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Ensuring fairness in the listing and de-listing process of individuals and entities subject to sanctions

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United Nations Security Council sanctions and the Rule of Law

Ensuring fairness in the listing and de-listing process of individuals and entities subject to sanctions

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I. Introduction

The Security Council in recent years has accelerated the trend towards imposing targeted (rather than comprehensive) sanctions, directed at those individuals and entities most responsible for non-compliance with its resolutions. While targeted sanctions have been introduced to mitigate the negative impact of sanctions on the civilian population, the enforcement of such measures has raised due process concerns for the affected individuals and entities. Although the Security Council has taken auspicious steps to improve the process of listing and de-listing of individuals and entities, much remains to be done in this area, especially with regard to the listing process.

Due process concerns in sanctions regimes are related to the procedures for designating (listing) individuals and entities for targeted measures by the Security Council, as well as the process of removing them from the sanctions lists (de-listing). It is widely agreed that rights of due process for individuals and entities targeted by sanctions should at least include the right to be informed, the right to be heard, the right to be advised and represented as well as the right to an effective remedy. Similarly, there is widespread concern that in the designating process these rights are insufficiently guaranteed. Potentially targeted individuals or entities receive no prior notifications and when they are proposed for listing, they have no opportunity to prevent or challenge this by demonstrating it is unjustified.

Targeted sanctions imposed by the Security Council have been challenged in various courts around the world by listed individuals and entities. The most prominent of these challenges is the joined Kadi and Al Barakaat case before the European Court of Justice (ECJ), which ruled in 2008 that “the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected”, with respect to their designation under the European Union (EU) Regulation implementing Security Council resolution 1267 (1999). The Court annulled the relevant EU Regulations to the extent that they concerned the claimants.

1 The views and opinions expressed in this paper are those of the authors and do not represent the views of the United Nations, the Security Council or its subsidiary organs, or any of their affiliated organizations.
4 Listings are undertaken either by the Security Council or its Sanctions Committees.
5 European Court of Justice, Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P, Press Release No. 60/08, 3 September 2008, p. 2.
II. Overview of current designations under UN sanctions regimes and de-listings

The table below shows the number of designations for all current UN sanctions regimes. It shows that there are substantial differences in the numbers between the regimes. The lists for the Al-Qaida, Taliban, Iraq and Iran sanctions regimes are considerably longer than those of the other regimes, with 33, 12, 28 and 11 percent of the total number of designations of 1050, respectively. Political will displayed by Security Council members varies from sanctions regime to sanctions regime, which may explain the discrepancy in the number of designations. Since the events of 11 September 2001, some Security Council members, particularly the United States, have intensified their focus on combating international terrorism, which may explain the disproportionate number of listings of individuals and entities on the Al Qaida and Taliban lists for targeted sanctions. The Iraq designations appear to be a legacy of the Saddam Hussein regime, reinforced by the new government’s de-Ba’athification policy. The high number of designations in the context of the Iran sanctions regime may be related to the political spotlight placed on the Islamic Republic since the adoption of the Security Council resolution 1737 in 2006, which has been compounded by the lack of demonstrable progress in a parallel political process.

Table 1. Designations by UN Sanctions Committees

<table>
<thead>
<tr>
<th>Sanctions List</th>
<th>Resolution (year)</th>
<th>Travel Ban and Assets Freeze</th>
<th>Assets Freeze only</th>
<th>Travel Ban only</th>
<th>Total (unique designations)</th>
<th>Percentage of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Somalia &amp; Eritrea</td>
<td>751 (1992) and 1907 (2009)</td>
<td>10 individuals and 1 entity (incl. targeted arms embargo)</td>
<td>-</td>
<td>-</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>Al-Qaida</td>
<td>1267 (1999) and 1989 (2011)</td>
<td>252 individuals and 91 entities</td>
<td>-</td>
<td>-</td>
<td>343</td>
<td>33</td>
</tr>
<tr>
<td>Taliban</td>
<td>1988 (2011)</td>
<td>127 individuals</td>
<td>-</td>
<td>-</td>
<td>127</td>
<td>12</td>
</tr>
<tr>
<td>Iraq</td>
<td>1518 (2003)</td>
<td>-</td>
<td>89 individuals and 208 entities</td>
<td>-</td>
<td>297</td>
<td>28</td>
</tr>
<tr>
<td>Liberia</td>
<td>1521 (2003)</td>
<td>-</td>
<td>22 individuals and 30 entities</td>
<td>45 individuals (22 overlapping with assets freeze)</td>
<td>75</td>
<td>7</td>
</tr>
<tr>
<td>Democratic Republic of the</td>
<td>1533 (2004)</td>
<td>26 individuals and 6 entities</td>
<td>-</td>
<td>-</td>
<td>32</td>
<td>3</td>
</tr>
</tbody>
</table>

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As of February 2012, Saddam Hussein Al-Tikriti, and his sons Uday and Qusay, remain on the Consolidated List pursuant to Security Council resolution 1518 (2003), presumably because assets under their names have yet to be recovered.
In the process of ‘de-listing’ of individuals and entities, there are also due process concerns as the rights of listed individuals and entities vary considerably across UN sanctions regimes. Due to procedural differences, only petitioners who are on the list of the Al Qaida Committee have the opportunity to further clarify their de-listing request; the others do not. In addition, consulted governments have seemingly limitless opportunities to request for additional time to consider de-listing requests (which may be politically motivated) under the Focal Point process. These differences will be explained in greater detail below. While the de-listing process for the Al Qaida sanctions list works from the starting point that individuals, groups and entities should be de-listed when there is no continued justification for their listing, the rationale for all the other sanctions regimes seems to be the presumption of guilt rather than the presumption of innocence. Consulted governments and Committee members have ample opportunity to object, oppose or delay de-listing requests, while targeted individuals or entities have little opportunity to respond or to be heard.

The table below shows the number of de-listing requests that have been processed by the Focal Point for De-listing so far. It shows that 29 out of 74 (39%) processed requests (considering the number of individuals and entities, not the number of requests) have resulted in de-listing. This number indicates that the Focal Point, at least at one point, was an effectively functioning instrument for de-listing, as others have argued.\(^7\) This does not mean however, that due process rights are sufficiently covered in the Focal Point’s procedures, as outlined in the annex to Security Council resolution 1730 (2006).

Table 2. Number of de-listing requests

<table>
<thead>
<tr>
<th>Security Council Committee</th>
<th>Requests received(^8)</th>
<th>Requests processed</th>
<th>De-listed</th>
<th>Remained on the list(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Al-Qaida and the Taliban</td>
<td>(25 requests) 18 individuals and 22 entities</td>
<td>25</td>
<td>3 individuals(^9) and 17 entities(^10)</td>
<td>13 individuals and 3 entities</td>
</tr>
<tr>
<td>Iraq</td>
<td>(2 requests) 3 individuals and 1 entity</td>
<td>2</td>
<td>2 individuals</td>
<td>1 individual and 1 entity</td>
</tr>
<tr>
<td>Liberia</td>
<td>(27 requests(^7)) 18 individuals and 9 entities</td>
<td>23</td>
<td>6 individuals</td>
<td>11 individuals and 9 entities</td>
</tr>
<tr>
<td>Democratic Republic of the Congo</td>
<td>(5 requests) 3 individuals and 4 entities</td>
<td>5</td>
<td>1 individual</td>
<td>2 individuals and 4 entities</td>
</tr>
<tr>
<td>Iran</td>
<td>(1 request) 1 entity</td>
<td>1</td>
<td></td>
<td>1 entity</td>
</tr>
<tr>
<td>Totals</td>
<td>(60 requests) 42 individuals and 37 entities</td>
<td>56</td>
<td>12 individuals and 17 entities</td>
<td>27 individuals and 18 entities</td>
</tr>
</tbody>
</table>


This paper will focus on outlining several pragmatic recommendations on how the concerns described above could be addressed, including the practical and administrative consequences these recommendations might have. It will examine due process concerns for listing and de-listing by taking stock of the experiences of the Focal Point for De-listing, the Office of the Ombudsperson, and the various experts groups that are attached to sanctions Committees. The aim of this paper is to stimulate the ongoing debate within, and between, the United Nations, Member States, the legal community, academics and NGOs on how to better address due process concerns in the context of targeted sanctions.

III. Due process concerns for listing

No prior notification

When individuals or entities are potentially targeted, there is no prior notification. As such, there is no opportunity to demonstrate that their inclusion is unjustified under

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\(^8\) As of 7 December 2011.
\(^9\) Some requests are second or third requests from the same individual.
\(^10\) Two additional individuals were delisted by the Committee, pursuant to its review of the names as called for in paragraph 25 of resolution 1822 (2008), while the focal point process was ongoing.
\(^11\) Two additional entities were delisted by the Committee, pursuant to its review of the names as called for in paragraph 25 of resolution 1822 (2008), while the focal point process was ongoing.
\(^12\) One additional request was returned pursuant to paragraph 3 of the annex to resolution 1730 (2006).
the relevant Security Council resolutions. Under the current practice any Member State can submit listing requests at any time. Guidelines for the various Committees require designating States to provide a detailed statement of case in support of the proposed listing that forms the basis or justification for listing. The statement of case should also include sufficient identifiers to allow for the positive identification of the individual or entity. Usually, the designating State will have bilateral consultations with key members of the Committee concerned to ensure support for its submission. The request for designation is then circulated to the members of the Committee under a “no-objection procedure”\textsuperscript{13} or put onto the agenda of a formal Committee meeting.

\textit{The right to be informed, to be heard, and to an effective review}

Persons or entities recommended for designation do not have access to sufficient information regarding the grounds for listing, so they do not have the means at their disposal to challenge the decision to list them and present an effective defence prior to their designation. Under the current practice, this process also fails to inform the prospective designee of the identity of the designating State. The non-disclosure of the identity of the designating State not only violates the designee’s right to be informed (to the detriment of their legal defence), but denies the designating State the opportunity to consider exculpatory evidence. Informing designees of a potential listing would also have the effect of inducing designating States to fulfil their obligation for due diligence.

The Committee must also ensure that the narrative summaries of reasons for listing contain substantial information and a detailed statement of case. The Committee may wish to hold separate meetings with the designating State to ask questions, verify information and identifiers presented by the designating State (full name, date of birth, nationality).

Generally recognized due process rights include the right of every person to be heard “before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority”\textsuperscript{14}. Under the current practice in the Security Council and its subsidiary organs, however, individuals or entities that are proposed for listing have no opportunity to prevent or challenge this by demonstrating it is unjustified. Once the designee is informed of the Committee’s intention to designate, the Committee (or an office or individual designated by the Committee), should allow the designee to present potentially exculpatory evidence. There is a similar lack of due process, which amounts to a “denial of legal remedies”\textsuperscript{15}, in the de-listing process for most sanctions Committees. This will be further explained in the part on the Ombudsperson below. Exculpatory evidence should be presented to the Committee for its consideration, together with information provided by the designating State.

\textsuperscript{13} This is a written decision-making procedure by which a decision is taken as long as no Committee member objects to the decision proposed by the Chairman within a specified period of time.

\textsuperscript{14} Fassbender, supra., p. 6.

\textsuperscript{15} Ibid., p. 5.
Ensuring that designation is undergirded by procedural due process principles has numerous advantages. The right to be informed, to be heard, and to an effective review, will promote transparency, fairness and legitimacy regarding the designation process, and address the legal challenges and backlashes that have sprouted in the course of implementing United Nations sanctions.

This was demonstrated most prominently with the Kadi and Al Barakaat International Foundation litigation in the European Court of Justice (ECJ), which generated discussions regarding the petitioner’s fundamental rights, including his right to be heard, the right to effective review, and his property rights. As such, addressing due process concerns head-on prior to listing would avoid thorny legal issues that may arise in implementing Articles 25 and 103 of the United Nations Charter (as seen in the Kadi case), where the legal tension between Security Council resolutions and the laws of a regional organization received prominent attention (the Court, however, was careful to explain that the Community courts have no power to review the lawfulness of resolutions adopted by the UN Security Council under Chapter VII).

The consensus among judges and legal scholars is that international organizations, such as the United Nations, can be bound by international legal norms that are relevant to the functions, purposes and powers of each specific international organization. The designation process should be compatible with the principles espoused in the United Nations Charter, the Universal Declaration on Human Rights, and the national constitutions of many Member States. Aside from the normative logic of adhering to procedural due process principles underscored by those documents, the risk of flouting those fundamental rights – so inimical to one of the core values of the United Nations - could cause irreparable reputational harm to the Organization.

Paying heed to due process prior to designation, however, does represent a goal that is more ambitious and outside the boundaries of conventional thinking. Even in the Kadi judgment, the Court of First Instance ruled that the freezing of assets did not infringe the applicant’s fundamental rights, in part because “freezing of funds is a

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16 Article 25 of the United Nations Charter: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. Article 103: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
17 European Court of Justice, Judgment of the Court of Justice in Joined Cases C-402/05 P and C-415/05 P, 3 September 2008, paragraph 287.
18 Fassbender, supra., pp. 6-7.
19 Article 10 provides: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.
20 Its corollary could be found, for example, in the Fifth Amendment to the Constitution of the United States of America states: “No person shall … be deprived of life, liberty, or property, without due process of law”.
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. This appears to be consistent with the ECJ’s inclination to treat assets freezes as coming under the ambit of administrative, rather than criminal, procedure, where the latter affords more procedural guarantees. It is recognized, however, that the ECJ generally employs a “very narrow concept of what constitutes a criminal sanction, which is actually different from the case law of the European Court of Human Rights that has a broad and autonomous concept of criminal charge”.22

As applied in the context of the sanctions framework, particularly in international terrorism cases, the designation of individuals and entities does cause irreversible reputational harm, affecting their long-term commercial interests, including their ability to earn a living. Based on anecdotal evidence, the stigma of designation or mere threat thereof often leads to an indefinite deprivation of business and professional opportunities; contractors or sub-contractors who are so “black-listed” often see their employment arrangements curtailed or terminated. When taking into consideration the severity of the potential penalty and the practical consequences associated with a Security Council mandated assets freeze23 - imposed in many instances with travel restrictions and arms embargo measures – designation is more akin to criminal, rather than merely administrative, sanctions.

There are, however, some practical challenges to introducing due process standards prior to listing, which was recognized by the ECJ in the Kadi judgment:

“[I]t is unarguable that to have heard the applicants before they were included in that list would have been liable to jeopardise the effectiveness of sanctions and would have been incompatible with the public interest objective pursued. A measure freezing funds must, by its very nature, be able to take advantage of a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore be the subject-matter of notification before it is implemented.”24

While the Court did not elaborate this point further in its decision (or in a subsequent appeal), some of its concerns could be easily discerned.

For one, the designation process would be prolonged, as individuals and entities would need to be located, and given an opportunity to respond to the evidence contained in the statements of case. Many individuals and entities may be difficult, if not impossible, to locate. For instance, Al-Shabaab, which is a designated entity under the Somalia/Eritrea sanctions regime, is an amorphous and highly decentralized group of armed insurgents, with no known headquarters, but which controls a large swath of the

23 Ibid., p. 27.
territory in south-central Somalia. Because it is not a single, unitary entity but a tactical alliance and network of fragmented groups, it is highly improbable that members of such a fractured entity, scattered over a vast geographical area, could be located, let alone consulted, about the reasons for their potential listing. In the context of Iran sanctions, many of the individuals and entities designated by the Security Council have either direct or indirect affiliation with the Government of Iran, which is unlikely to facilitate the notification to potential Security Council or Committee designees. While every effort should be made to comply with procedural due process standards, the utility, effectiveness and viability will vary from committee to committee, as the cases of the Somalia/Eritrea and Iran sanctions regimes clearly demonstrate.

The Kadi judgment also cites the advantage of “surprise”, i.e., that prospective designees could transfer, convert, dispose or move funds or liquidate assets; it is also foreseeable that they would establish accounts under other names to evade the assets freeze, thus undermining the effectiveness of enforcing assets freezes.

As a practical matter, the element of surprise is generally not available in many, perhaps most, sanctions regimes. Targeted sanctions under the authority of the Security Council typically impose assets freezes on individuals and entities. It is necessary for expert groups, which are established by the Security Council to monitor the implementation of targeted sanctions regimes, to approach and confront potential violators of sanctions or spoilers of peace processes in the course of fulfilling their respective investigative mandates, and to the extent possible, accord them the “right of reply”. They are tasked with collecting information on events and topics from multiple sources, and from sources with first-hand knowledge, if feasible. The gathering of such evidence, and corroborating their findings of any illicit activity, would require interviews and interrogation of individuals and entities that are deemed to have met the criteria for designation. These unscrupulous individuals can already extrapolate from these contacts that they are being targeted for possible designation.

Indeed, “persons of interest” are named in public reports of expert groups prior to designation, or in a build up thereto. The Monitoring Group on Somalia and Eritrea, for instance, routinely names individuals and entities in its reports, in a prelude to designation recommendation. In their last report, the Monitoring Group named Eritrean businessmen, as well as Eritrean consulate officials, who may be suspected of using Dubai as an offshore Eritrean financial hub; those who accrued financial benefits through dubious transfers were also explicitly named. By moving funds through complex and

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26 Assets freezes are a component of targeted sanctions the implementation of which is overseen by the following Security Council Sanctions Committees: Somalia/Eritrea, pursuant to resolutions 751 (1992) and 1907 (2009); Al-Qaeda, pursuant to resolutions 1267 (1999) and 1989 (2011); Afghanistan/Taliban, pursuant to resolution 1988 (2011); Iraq, pursuant to resolution 1518 (2003); Liberia, pursuant to resolution 1521 (2003); Democratic Republic of the Congo, pursuant to resolution 1533 (2004); Côte d’Ivoire, pursuant to resolution 1572 (2004); the Sudan, pursuant to resolution 1591 (2005); Lebanon/Hariri assassination, pursuant to resolution 1636 (2005); Democratic People’s Republic of Korea, pursuant to resolution 1718 (2006); Islamic Republic of Iran, pursuant to resolution 1737 (2006), and; Libya, pursuant to resolution 1970 (2011).
opaque networks, these individuals are alleged to have engaged in military procurement activities or providing funds to promote covert activities, which, if true, would constitute violations of Security Council resolutions\(^\text{27}\). Similarly, individuals and entities involved in contraband trade with the Sudan, and other illicit arms trafficking through the Sudan and Egypt, have been identified in the report\(^\text{28}\).

In short, those “persons of interest” already have de facto or inferred knowledge regarding the possibility of designation, which may trigger the transfer of funds to another financial institution, presumably to a jurisdiction where the enforcement of sanctions, particularly assets freezes, is considered lax. The prospective designees could also establish accounts under false names, with the aid of forged or falsified travel documents, to evade detection of their funds by government authorities. This reality should frame any deliberations on the issue of pre-designation due process.

Moreover, there are legal and financial tools available to request temporary injunctions to another jurisdiction to prevent an account holder from transferring funds. Many Member States have already codified arrangements for mutual legal assistance in criminal matters, which could take the form of either bilateral or multilateral treaties. In that regard, a temporary injunction on assets freezes could be executed with international letters rogatory. The United Nations Office on Drugs and Crime, in fact, recommends that such provisional measures be made available when requested from a competent foreign authority\(^\text{29}\).

In the context of terrorist financing, the Financial Action Task Force Special Recommendation III specifically calls on each country to take measures to freeze and confiscate terrorist assets. In its interpretative note, the FATF explains: “the objective … is to freeze terrorist-related funds or other assets based on reasonabla grounds, or a reasonable basis, to suspect or believe that such funds or assets could be used to finance terrorist activity” (emphasis added). Under the FATF framework, the designating State would need to make a prima facie case to request national authorities in other States to initiate an action to freeze the assets of individuals and entities it intends to propose for designation.

In non-terrorism related cases, States may also exchange information through arrangements between financial intelligence units (FIUs) to facilitate a temporary assets freeze; such cooperation could also occur even in the absence of a formal agreement\(^\text{30}\).

*The role of the Office of the Ombudsperson*

While the Ombudsperson’s (de-listing) procedures include the right to be heard for a petitioner, it does not apply for the designation process. Due process concerns are


\(^{28}\) Ibid., pp. 95-97, 108-109.


\(^{30}\) Ibid.
however even more imminent when an individual, group or entity will potentially be designated but has no possibility to clarify its case or present information that may demonstrate the listing proposal is unjustified. It would therefore be a significant due process improvement to add this to the mandate of the Ombudsperson.

The Ombudsperson is well placed to perform this function. The mandate of the Ombudsperson, while currently limited to the Al-Qaeda Committee and in the de-listing process, dovetails well with the goal of implementing fair and clear procedures throughout the designation process.

Moreover, the Office of the Ombudsperson will need to assume a more prominent role in situations where notification and consultation between the Committee and the prospective designee is impractical. In those circumstances, the Ombudsperson, in lieu of consulting the prospective designee, should have the mandate to examine and review the narrative summaries against individuals and entities, make qualitative judgments about the veracity and probity of the evidence presented, and make appropriate recommendations to the relevant sanctions Committee. The Office would thus serve as an independent mechanism to ensure that the designating State has met the minimal evidentiary standards underlying its case.

- Recommendation: establish a dialogue between the Committee and the designee to ensure: (1) the right to be informed, (2) the right to be heard, and (3) the right to an effective review before the designation process.
- Recommendation: expand the mandate of the Ombudsperson to include engagement and dialogue with individuals, groups or entities before they are designated by Committees or the Security Council. In cases where such a dialogue is not possible, the Ombudsperson should be mandated to interact with the designating State to ensure that the statement of cases and reasons for listing presented are based on solid evidence.

The role of the expert groups

The use of panels of experts and monitoring groups has led to a substantial improvement in assessing the effectiveness of targeted or “smart” sanctions, particularly on the cross-border movement of arms and ammunition, and on financial controls. Moreover, the designation process has raised the investigative profiles of these expert panels and groups, which are tasked by the Security Council with developing statements of cases and updating publicly available information regarding listed individuals and entities. As such, expert group have launched vigorous investigations with a view towards recommending designation of individuals and entities for travel ban and assets freeze. The relevant Committee, in turn, would have the prerogative to actually designate them.

In the context of their investigative work, due process issues have already been raised by Member States, as well as individuals and entities implicated in reports of expert groups. This is a difficult challenge to overcome for experts, as various interests –
the need to conduct vigorous and effective investigation on the one hand, and the goal of promoting legitimacy, fairness and transparency on the other - must be balanced in what is putatively a political, or at least non-judicial, process.

In general, the evidentiary standards used by expert groups do not necessarily meet a rigid judicial standard, as they do not operate as independent judicial bodies and lack the powers exercised by such bodies (e.g. subpoena); in cases where expert groups are mandated to submit to Committees the names of individuals and entities for possible designation targeted measures, expert groups strive to apply the highest evidentiary standards they can achieve given the limitations outlined above. For that reason, it is important for experts to be informed and to be sensitized to the universal human rights instruments, particularly those pertaining to the right of due process, and to integrate those principles in their standard operating procedures and investigative methodology.

The Security Council Subsidiary Organs Branch (SCSOB), which oversees the work of these expert groups within the United Nations Secretariat, should continue to arrange training and orientation, especially at the outset of the mandate, to ensure that experts have the necessary tools to apply these principles in recommending designation to their respective Committees. In this connection, the report of the United Nations Security Council Informal Working Group on General Issues of Sanctions (S/2006/997) contains useful guidance for expert groups in paragraph 9, which makes reference to the “right of reply” that expert groups should accord to individuals and entities under investigation.

IV. Due process concerns for de-listing

Background to the establishment of the Focal Point for De-Listing

In September 2005, the General Assembly called on the Security Council “to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them (...)”31 Subsequently, the Office for Legal Affairs (OLA) in the UN Secretariat commissioned Professor Fassbender of the Humbold University in Berlin to conduct a study addressing these issues, including the process of de-listing (as referenced before in this paper). One of the findings of his study includes the right of listed individuals and entities “to be heard by the Council, or a subsidiary body, within a reasonable time”.32 Based on this study the Secretary-General presented a non-paper to the Security Council setting out his views on listing and de-listing of individuals and entities on sanctions lists. Quoting from it when addressing the Council on 22 June 2006, the UN’s Legal Council said “a person against whom measures have been taken by the Council has the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body. That right should include the

32 Fassbender, supra., p.8.
ability to directly access the decision-making body, possibly through a focal point in the Secretariat (…)” 33

In response, the Security Council adopted resolution 1730 on 19 December 2006, by which it adopted the de-listing procedures annexed to the resolution and asked the Secretary-General to establish within the Security Council Subsidiary Organs Branch of the Secretariat a focal point to receive de-listing requests.

Until the adoption of Security Council resolution 1730 in 2006 listed individuals and entities were not able to submit de-listing requests directly to an office at the United Nations, but only to their State of residence or nationality. If the petitioned State was unwilling to act upon the request, they had no other means to put forward a de-listing request.

**Due process concerns with the Focal Point process and recommendations on how to address them**

While the creation of the Focal Point for De-listing increased access for listed individuals and entities to seek redress to their listing, it did not address all the other due process concerns. The main shortcomings of the de-listing procedures in resolution 1730 (2006) can be summarized as follows:

While initially the designating governments and the governments of citizenship and residence (the ‘reviewing governments’) are given three months to review de-listing requests forwarded to them by the Focal Point for De-listing, they can indicate to the Focal Point that they “require an additional definite period of time” as per paragraph 6 (c) of the annex of resolution 1730 (2006). It is not specified what ‘definite’ means for this purpose, thereby giving the opportunity to the reviewing governments to renew this period indefinitely (i.e asking for an additional three months again and again). In practice, this may lead to holds being placed on de-listing requests for unclear or political reasons and without a perspective for the requesting individuals or entities to receive a final decision on their request.

- **Recommendation:** The de-listing procedure should be modified to specify how much additional time the reviewing governments can request at maximum and that they can do so only once.

Upon receipt by the Focal Point, de-listing requests are only shared with the designating government(s) and the government(s) of citizenship and residence, but not with the relevant Committee or expert group, which means Committees and expert groups might not be aware of a de-listing request for a period of time, especially if the reviewing governments request additional time to review the request multiple times.

**Recommendation:** The Focal Point, should be mandated to share the de-listing requests with the relevant Committee and expert groups upon receipt. The latter should be mandated to provide an advisory opinion to the Committee as to whether the listing is still justified (i.e. whether the individual or entity concerned still meets the listing criteria stipulated in relevant Security Council resolutions).

The De-listing Focal Point has very limited responsibilities and limited interactions with petitioners. Currently, the Focal Point can only inform them that the review process is still ongoing, that they have been de-listed or that they remain on the list. Furthermore, the de-listing procedure under resolution 1730 (2006) accords the primary responsibility for approving de-listing request to designation states as they are asked to review the request and to indicate whether they support it or not. “Essentially this asks the designating state to reverse a previous decision, one that may have involved a considerable process of interagency consultation. It is like asking a judge to find innocent someone previously determined to be guilty.”

In all likelihood this significantly decreases the success of de-listing requests submitted to the Focal Point regardless of their merits.

**Recommendation:** Governments opposing de-listing should be required to provide detailed explanations for their decision to the Committee and the Focal Point, who should be authorized to share those explanations with the petitioner. With the agreement of the petitioner, the Focal Point should be able to post de-listing requests on his website to increase the transparency of the Focal Point process and to enable other Member States who are not Committee members to submit relevant information to the Focal Point as well.

V. The Office of the Ombudsperson

*Current mandate*

While expressing “its intent to continue efforts to ensure that procedures are fair and clear”

the Security Council created the Office of the Ombudsperson with resolution 1904 of 17 December 2009 as the successor to the Focal Point for Delisting for cases related to the 1267/Al Qaida Sanctions Committee. The Council has mandated the Ombudsperson to assist the 1267/Al Qaida Committee with de-listing requests by providing an analysis of, and observations on, all information available to the Ombudsperson relevant to the de-listing request. The Ombudsperson also provides the

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35 Security Council resolution 1904 (2009), p. 2
36 Before the adoption of resolution 1988 and 1989 in June 2011, the lists of individuals and entities associated with Al Qaida and Taliban were combined. Since then, there are two separate lists and two separate committees.
37 Its mandate was extended by resolution 1989, adopted on 17 June 2011.
Committee with recommendations on de-listing requests received. The Ombudsperson has been appointed by the Secretary-General in an independent and impartial role.

The Ombudsperson is mandated to gather information and to interact with petitioners, relevant states and organizations with regard to de-listing requests. Within an established time frame, the Ombudsperson will then present a comprehensive report to the Sanctions Committee. Based on an analysis of all available information and the Ombudsperson’s observations, the report will set out for the Committee the principal arguments concerning the specific de-listing request. The report will also contain a recommendation from the Ombudsperson on the de-listing request. Six out of eight cases presented thus far by the Ombudsperson to the Al Qaida (and before 17 June 2011, Al-Qaida/ Taliban) Committee have resulted in (partial) de-listing of the individuals or entities petitioning.

In 2010, the UN Secretary-General, in his annual report on Rule of Law, made the following recommendation: “As a general rule, any improvements in procedures for listing and de-listing, as well as for granting humanitarian exemptions, should apply universally to all sanctions regimes.” As such, the Council should consider extending the mandate of the Ombudsperson to all the sanctions lists.

The Security Council has yet to formally discuss this recommendation, which accounts for the different de-listing procedures for the 1267/Al Qaida Committee and the other Committees. The application of different procedures has had a direct bearing on the due process rights of the individuals and entities concerned.

Consultation with petitioner of de-listing request

After the Ombudsperson has determined that a de-listing request properly addresses all designation criteria and the justification for listing, one of the core tasks of the Ombudsperson is to facilitate dialogue between the petitioner, the Committee, relevant States and the relevant expert group. This critical phase provides an opportunity for the Ombudsperson to explore with the petitioner in detail the various aspects of the case. It gives the petitioner an opportunity to be heard, to address issues and answer questions with a view to ensuring that his or her position is fully explained and understood.

The initial period of two months can be extended with another two if the Ombudsperson determines that further time is needed. For individuals, groups and entities that are listed under another sanctions regime, this possibility does not exist and a petitioner is not consulted after requesting de-listing. In order to provide the individual or entity in question with the right to be heard, it is recommended that engagement with the

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38 Details on the status of de-listing requests submitted to the Ombudsperson are available at: http://www.un.org/en/sc/ombudsperson/status.shtml

39 ‘Strengthening and coordinating United Nations rule of law activities’, Report of the Secretary-General, 20 August 2010, A/65/318, p. 21

petitioner be made available to all sanctions regimes, within existing procedures or by extending the mandate of the Ombudsperson.

- **Recommendation: introduce the possibility of engagement and dialogue with a petitioner and relevant States, Committee and expert groups in all sanctions regimes to ensure that the de-listing request is fully explained and understood.**

**Time limits for considering de-listing request**

As explained above, due to unspecific language in the annex to resolution 1730 (2006), reviewing governments can, if they so choose, put de-listing requests on hold without time constraints, by continuously requesting additional time to review them. This loophole has been closed in the procedures that govern the work of the Ombudsperson. If the Ombudsperson has produced a report on a de-listing request, recommending to either keeping the person or entity on the list or removing the person or entity from the list, the Committee has 15 days to review it before it will be placed on the Committee’s agenda. The Committee will then have to complete its review within 30 days of its submission. The Ombudsperson will present the report in person to the Committee and answer questions regarding the same. After consideration, the Committee will decide on the de-listing request.

This procedure guarantees that reviewing governments are not able to extend the reviewing period indefinitely without providing an explanation for each request for extension. It is therefore recommended that all sanctions Committees introduce a specific time limit for reviewing de-listing requests.

- **Recommendation: introduce a time limit for reviewing delisting request for all sanctions Committees.**

**De-listing procedures in the Committees**

In all the sanctions Committees except the 1267/Al Qaida Committee, a de-listing request will only be placed on the Committee’s agenda if none of the ‘reviewing governments’ opposes it or after a 3-month period without comment from the reviewing governments. If after one month no Committee member recommends de-listing, it is deemed to have been rejected. This makes it relatively easy for members to block or delay a delisting request, and it obstructs the right of a listed individual or entity to challenge a designation.

For the Ombudsperson, this procedure is reversed. When the Ombudsperson recommends de-listing, the person or entity will be removed from the list unless within 60 days the Committee decides, by consensus, that the person or entity should remain

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subject to sanctions. The point of departure for the Ombudsperson is the possibility for an individual or entity to be de-listed if there is sufficient justification. Committee members would not only have to actively oppose a request, but find consensus to reject a de-listing proposal by the Ombudsperson. By tilting the balance in favour of the petitioner, this process manages to address an important procedural due process concern.

One of the explanations for limiting the mandate of the Ombudsperson to the Al Qaida sanctions regime is the distinction between ‘country specific sanctions’ and ‘global’ sanctions targeting terrorists. In a currently pending EU Court of Justice case, the General Court reasoned that due process rights do not apply to individuals targeted by country specific sanctions. The court dismissed the application of an individual who was targeted by EU sanctions imposed on members of the Burmese government and persons/entities associated with them, by arguing that individuals do not have the right of participation (prior notification and possibility to be heard) because these measures constitute a ‘general legislative act’.

The General Advocate disagreed with the distinction between sanctions that are country specific and those targeting terrorists, arguing that a (EU) regulation aimed at a third State should fulfill the same due process requirements as one that targets individuals. The reasoning of the General Court does not take into account the gravity of the sanctions imposed against listed persons as it would in cases of sanctions against terrorists. It is likely that the European Court of Justice (ECJ) will follow the GA’s opinion and overrule the Court’s judgement.

- **Recommendation:** expand the de-listing mandate of the Office of the Ombudsperson to all other Sanctions Committees/ regimes.

**Limitations of the Office**

While the Office of the Ombudsperson is widely acknowledged to have improved the enforcement of due process rights for listed individuals and entities, it has not been immune to criticism. Some have stated that the “introduction of the Ombudsperson does not amount to the introduction of independent and impartial judicial review”. The role of the Ombudsperson is advisory, while decisions on de-listing requests are still taken confidentially and by consensus in the Committee. The Ombudsperson has “no power to grant any sort of remedy to the listed petitioner”. In addition, during the information exchange process, Member States are able to withhold information they deem

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42 However, if there is no such consensus, during that 60 day period a Committee member may request the matter be referred to the Security Council for a decision on the question of whether to delist. The decision of the Committee on the delisting request will be communicated to the Petitioner by the Ombudsperson.
43 Appeal brought on 27 July 2010 by Pye Phyo Tay Za against the judgment of the General Court (Eighth Chamber) delivered on 19 May 2010 in Case T-181/08.
44 Paragraph 123 of the Judgement of the General Court (Eighth Chamber), 19 May 2010
45 Case note to Pye Phyo Tay Za v. Council of the European Union.
47 Willis, supra, p. 739
confidential, except for a few that have reached confidentiality agreements with the Ombudsperson for full access to relevant information. This raises the questions if “the factual information conveyed to listed persons or entities will in the future be more comprehensive”48 than in the past.

There are three arguments to support the recommendation to expand the Ombudsperson’s mandate, as the Ombudsperson herself has argued49. First, the Ombudsperson can outline the case against the petitioner, clarify his answer to that case and draw him out as to the details of his response, all of which represents progress in the right to be heard for a petitioner. Second, the Ombudsperson will present an analysis of all the underlying information in terms of sufficiency of the case, which is an improvement in the provision of information to the decision maker (the Committee). Third, the analysis and observations of the Ombudsperson will focus on the question if there is sufficient basis to keep an individual on the list, rather than the question if the original decision for listing was reasonable or justified.

VI. Recommendations

“Continued challenges without what is perceived as an adequate response, risks the Security Council’s legitimacy and future ability to utilize such tools effectively to act against threats to international peace and security.”50

This passage from the 2009 update of the ‘Watson Report’ continues to be relevant in 2012. The writers recommend taking “the initiative to address the issue proactively”51 and this paper aims to be a contribution in that direction, as it might support the ongoing debate. It will of course depend on the willingness of the Security Council to take this matter further. Nevertheless, with the Office of the Ombudsperson in place for more than two years, this might be a good moment in time to expand on the progress it has made.

While some of the procedural defects in the designation process have gained prominence, particularly at the de-listing stage, comparatively little attention has been paid to due process issues prior to designation. It is thus incumbent upon the Security Council to consider improving the process over the entirety of the designation continuum.

As with every sacred principle espoused by the international community, due process must be balanced and carefully calibrated against other, often competing, interests. The legally compelling reasons, in other words, cannot completely obscure the practical flexibility required to effectively implement the sanctions regimes. Drawing that line presents a challenge, but however it is drawn, it must pass some unspecified threshold that incorporates the principles of fairness, transparency and legitimacy. To do

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48 Cortright and de Wet, supra., p. 10
49 Briefing by the Ombudsperson to the annual informal meeting of Legal Advisers of the Ministries of Foreign Affairs of United Nations Member States, 25 October 2010.
50 Biersteker, T.J. and S.E. Eckert, supra., p.30
51 Ibid.
so, this paper posits that the following recommendations could frame discussions on how
the Security Council could meet that challenge:

Listing procedures

1. Establish a dialogue between the Committee and the designee to ensure: (1) the
right to be informed, (2) the right to be heard, and (3) the right to an effective review
before the designation process.

2. Expand the mandate of the Ombudsperson to include engagement and dialogue
with individuals, groups or entities before they are designated by Committees or the
Security Council. In cases where such a dialogue is not possible, the Ombudsperson
should be mandated to interact with the designating State to ensure that the statement
of cases and reasons for listing presented are based on solid evidence.

De-listing procedures

3. The de-listing procedure should be modified to specify how much additional time
the reviewing governments can request at maximum and that they can do so only
once.

4. The Focal Point should be mandated to share the de-listing requests with the
relevant Committee and expert groups upon receipt. The latter should be mandated to
provide an advisory opinion to the Committee as to whether the listing is still justified
(i.e. whether the individual or entity concerned still meets the listing criteria
stipulated in relevant Security Council resolutions).

5. Governments opposing de-listing should be required to provide detailed
explanations for their decision to the Committee and the Focal Point, who should be
authorized to share those explanations with the petitioner. With the agreement of the
petitioner, the Focal Point should be able to post de-listing requests on his website to
increase the transparency of the Focal Point process and to enable other Member
States who are not Committee members to submit relevant information to the Focal
Point as well.

Ombudsperson

6. Introduce the possibility of engagement and dialogue with a petitioner and
relevant States, Committee and Monitoring Groups or Panels of Experts in all
sanctions regimes to make sure the de-listing request is fully explained and
understood.

7. Introduce a time limit for reviewing de-listing request for all sanctions
Committees.
8. Expand the de-listing mandate of the Office of the Ombudsperson to all other Sanctions Committees.\textsuperscript{52}

\textit{Other recommendations}

9. Mandate all other Committees to review and update, as necessary, lists of sanctioned individuals and entities in regular intervals (for instance every two years).\textsuperscript{53}

10. In addition to issuing press releases and sending notes verbale to all Member States once a decision is taken to de-list individuals or entities, SCSOB should also communicate this information directly to designated focal points in all Member States via e-mail. This would decrease the likelihood that the de-listed individuals or entities still face adverse consequences such as not being able to access bank accounts, being denied visas or being stopped at airports after they have been de-listed.

The implementation of some of these recommendations will have financial implications. In particular, the recommendations related to augmenting the role of the Office of the Ombudsperson would require that its Office is adequately resourced. In an era of fiscal austerity at the United Nations (the General Assembly recently adopted the 2012-2013 budget of $5.15 billion, which reflects a 4.9\% cut from the previous biennium), and calls by the Secretary General to “do more with less”, requesting additional resources commensurate with the expansion of the Ombudsperson’s mandate, will not be an easy pitch to make.

However, as seen in the last few years, the Security Council has increasingly turned to targeted sanctions as an efficient and cost-effective means of conflict management and resolution. In just the last two years, the Security Council added Libya and Eritrea to the existing sanctions regimes. Due process, in the context of the designation and de-listing process, does not appear to be an ephemeral phenomenon, and conferring legitimacy to the process should be a priority to the Organization to ensure optimal compliance with sanctions measures. Perceptions that the Security Council – the principal organ responsible for discharging the duty for the maintenance of international peace and security - may be undermining due process principles, however unwittingly, could undercut and impede efforts to compel Member States to comply with sanctions measures; in fact, it may provide ammunition to those who are looking for additional reasons to undermine and circumvent them.

\textsuperscript{52} If this recommendation were to be implemented, the recommendations on how to improve the Focal point process would no longer be necessary.
\textsuperscript{53} In addition to how the Security Council has mandated the 1267 Committee.