4 (2003): 873-88.

"Approach and Standard | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/approach-and-standard>>

"Approach to Analysis, Assessment and Use of Information | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/assessment-information>>

Biersteker, Thomas J. "Targeted Sanctions and Individual Human Rights." *International Journal* 65.1 (Winter 2009-10): 99-117.

Case T-85/09, *Yassin Abdullah Kadi v European Commission*, General Court of the European Union (Seventh Chamber), 30 Sept. 2010.

Communiqué. International Conference on Afghanistan, Kabul. 20 Jul. 2010.

Conference Conclusions. The International Afghanistan Conference in Bonn. 5 Dec. 2011.

Constitution of Ireland (last amended Jun. 2004) [Ireland], 1 Jul. 1937.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as amended by Protocols Nos. 11 and 14*, 4 Nov. 1950, ETS 5.

"De-listing Requests | United Nations Security Council Subsidiary Organs." *UN News Center*. UN. Web. 04 Oct. 2016. <<https://www.un.org/sc/suborg/en/sanctions/delisting/delisting-request-stats>>

De Wet, Erika. "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protections." *Securing Human Rights? Achievements and Challenges of the UN Security Council*. Ed. Bardo Fassbender. New York, NY: Oxford UP, 2011. 141-71.

Eckert, Sue E. and Biersteker, Thomas J. *Addressing Challenges to Targeted Sanctions: An Update of the "Watson Report."* Rhode Island: Watson Institute for International Studies, Brown University, 2009.

Eckert, Sue E. and Biersteker, Thomas J. *Due Process and Targeted Sanctions: An Update of the "Watson Report."* Rhode Island: Watson Institute for International Studies, Brown

University, 2012.

“Egypt's parliament endorses controversial anti-terrorism law.” *Reuters*. 17 Jan. 2016. Web. 16 Dec. 2016.

“Fact Check: Who wants to get rid of the Special Criminal Court?” *thejournal.ie*. 10 Feb. 2016. Web. 16 Dec. 2016. <<http://www.thejournal.ie/ge16-election-2016-ireland-fact-check-special-criminal-court-2594422-Feb2016/>>

Fassbender, Bardo. “Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations.” *International Organizations Law Review*, 3.2 (2006).

Fink, Naureen Chowdhury. “Al-Qaida Analytical Support and Sanctions Monitoring Team.” *Meeting the Challenge: A Guide to United Nations Counterterrorism Activities*. New York, NY: International Peace Institute, 2012. 38-43.

“First sitting of second Special Criminal Court.” *The Irish Times*. 6 May 2016. Web. 16 Dec. 2016. <<http://www.irishtimes.com/news/crime-and-law/courts/first-sitting-of-second-special-criminal-court-1.2636993>>

First Informal Report of the Focal Point for De-listing Established Pursuant to Resolution 1730 (2006), 20 Jan. 2014, SCSOB/SCAD/DPA.

Foot, Rosemary. “The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas.” *Human Rights Quarterly* 29.2 (May 2007).

“Foreign Intelligence Surveillance Act (FISA).” *Epic.Org*. Web 16 Dec. 2016. <<http://epic.org/privacy/terrorism/fisa/>>

“Foreign Intelligence Surveillance Court (FISC).” *Epic.Org*. Web 16 Dec. 2016. <<https://epic.org/privacy/surveillance/fisa/fisc/>>

“Foreign Intelligence Surveillance Act Court Orders (1979-2015).” *Epic.Org*. Web 16 Dec. 2016. <<https://www.epic.org/privacy/surveillance/fisa/stats/>>

“For Future Petitioners | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/application>>

Ginsborg, Lisa, and Martin Scheinin. *Judicial Powers, Due Process and Evidence in the Security Council 1267 Terrorist Sanctions Regime: the Kadi II Conundrum*. Working Paper No. RSCAS 2011/44. Florence: European University Institute, Robert Schuman Center for Advanced Studies, 2011.

Glazier, David. “Destined for an Epic Fail: The Problematic Guantanamo Military Commissions.” *Ohio State Law Journal* 75.5 (2014): 904-967.

Greene, Alan. “We seem to have forgotten the Special Criminal Court is supposed to be exceptional.” *thejournal.ie*. 10 Feb. 2016. Web. 16 Dec. 2016. <http://www.thejournal.ie/readme/special-criminal-court-2595467-Feb2016/>

Gutherie, Peter. “Security Council Sanctions and the Protection of Individual Rights.” *NYU Annual Survey of American Law*, 60.3 (2005-2006): 491-542.

Keller, Helen, and Fischer, Andreas. “The UN Anti-terror Sanctions Regime under Pressure.” *Human Rights Law Review* 9.2 (2009): 257-66.

Michaelsen, Christopher. “Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council’s 1267 Sanctions Regime with European Due Process Guarantees.” *Melbourne Journal of International Law* 10.1 (May 2009): 329-345.

Offences Against the State Act, 1939.

Paul Perterer v. Austria, Communication No. 1015/2001, U.N. Doc. CCPR/C/81/D/1015/2001 (2004).

“Procedure | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/ombudsperson/procedure>>

Rosand, Eric. “The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions.” *The American Journal of International Law* 98.4 (Oct. 2004).

Scheinin, Martin. “Is the ECJ Ruling in Kadi Incompatible with International Law?” *Yearbook of European Law* 28.1 (2009): 637-53.

Second Informal Report of the Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006), 13 Feb. 2015, SCSOB/SCAD/DPA.

“Status of Cases | United Nations Security Council Subsidiary Organs.” *UN News Center*. UN. Web. 03 Oct. 2016. <<https://www.un.org/sc/suborg/en/sc/ombudsperson/status-of-cases>>

Sullivan, Gavin and Hayes, Ben. *Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights*. Berlin: European Center for Constitutional and Human Rights, 2009.

Sullivan, Gavin and DeGoede, Marieke. “Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise.” *Leiden Journal of International Law* 26.4 (Dec 2013): 833-854.

Third Informal Report of the Focal Point for De-listing Established Pursuant to Security Council Resolution 1730 (2006), 31 Dec. 2015, SCSOB/SCAD/DPA.

Ullmann v. United States, 350 U. S. 422, 428 (1956).

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 Dec. 1965, United Nations, Treaty Series, vol. 660, p. 195.

UN General Assembly, *International Covenant on Civil and Political Rights* (“ICCPR”), 16 Dec. 1966, United Nations, Treaty Series, vol. 999, p. 171.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”), 16 Dec. 1966, United Nations, Treaty Series, vol. 993, p. 3.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Ben Emmerson*, 26 Aug. 2012, A/67/396.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 16 Aug. 2006, A/61/267.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 29 Jan. 2007, A/HRC/4/26.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 6 Aug. 2008, A/63/223.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 3 Aug. 2009, A/64/211.

UN General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin*, 6 Aug. 2010, A/65/258.

UN General Assembly, *Security Council Resolution 2161 (2014) On Threats to International Peace and Security Caused by Terrorist Acts by Al-Qaida*, 17 Jun. 2014, S/RES/2161.

UN General Assembly, *Universal Declaration of Human Rights* (“UDHR”), 10 Dec. 1948, 217 A (III).

UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin: Ten Areas of Best Practices in Countering Terrorism*, 22 Dec. 2010, A/HRC/16/51.

United Nations, *Charter of the United Nations*, 24 Oct. 1945, 1 UNTS XVI.

UN Security Council, *Eighth Report of the Analytical Support and Sanctions Monitoring Team*, 14 May 2008, S/2008/324.

UN Security Council, *Eighth Report of the Office of the Ombudsperson, Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 31 Jul. 2014, S/2014/553.

UN Security Council, *Eleventh Report of the Analytical Support and Sanctions Monitoring Team*, 13 Apr. 2011, S/2011/245.

UN Security Council, *Eleventh Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2253 (2015)*, 1 Feb. 2016, S/2016/96.

UN Security Council, *Fifth Report of the Analytical Support and Sanctions Monitoring Team*, 20 Sept. 2006, S/2006/750.

UN Security Council, *Fifth Report of the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jan. 2013, S/2013/71.

UN Security Council, *First Report of the Office of the Ombudsperson, Pursuant to Paragraph 15 (c) of Annex II to Security Council Resolution 1904 (2009)*, 24 Jan. 2011, S/2011/29.

UN Security Council, *Fourteenth Report of the Analytical Support and Sanctions Monitoring Team*, 2 Aug. 2013, S/2013/467.

UN Security Council, *Fourth Report of the Analytical Support and Sanctions Monitoring Team*, 10 Mar. 2006, S/2006/154.

UN Security Council, *Fourth Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 30 Jul. 2012, S/2012/590.

UN Security Council, *Ninth Report of the Analytical Support and Sanctions Monitoring Team*, 13 May 2009, S/2009/245.

UN Security Council, *Ninth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 2 Feb. 2015, S/2015/80.

UN Security Council, *Second Report of the Analytical Support and Sanctions Monitoring Team*, 15 Feb. 2005, S/2005/83.

UN Security Council, *Second Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 22 Jul. 2011, S/2011/447.

UN Security Council, *Security Council Resolution 1267 (1999) Adopted by the Security Council at its 4051st meeting on 15 Oct. 1999*, 15 Oct. 1999, S/RES/1267.

UN Security Council, *Security Council Resolution 1333 (2000) Adopted by the Security Council at its 4251st meeting, on 19 Dec. 2000*, 19 Dec. 2000, S/RES/1333.

UN Security Council, *Security Council Resolution 1363 (2001) on the Situation in Afghanistan*, 30 Jul. 2001, S/RES/1363.

UN Security Council, *Security Council Resolution 1390 (2002) on the Situation in Afghanistan*, 16 Jan. 2002, S/RES/1390.

UN Security Council, *Security Council Resolution 1452 (2002) On the Threats to International Peace and Security Caused by Terrorist Acts*, 20 Dec. 2002, S/RES/1452.

UN Security Council, *Security Council Resolution 1526 (2004) On Improving Implementation of Measures Imposed by Paragraph 4 (b) of Resolution 1267 (1999), Paragraph 8 (c) of Resolution 1333 (2000) and Paragraphs 1 and 2 of Resolution 1390 (2002) on Measures Against Al-Qaida and the Taliban*, 30 Jan. 2004, S/RES/1526.

UN Security Council, *Security Council Resolution 1617 (2005) Threats to International Peace and Security Caused by Terrorist Acts*, 29 Jul. 2005, S/RES/1617.

UN Security Council, *Security Council Resolution 1730 (2006) General Issues Relating to Sanctions*, 19 Dec. 2006, S/RES/1730.

UN Security Council, *Security Council Resolution 1735 (2006) Threats to International Peace and Security Caused by Terrorist Acts*, 22 Dec. 2006, S/RES/1735.

UN Security Council, *Security Council Resolution 1822 (2008) On Continuation of Measures Imposed Against the Taliban and Al-Qaida*, 30 Jun. 2008, S/RES/1822.

UN Security Council, *Security Council Resolution 1904 (2009) On Continuation of Measures Imposed Against the Taliban and Al-Qaida*, 17 Dec. 2009, S/RES/1904.

UN Security Council, *Security Council Resolution 1988 (2011) On Establishment of a New Sanctions Committee Focusing on the Threat From Those Associated With the Taliban*, 17 Jun. 2011, S/RES/1988.

UN Security Council, *Security Council Resolution 1989 (2011) On Expansion of the Mandate of the Ombudsperson Established by the Resolution 1267 (1999) and the Establishment of a New Al-Qaida Sanctions List*, 17 Jun. 2011, S/RES/1989.

UN Security Council, *Security Council Resolution 2082 (2012) On Implementation of Measures to Implement Sanctions List Concerning Individuals and Entities and Other Groups and Undertakings Associated With the Taliban*, 17 Dec. 2012, S/RES/2082.

UN Security Council, *Security Council Resolution 2083 (2012) On Extension of the Mandate of the Office of the Ombudsperson and the Implementation of Measures Relating to the Al-Qaida Sanctions List*, 17 Dec. 2012, S/RES/2083.

UN Security Council, *Security Council Resolution 2253 (2015) On Renaming of Al-Qaida Sanctions Committee as "1267/1989/2253 ISIL (Da'esh) and Al-Qaida Sanctions Committee" and the Al-Qaida Sanctions List as "ISIL (Da'esh) and Al-Qaida Sanctions List" and on Extension of the Mandate the Office of the Ombudsperson for a Period of 24 Months From the Date of Expiration of its Current Mandate in Dec. 2017*, 17 Dec. 2015, S/RES/2253.

UN Security Council, *Seventh Report of the Analytical Support and Sanctions Monitoring Team*, 20 Nov. 2007, S/2007/677.

UN Security Council, *Seventh Report of the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jan. 2014, S/2014/73.

UN Security Council, *Sixth Report of the Analytical Support and Sanctions Monitoring Team*, 8 Mar. 2007, S/2007/132.

UN Security Council, *Sixth Report the Office of the Ombudsperson, Pursuant to Paragraph 18 (c) of Annex II to Security Council Resolution 2083 (2012)*, 31 Jul. 2013, S/2013/452.

UN Security Council, *Tenth Report of the Analytical Support and Sanctions Monitoring Team*, 2 Oct. 2009, S/2009/502.

UN Security Council, *Tenth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2161 (2014)*, 14 Jul. 2015, S/2015/533.

UN Security Council, *Third Report of the Analytical Support and Sanctions Monitoring Team*, 9 Sept. 2005, S/2005/572.

UN Security Council, *Third Report of the Office of the Ombudsperson, Pursuant to Paragraph 16 (c) of Annex II to Security Council Resolution 1989 (2011)*, 20 Jan. 2012, S/2012/49.

UN Security Council, *Thirteenth Report of the Team Analytical Support and Sanctions Monitoring Team*, 31 Dec. 2012, S/2012/968.

UN Security Council, *Twelfth Report of the Analytical Support and Sanctions Monitoring Team*, 1 Oct. 2012, S/2012/729.

UN Security Council, *Twelfth Report of the Office of the Ombudsperson Pursuant to Paragraph 20 (c) of Annex II to Security Council Resolution 2253 (2015)*, 1 Aug. 2016, S/2016/671.

Uruena, Rene. "International Law as Administration: The UN's 1267 Sanctions Committee and the Making of the War on Terror." *International Organizations Law Review* 4.2 (2008): 321-342.

Vande Zande, Daniel L. "Coercive Power and the Demise of the Star Chamber." *The American Journal of Legal History* 50.3 (July 2008-2010): 326-349.

Willis, Grant L. "Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson." *Georgetown Journal of International Law* 42.3 (Spring 2011): 673-745.

Yu, Jonathan H. "Combating Terrorism with the Alien Terrorist Removal Court." *American University National Security Law Brief* 5.2 (2015): 1-22.