

Non-judicial adjudication in International Law

A case-study of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee of the UN Security Council

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I. Introduction

It is a bedrock assumption of much international public law scholarship that the institutions best suited to protect human rights are courts.¹ Although the end of the Cold War had sparked a stunning proliferation of international courts, today the appetite of states for establishing judiciaries has largely disappeared. While in the decade from 2000 until 2009, 17 new international judicial bodies were established, the 2010s brought about the establishment of only one.² A central cause is likely a tectonic shift in the geopolitical context: While the American empire and the rule of the West has faded, the emerging world order is multipolar, and new power houses such as China or the BRICS are less inclined to establish international courts following the model of Western-style judicial review. Tom Ginsburg has even predicted that with the rise of authoritarian regimes, “we should expect international law to increasingly take on the character of that demanded by authoritarians”³ – which likely means less “third-party dispute resolution mechanisms in the form of a court”.⁴ At the same time, global governance still creates multiple human rights problems and lacunas that require an effective remedy.

If states create international institutions or procedures to address these issues at all, it seems plausible to assume, for better or for worse, that they will either rely upon mechanisms of intergovernmental politics and diplomacy to resolve disputes or, at best, set up non-judicial mechanism that fall short of a court considering the recent backlash against international courts and tribunals,⁵ and the increasing desire of states to avoid a loss of control that independent courts typically induce.⁶ Today, there already are numerous quasi-judicial or non-judicial alternatives to a court on the international plane such as the UN treaty bodies, the World Bank inspection panel or the Kosovo ombudsperson, some of which have attracted criticism precisely for falling short of a true court.⁷ This raises a normative issue, which is embedded in a broader debate about the just design of global institutions⁸ and reflects public international law’s in-built tension between realist pragmatism and normative aspirations, between apology and utopia.⁹ Is it normatively acceptable, or even preferable, to establish more flexible and less intrusive adjudicatory mechanisms given the realities and particular features of the international legal system, or should international law scholars demand nothing less than the creation of international courts vested with the power to render binding judgments?¹⁰

The Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee is one of the most remarkable, yet controversial non-judicial adjudicatory bodies beyond the state. It was grudgingly established by the UN Security Council in response to the Kadi judgment of the European Court of Justice to save the the ISIL and Al Qaeda sanctions regime established in 1999 by Security Council Resolution 1267.¹¹ Against this background, the Security Council created the Office of the

¹ Sources

² Court of the Eurasian Economic Community

³ Ginsburg, *Authoritarian International Law?*, 231

⁴ Ginsburg, *Authoritarian International Law?*, 238

⁵ Backlash literature

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⁷ Debate world court

⁸ Pogge, in Farrall/Rubenstein, 415

⁹ Koskenniemi

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¹¹ See for more detail below

Ombudsperson to the 1267-sanctions regime, thereby empowering a single individual to review the listing decisions of arguably the most powerful international institution. At the same time, the ombudsperson mechanism falls short of a court in several regards. In particular, it is neither institutionally independent nor does it have the power to render binding decisions,¹² raising the questions whether this kind of mechanism could become a blueprint for global governance or whether it only constitutes a fig leaf of the Security Council's sanctions regime. While these questions are highly controversial in legal and political scholarship, one implication may remain beyond dispute: How we evaluate the contribution of a non-judicial adjudicatory mechanism such as the 1267-ombudsperson to protecting human rights, ensuring due process and providing accountability may have ramifications on the future design of global institutions.

In the legal debate about the 1267-Ombudsperson, two opposing camps have evolved on this issue: the court camp and the ombuds camp. While both camps agree that legal protection for listed persons should be provided by an independent oversight body, they hold contrasting views on whether the 1267-Ombudsperson constitutes a sufficient adjudicatory body to review the UN Security Council's targeted sanctions. According to the ombuds view, most prominently represented by the former Ombudsperson Kimberly Prost and Devika Hovell, the ombuds model essentially ensures court-equivalent legal protection and is institutionally the best solution for the highly political context of the Security Council.¹³ While traditional judicial review is deemed unrealistic and unnecessary to provide an effective and independent adjudicatory mechanism against the targeted sanctions of the 1267-regime,¹⁴ the ombuds model is described as an institutional success story and a prime example of the emergence of accountability mechanisms in the context of nascent global administrative law.¹⁵ Instead of fixating on courts as the universal ideal model and calling for the establishment of a sanctions court, the ombuds view argues that context-appropriate institutional models should be developed beyond the state and that the ombuds model should be consolidated and expanded.¹⁶ According to Hovell, it is precisely the non-judicial character of the ombudsperson that could both

¹² *Devika Hovell*, *Due Process in the United Nations*, AM. J. INT'L L. 110 (2016), S. 26.

¹³ Armin Cuyvers, "Give me one good reason": The unified standard of review for sanctions after *Kadi II*' (2014) 51(6) *Common Market Law Review* 1759 (1786) ("Legal scholars have argued that in light of the 'high level of de facto judicial protection offered by the Ombudsperson ... [it] no longer seems appropriate to summarily dismiss the protection that is offered.'"); Sue Eckert/Thomas Biersteker, *Due Process and Targeted Sanctions: An Update of the 'Watson Report'*, 2012, 24 ("While the Ombudsperson process falls short of formal judicial review, it offers what arguably are equivalent elements that go a long way to address due process concerns, in essence, de facto judicial review"); Kimberly Prost "The Office of the Ombudsperson: a Case for Fair Process" United Nations <www.un.org> at 1 (arguing that "other forms of objective review" [than judicial review] are sufficient, provided these provide "an effective and independent assessment").

¹⁴ Kimberly Prost "The Office of the Ombudsperson: a Case for Fair Process" United Nations <www.un.org> at 1 (in a perfect world maybe it would be a step forward and it would be a benefit but we're not in a perfect world. I believe it's the best model because it's realistic and workable. Judicial review of the Security Council decision, it certainly wasn't going to happen then and it's not going to happen now").

¹⁵ See Hovell, *Power of Process* 40 ff.; KatalinTünde Huber/Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: a Paradigm Shift?*, *Anuario Mexicano de Derecho Internacional*, Décimo Aniversario 2012, 107 (140) (viewing the establishment of the ombudsperson as a "paradigm shift in the history of the S[ecurity] C[ouncil]"). But see Sullivan, *The Law of the List*, 12 ff, 132 f. (criticizing the narrative of the ombudsperson as a manifestation of the progress of global administrative law).

¹⁶ Hovell, *Power of Process*, S. 3 f., 23

Larissa van den Herik, 'Peripheral hegemony in the quest to ensure Security Council accountability for its individualized UN Sanctions regimes' (2014) 19(3) *Journal of Conflict and Security Law* 427 (447 ff.)

José Alvarez, International Organisations and the Rule of Law, 14 New Zealand Journal of Public and International Law 3 (43).

counter the legitimacy deficits of the sanctions regime and accommodate the political assessment prerogative of the Security Council in the sensitive field of counterterrorism.¹⁷

Conversely, the judicial view, held, amongst others, by former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Ben Emmerson, Gavin Sullivan, and several European courts insist that only a court can guarantee sufficient legal protection for the listed persons and that the ombudsperson does not meet the requirements of "effective judicial legal protection" as a non-judicial supervisory body.¹⁸ The main criticisms of the ombuds view are that the ombudsperson is not a legally binding and final judge of the Security Council's listings; instead the ombudsperson can only make recommendations to the Sanctions Committee and cannot review original listing decisions.¹⁹ Emmerson insists therefore that only a judicial or quasi-judicial mechanism that "meet[s] the structural due process requirement of objective independence" and whose decisions are "accepted as final" would suffice.²⁰ Sullivan argues that the sanctions regime constitutes a global security exceptions that is incompatible with the rule of law and that the ombudsperson is a fig-leaf that had the detrimental effect of contributing to restoring the legitimacy (in the sociological sense) of the sanctions regime.²¹

I argue in this Article that both views are overstated and prioritize a strong narrative over a more nuanced and, I believe, more accurate account. Before engaging in principled and abstract debates about the merits and demerits of the ombuds mechanism, we need to better understand how this non-judicial adjudicatory body operates in legal and political practice and how it protects (or fails to protect) the concerns of listed persons. At the outset, there is hence a need to investigate the ramifications of the institutional choice for the ombudsperson in a systematic, more nuanced and empirically grounded way. It requires, in other words, shifting the attention from theory to practice.

This Article seeks to contribute to the global debate about non-judicial adjudication in international law more generally and the 1267-Ombudsperson more specifically by setting forth a case-study of the 1267-Ombudsperson after the celebration of the 10th anniversary of its operation, analyzing in-depth which specific institutional features, procedures and decision-making techniques characterize the ombudsperson, how it resembles and differs from a court, how it functions in legal and political practice, how effective and legitimate it is, and what prospects and limitations it has as an

¹⁷ Devika Hovell, *Due Process in the United Nations*, AM. J. INT'L L. 110 (2016), S. 23: "the ombudsperson is superior to a court process because it offers the most appropriate response to legitimacy gaps in Security Council sanctions decisions."

¹⁸ So explicit EuGH, Urt. v. 18.7.2013, Rs. C-584/10 P, C-593/10 P, C-595/10 P – *Kommission v. Kadi* („*Kadi II*“), ECLI:EU:C:2013:518, Rn. 133. Siehe auch EGMR, Urt. v. 12.9.2012, Nr. 10593/08 – *Nada v. Schweiz*, Rn. 213; UK Supreme Court, Urt. v. 27.1.2010, UKSC 2 (2010) – *Ahmed u.a. v. Her Majesty's Treasury*, Rn. 78 (Lord Hope): "While these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy" und Rn. 239 (Lord Mance): "But nothing in it affects the basic problems that there exists no judicial procedure for review" Aus dem UN-Menschenrechtssystem plädieren für ein Sanktionsgericht: Ben Emmerson (Special Rapporteur), *Second Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Rn. 35, UN Doc. A/67/396 (Sept. 26, 2012); High Commissioner for Human Rights, A/HRC/16/50, paras. 27 and 44. Siehe in der Literatur nur: Lisa Ginsborg and Martin Scheinin, 'You Can't Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorist Sanctions Regime' (2011) 8 *Essex Human Rights Review* 7, at 11 f.; Grant L Willis, 'Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson' (2011) 42 *Georgetown Journal of International Law* 673, at 743 f.; S Ghasem Zamani and Jamshid Mazaheri, 'The Need for International Judicial Review of UN Economic Sanctions' in Ali Z Marossi and Marisa R Bassett (eds), *Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (TMC Asser Press 2015); DAVID CORTRIGHT & ERKA DE WET, *HUMAN RIGHTS STANDARDS FOR TARGETED SANCTIONS* 10 (2010);

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²⁰ Emmerson Report Rn. 35

²¹ Sullivan 249

effective mechanism for the protection of due process. For this purpose, the paper relies upon a broad variety of sources beyond legal texts in order to develop a deeper understanding of the Ombudsperson and its institutional environment such as the analysis of publicly available documents, small-scale statistical measures, and semi-structured qualitative expert interviews with key actors, including all current and former ombudspersons, their staff, attorneys representing petitioners in the ombuds process, members of the monitoring team of the 1267-sanctions regime, and diplomats who were sitting in the Sanctions Committee and participated in the drafting of the pertinent Security Council resolutions.²²

The paper proceeds as follows: In a background section, it first gives a brief overview over the 1267-sanctions regime, pointing to its deep accountability and human rights deficits, while also showing that its practices have changed substantially since the establishment of the Ombudsperson, which is partially neglected in legal scholarship (II.). Second, based on first-hand accounts of diplomats involved in the negotiations, the Article dives into the diplomatic history of making the Resolution 1904 and 1989 that established and transformed the Office of the Ombudsperson in order to assess whether and to what extent the foundation of a court had ever entered the realm of real-world possibilities,²³ revealing how far-fetched the prospects for establishing a court were (III).

Part IV explores the non-judicial features of the ombuds mechanism. It shows that its institutional design falls short of the requirements deemed essential for a court in important ways. The ombudsperson is not institutionally independent, it has neither the power to compel evidence nor to issue legally binding judgments, its process is characterized by a high degree of informality and non-adversarialism. While the ombudsperson mechanism therefore seems deeply troubling at first sight, Part V takes a deeper and empirically grounded look into the practice and institution-building of the ombudsperson, finding that it is a surprisingly effective adjudicatory body, despite its non-judicialness.

Part V documents, amongst others, that although the Security Council and the Sanctions Committee are legally entitled to override the ombudsperson's delisting recommendations, they have, in fact, never done so, indicating that fire-alarm controls for international adjudicatory decisions, while disconcerting from a normative standpoint, may have limited practical significance, at least if they are accompanied by substantial override requirements. Part VI then again changes the perspective and considers the achievements of the ombudsperson in the broader context of the 1267-sanction regime, exploring the institutional capacities of the ombudsperson to address the legitimacy issues created by the regime.

II. In need of an adjudicatory process: A sketch of the 1267-sanctions regime

In order to maintain or restore international peace and security, the UN Security Council is authorized under Art. 39 in conjunction with Art. 41 in Chapter 7 of the UN Charter, to impose economic sanctions on states and individuals that are legally binding on all UN member states and take precedence over conflicting international law obligations.²⁴ On the basis of these far-reaching Chapter 7 powers, the Security Council has established 30 different sanctions regimes since 1966, 14

²² A request to interview a former petitioner and listed person was unfortunately denied.

²³ Reference to Tünde Huber/Rodiles; incomplete history not P5, especially perspective of the US, which were the key actor

²⁴ Fn: The combined effect of Articles 25 and 103 of the UN Charter, which provides that the obligation on states to comply with Security Council resolutions prevails over all competing international obligations

of which are currently still in force.²⁵ The most elaborate and controversial is the 1267-sanctions regime,²⁶ which was, in response to 9/11, transformed into a counterterrorism instrument against Al-Qaeda (and later also ISIL) virtually unlimited in time, global reach, and potentially designated persons.²⁷

The 1267 sanctions regime reflects a tectonic shift in the Security Council's sanctions practice – away from comprehensive trade sanctions against states in view of their repeatedly disastrous humanitarian consequences toward targeted sanctions. At first glance, this new direction appears both gentler and more effective, as innocent populations are spared and instead the responsible leaders are sanctioned. However, particularly in the context of the 1267 sanctions regime, the switch to targeted sanctions created a new structural legitimacy and human rights protection vacuum.²⁸

The 1267 sanctions regime establishes a novel form of international security law through which the Security Council exercises international public power over individuals.²⁹ The Security Council itself reaches out to listed individuals, placing them via its subsidiary body, the 1267 Sanctions Committee, on the so-called Consolidated List, thereby effectively eliminating the state as a mediator between international law and its citizens – and with it its infrastructure of parliament and courts that controls the executive and protects individuals.

The Security Council justifies this arrogation of authority with the right to preventive self-defense against the diffuse enemy of terrorism, which can strike at any time and threaten international security. The orientation of the sanctions is thus preventive, not repressive: they are not intended to sanction past acts, but to prevent future terrorist acts; the relevant question is therefore not whether someone is guilty, but whether someone poses a threat.³⁰ One effect of the controversial classification as preventive is that the human rights procedural safeguards of Article 14 ICCPR are circumvented.³¹

For the targeted individuals, the sanctions interfere with their human rights guarantees of property, freedom of movement, personality and family, and severely affect their daily lives.³² Sanctioned individuals have all their assets frozen, including bank accounts used to pay rent and

²⁵ reference Website

²⁶ Peter Wittig, Making UN Sanctions Work: Germany's Chairmanship of the Al-Qaida/Taliban Sanctions Committee of the UN Security Council, 55 GERMAN Y.B. INT'L L. 55 (2012), 561 (561)

²⁷ Lisa Ginsborg, The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime, in: Ben Saul (Hrsg.), Research Handbook on International Law and Terrorism, Cheltenham 2020, 550 (551); Sullivan 3. **For a brief history of the 1267-Regime, see** Lisa Ginsborg, The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime, in: Ben Saul (Hrsg.), Research Handbook on International Law and Terrorism, Cheltenham 2020, 550 (557)

²⁸ Monika Heupel, UN Sanctions Policy and the Protection of Due Process Rights: Making Use of Global Legal Pluralism, S. 86 (86) speaks of "Pyrrhic victory".

²⁹ *Monika Heupel/Michael Zürn*, Human Rights Protection in International Organizations: An Introduction, in: *Monika Heupel/Michael Zürn* (Hrsg.), Protecting the Individual from International Authority. *Human Rights in International Organizations*, 2017, S. 14. Grundlegend zum Konzept der internationalen öffentlichen Gewalt Bogdandy

³⁰ Thus explicitly the preamble : The sanctions „are preventative in nature and are not reliant upon criminal standards set out under national law". Security Council resolution 1989 (2011), fourteenth preambular paragraph.

³¹ While one camp ascribes a quasi-criminal character to sanctions because of their severity and their stigmatizing and drastic effects on the individuals concerned, the other camp believes that the severe effects are not sufficient to reinterpret formally preventive sanctions as criminal sanctions. For a good overview of the debate, Hovell, Power of Process, 42 ff.

³² U.K. Supreme Court: leading one domestic court to characterize designated individuals as "effectively prisoners of the State"; One official has likened the effect to a 'civil death penalty'. Dick Marty, Rapporteur for the Council of Europe, cited in Birgi Kruse, 'Zivile Todesstrafe' (*Sueddeutsche Zeitung*, 12 November 2007). Available at: bit.ly/30m2z39; EuGH, Urt. v. 18.7.2013, Rs. C-584/10 P, C-593/10 P, C-595/10 P – *Kommission v. Kadi* („Kadi II"), ECLI:EU:C:2013:518, Rn. 132.

salaries, and have bans on travel and acquiring weapons are also imposed against them.³³ In many cases, the sanctions force the listed legal entities to cease operations.³⁴

The sole criterion for the Sanctions Committee's listing decision is the “associated with”-standard set forth in Security Council Resolution 1989 (2011), i.e., the association of the listed individuals with Al-Qaeda or ISIL.³⁵ Resolution 1904 (2009) provides examples of several subcases in which association is presumed, such as involvement in financing or planning, supplying or transferring weapons, recruiting, or otherwise providing support.³⁶ This makes the scope and target group of the sanctions list very broad and indeterminate, opening the door for aid workers and supporters leading “normal lives” to be listed along with terrorists fighting in Afghanistan or Iraq.

The Security Council initially showed flagrantly little sensitivity for the serious legitimacy and human rights vacuum it had created.³⁷ At first, some members of the Security Council even took the position that the targeted sanctions against individuals did not raise any human rights or administrative law issues at all.³⁸ As they see themselves, the member states on the Security Council, most especially the P5, are sovereign and empowered to take what they see as necessary measures to ensure peace and international security without having to justify them to individuals or to an independent oversight institution.³⁹ Accordingly, the 1267 sanctions regime in its original form lacked even rudimentary procedural safeguards, drawing metaphorical comparisons with Kafka's literary account “The Trial”.⁴⁰ Neither were listed individuals informed or heard in advance, nor were they told the reasons for listing. The legal protections for delisting were exhausted in the mechanism of diplomatic protection. Nevertheless, numerous U.S. nominations in the “war on terror” were – even if some of them contained only very little identifying information⁴¹ – mostly just rubber-stamped by the sanctions committee in the aftermath of 9/11,^{42,43}

³³ Resolution 1989 (2011), Rn. 1 a) – c).

³⁴ Lisa Ginsborg, The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime, in: Ben Saul (Hrsg.), Research Handbook on International Law and Terrorism, Cheltenham 2020, 550 (553)

³⁵ Specifically, the resolution states: „Decides that all States shall take the measures [...] with respect to Al-Qaida and other individuals, groups, undertakings and entities associated with them [...]” Subcases of being associated are ... xxx providing support to, and participating in the activities of, Al-Qaeda

³⁶ Res. 1904 (2009), Rn. 2

³⁷ Emmerson Report, Rn. 15; Sullivan 245

³⁸ See Confidential communication between member states cited in Simon Chesterman, ‘The Spy Who Came In From the Cold War: Intelligence and International Law’ (2006) 27 Michigan Journal of International Law 1071, 1117

³⁹ its (SC) traditional hermetic self-comprehension as being “the master of its own decisions”. KatalinTünde Huber/ Alejandro Rodiles, An Ombudsperson in the United Nations Security Council: a Paradigm Shift?, Anuario Mexicano de Derecho Internacional 2012, S. 107 (135)

‘right to justification’. Forst, Rainer 2007. Das Recht auf Rechtfertigung. Elemente einer konstruktivistischen Theorie der Gerechtigkeit. Frankfurt am Main: Suhrkamp.

As Buchanan and Keohane have recognized, when an international institution fails to provide public justification for its decisions and when it withholds other information critical to the evaluation of its institutional performance, the institution does not fulfill substantive criteria for legitimacy. Allen Buchanan & Robert O. Keohane, The Legitimacy of Global Governance Institutions, 20 ETHICS INT'L AFF. 405 (2006) at 429.

⁴⁰ See Justice Zinn in Federal Court of Ottawa, Entsch. v. 4.6.2009, *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, Rn. 53: „The 1267 Committee regime is, as I observed at the hearing, a situation for a listed person not unlike that of Josef K. in Kafka's The Trial, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.”

⁴¹ Mohamed from Peshawar

⁴² In the words of former U.S. Treasury General Counsel David Aufhauser: „It was almost comical ... We just listed out as many of the usual suspects as we could and said Let's go freeze some of their assets.” Zitiert in: Ron Suskind, The Price of Loyalty: Georg W. Bush, the White House and the Education of Paul O'Neill (New York: Simon & Schuster, 2004), p. 193. See also Interview 5, 13:440-3: “I think after 9/11, there was a flurry of listings just because everybody was scared. Everybody wanted to be seen as doing something and this was one of the things they could do, is list people.” According

While the Security Council has noticeably, albeit not sufficiently, improved the listing regime in incremental steps in favor of the listed individuals in response to widespread criticism,⁴⁴ descriptions of the listing process in legal literature today still tend to paint a caricatures of the 1267 sanctions regime's original form, preempting a more nuanced account. In current Committee practice, however, the phenomenon of evidently false listings has gradually declined in the course of some procedural improvements, if not disappeared altogether.⁴⁵ The listing process has become a long, arduous, and information-intensive process for the designating state,⁴⁶ and listing designations are commonly withdrawn as a result thereof.⁴⁷ The Security Council requires member states to take all possible measures to notify listed individuals and entities,⁴⁸ to make available a publicly available Narrative Summary of Reasons for the Listing,⁴⁹ and a more detailed Statement of the Case.⁵⁰ In addition, Resolution 1822 (2008) has established an annual review, focusing on removing deceased or falsely identified persons from the List rather than engaging in a substantive review of the listing grounds,⁵¹ with which all listings are reviewed at least every three years.

However, the basic legitimacy vacuum inescapably remains: The 1267-Sanctions Committee, staffed by diplomats from the 15-member Security Council, is an intergovernmental and power-political forum that is institutionally wholly unsuited for designating individuals for serious human rights violations, let alone for adjudicating their delisting applications. The listing process is highly political.⁵² Any state, including a non-member, can nominate an individual it believes is “associated” with Al-Qaeda or ISIL for listing, without being required to attach the evidence or intelligence underlying the nomination. Although the Committee meets approximately every two to three weeks, usually behind closed doors and without public minutes,⁵³ there are virtually no deliberations about

to Ginsborg, the 1267 sanctions list was almost identical in content to the sanctions list of the U.S. Office of Foreign Assets Control (OFAC) in the first years after September 11, 2001. See Lisa Ginsborg, *The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime*, in: Ben Saul (Hrsg.), *Research Handbook on International Law and Terrorism*, Cheltenham 2020, 550 (553).

⁴³ See Interview 2, 3:76-7; 8:230-3; 9:256-61. As Thomas Biersteker put it, the political mood was one of global sympathy and blind trust: ‘if the US wanted a designation made, so the logic went, it must have good reasons’. Thomas J. Biersteker, ‘Targeted sanctions and individual human rights’ (2010) 65(1) *International Journal: Canada's Journal of Global Policy Analysis* 99, 102. Cited in Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 6.

⁴⁴ For an overview: Lisa Ginsborg, *The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime*, in: Ben Saul (Hrsg.), *Research Handbook on International Law and Terrorism*, Cheltenham 2020, 550 (556 ff.).

⁴⁵ See Interview 2, 18:569-72; Interview 5, 13:438-44; Interview 6, 13:418-9.

⁴⁶ Interview 6, 19:613-4.

⁴⁷ Interview 6, 23:737-8.

⁴⁸ see Resolution 1822 (2008), para. 17

⁴⁹ *ibid*, para. 13

⁵⁰ Resolution 1904 (2009), para. 11.

⁵¹ Interview 6, 313-30. See also Lisa Ginsborg, *The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime*, in: Ben Saul (Hrsg.), *Research Handbook on International Law and Terrorism*, Cheltenham 2020, 550 (563).

⁵² This context, in the words of a former chairman of the Sanctions Committee, shows one thing above all: „At the end of the day, it's a political decision based on a political process.“ Siehe Zitat in Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 234. Similarly; Kipfer: I was informed several times about the political nature of the sanction decisions; AG Bot's 2013 opinion in *Commission, Council and United Kingdom v. Kadi*, para. 80

⁵³ Siehe Devika Hovell, *Due Process in the United Nations*, AM. J. INT'L L. 110 (2016), S. 24 f., die von einer „culture of confidentiality“. Nach einer statistischen Auswertung Hovells waren im Zeitraum zwischen Oktober 1999 und Ende 2014 weniger als 11% der Sitzungen des 1267-Sanktionskomitees öffentlich. Ebd.

listing designations within the Committee⁵⁴ and listings are approved through a no-objection procedure.⁵⁵ As a result, the Sanctions Committee effectively does not review designations as a collective body, even though – or perhaps because – states typically have little incentives to diplomatically snub another state by explicitly rejecting a listing nomination simply to protect from sanctions an Islamist terrorist suspect that the other state believes poses a terrorist threat. The combination of the culture of secrecy in the sanctions committee and the political nature of its sanctions decisions makes the listing process structurally prone to error and abuse.⁵⁶ This look inside the workings of the listing process suggests that the Security Council does not conform to the rule of law-principles that an international institution, which exercises international public power against individuals should, from a normative perspective, conform to.⁵⁷

III. Why a court was never in the cards: Insights into the negotiation history

It is not surprising against this background that the practices of the 1267-sanctions regime raised widespread criticism. It is, perhaps, more surprising that this criticism triggered serious reflection inside the Security Council – an institution dominated by the power politics of its five permanent members (P-5) – about how to make the sanctions regime more just. Its greatest weakness was arguably the disregard for listed persons' right to be heard and right to effective review by an independent institution.⁵⁸ The Ombudsperson for the al-Qaeda and ISIL Sanctions Committee was established to address this deficiency and to resolve the legitimacy vacuum created by the sanction regime. Put in perspective, the establishment of the Ombudsperson through Resolution 1904 and the strengthening of this mechanism through Resolution 1989 is one of the most astonishing institutional developments in the context of the UN Security Council and in the field of non-judicial rights review. It constitutes the unique case of the UN Security Council accepting an institution to review and to alter its decisions.

This Part seeks to explain the genesis of the 1267-Ombudsperson. Based on accounts of diplomats who were involved in the drafting of those resolutions, it provides insights into the negotiation history of Resolution 1904 (A.) and Resolution 1989 (B.), suggesting not only that the establishment and strengthening of the ombuds mechanism constituted a truly remarkable reform conducted under exceptional circumstances, but also that this is likely key members of the P-5 and that the creation of an international sanctions court was never even considered as a possibility. The account set forth in this Article needs to be considered with some caution. Due to the difficulty of getting diplomats to agree to giving interviews for academic purposes, it is not based on qualitative interviews with representatives of all or most members of the Security Council, even though efforts

⁵⁴ See Interview 9, 20:628-21:631; *Gavin Sullivan*, *The Law of the List*. UN Counterterrorism Sanctions and the Politics of Global Security Law, 2020, S. 233 (citing member of the Sanctions Committee noting that „[l]isting and delisting requests typically are not handled within the Committee.“). However, confidential bilateral discussions between individual states on listings. regularly occur. Emmerson Report, Rn. 26.

⁵⁵ The Sanctions Committee decides on listing nominations by consensus but no explicit approval is required. Emmerson Report, Rn. 26.

⁵⁶ Critical Gavin Sullivan, *The Law of the List*, 2020, S. 5; Emmerson Report, Rn. 26. In this direction: Interview 3, 12:353-61. Skeptical about the allegation of abuse: Interview 5, 14:477-80.

⁵⁷ Lisa Ginsborg, *The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime*, in: Ben Saul (Hrsg.), *Research Handbook on International Law and Terrorism*, Cheltenham 2020, 550 (552); Interview 3, 13:378-9; Kipfer, *Remarks*, 10th Anniversary, S. 6.

⁵⁸ KatalinTünde Huber/ Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: a Paradigm Shift?*, *Anuario Mexicano de Derecho Internacional* 2012, S. 107 (118).

were made in this direction. The account is – in addition to publicly available sources – only based on interviews with U.S. and German diplomats, thus displaying a Western-centric perspective.

A. The Making of Resolution 1904 (2009)

The Security Council and especially the P-5 did not establish the Ombudsperson on the courage of their convictions, but because of considerable pressure from different actors under conditions that cannot be easily reproduced. Compared to the situation today, the Security Council was at least in basic terms still capable of meaningful compromise and action. In addition, the early days of the Obama presidency in the United States presented a political window of opportunity in the international arena.⁵⁹ However, no one should harbor any illusions that most member states established the ombudsperson because they felt that ensuring a fairer process for listed individuals through an independent oversight body was morally the right thing to do. Due process was never an end in itself but only a means to an end.

First, a number of UN actors directed heavy criticism against the 1267 sanctions regime. In 2005, UN member state leaders at the World Summit called on the Security Council to ensure a fair and clear process.⁶⁰ In 2006, then-U.N. Secretary-General Kofi Annan urged in a confidential non-paper that the Security Council guarantee listed individuals the right to be heard and right to effective legal protection.⁶¹ The UN human rights machinery, particularly the High Commissioner for Human Rights,⁶² the Human Rights Committee,⁶³ the Human Rights Council,⁶⁴ and the Special Rapporteur on the promotion and protection of human rights while countering terrorism,⁶⁵ also unanimously condemned the Security Council's sanctions regime.⁶⁶

Another important member state actor was the Group of Like-Minded States on Targeted Sanctions for fair and clear procedures for a more effective UN sanctions system from which some members were always represented in the Security Council.⁶⁷ This group of like-minded states put

⁵⁹ Kimberly Prost: “perfect storm”; Bush administration; Interview 7, 4:120.

⁶⁰ A/RES/60/1 v. 24.10.2005, Ziff. 109.

⁶¹ The letter by Secretary-General Kofi Annan dated 15 June 2006 has not been published but was referred to in the Security Council debate on 22 June 2006: see UN Doc, S/PV.5474 (June 22 2006), p. 5. Dazu Grant L. Willis, Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson, 42 GEO. J. INT'L L. 673 (2011) at 736.

⁶² See, e.g., Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/12/22 (2 September 2009)

⁶³ UN Human Rights Committee, Sayadi and Vinck v Belgium, Communication No. 1472/2006, Doc CCPR/C/94/D/1472/2006 (29 December 2008).

⁶⁴ See UN Doc, A/HRC/12/22, 2 September 2009, para. 42; UN Doc, A/HRC/RES/13/26 (2010), op 14 and op 15

⁶⁵ See M Scheinin, Report of the Special Rapporteur on the promotion and protection of human, Report of the Special Rapporteur on the promotion and protection of rights and fundamental freedoms while countering terrorism, UN Doc A/63/223 (6 August 2008); M Scheinin, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/65/258 (6 August 2010). UN Doc, A/63/223, 6 August 2008, para. 16, and UN Doc, A/65/258, 6 August 2010, paras. 52 & 54

⁶⁶ Siehe auch Generalversammlung UN General Assembly Res 60/1 (16 September 2005) [109]; UN Doc, A/RES/64/168 (2010), op 9

⁶⁷ The Like-Minded Group was set up in 2008 and initially included Denmark, Germany, Liechtenstein, the Netherlands, Sweden and Switzerland. Belgium, Costa Rica and Finland joined in 2009. See, for example: UN Doc. A/62/891 – S/2008/428 (2 July 2008). Here the group recommended an independent UN expert panel be created to review listing decisions, loosely modelled on the World Bank Inspections Panels. For an overview of the activities of the Like-Minded states on this issue, see: Katalin Tuñde Huber and Alejandro Rodiles, ‘An Ombudsperson in the United Nations Security Council: a paradigm shift’ (2012) *Anuario Mexicano de Derecho Internacional: Décimo Aniversario* 107.

As of November 2010, the group consists of the following States: Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland. See <http://www.norway-un.org/Statements/Security-Council/SC-On-the-al-Qaida-andTaliban-Sanctions-Committee> (last visited 25 November 2010).

forward various proposals for the establishment of an independent monitoring body, ranging from the expansion of the Focal Point, to the creation of a Special Advocate with access to intelligence, to a panel of experts.⁶⁸ One of these proposals, originally put forward by Denmark, was the establishment of an Ombudsperson,⁶⁹ thus continuing the Scandinavian Ombuds tradition. In addition, legal and political science studies that developed reform proposals and served as a basis for discussion circulated in Security Council circles in 2009.⁷⁰

The most important impetus for reform came from the European Court of Justice's Kadi ruling, which made waves in the diplomatic circles of the Security Council,⁷¹ for its widespread criticism of the sanctions regime that resulted in a serious legitimacy crisis.⁷² In the ruling, the ECJ annulled the EU regulation that incorporated the applicable Security Council resolutions into EU law on the grounds that it violated EU fundamental rights.⁷³ As a result, EU member states were legally prevented from implementing the UN sanctions, sparking fears that al-Qaeda money would be diverted through Europe in order to avoid the sanctions, creating an EU-wide “hole in the sanctions net”.⁷⁴ The Security Council members’ resulting actions thus did not stem from genuine concern about the human rights of the listed individuals, but rather from concern about the lack of legitimacy (in the sociological sense) and effectiveness of the sanctions regime.⁷⁵

The establishment of the ombudsperson by the Security Council was an extraordinary diplomatic achievement. After all, it was surprising that the P5 would agree to a limitation of their prominent position in the Security Council, which gave them veto power and permanent membership

⁶⁸ KatalinTünde Huber/ Alejandro Rodiles, An Ombudsperson in the United Nations Security Council: a Paradigm Shift?, *Anuario Mexicano de Derecho Internacional* 2012, S. 107 (122)

⁶⁹ Cf. Letter dated 28 September 2009 from the Chairman of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities addressed to the President of the Security Council v. 2.10.2009, UN Doc, S/2009/502, Rn. 46.

⁷⁰ KatalinTünde Huber/ Alejandro Rodiles, An Ombudsperson in the United Nations Security Council: a Paradigm Shift?, *Anuario Mexicano de Derecho Internacional* 2012, S. 107 (124)

⁷¹ Mit dieser Einschätzung auch Carol Harlow, *Composite Decision-Making and Accountability Networks: Some Deductions from a Saga*, S. 24; Kipfer, *Remarks by the Ombudsperson at the High-level Panel Discussion on the occasion of the 10th Anniversary of the Office of the Ombudsperson*. The event was organized by the Permanent Mission of Switzerland, on behalf of the Group of Like-Minded States on Targeted Sanctions, at United Nations Headquarters, New York, 17 December 2019, S. 2; Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 169.

- In a diplomatic dispatch dated Sept. 4, 2009, the then-U.S. ambassador to the United Nations stated, *Susan Rice*: „Bold action is needed to salvage the UN1267 al-Qaeda/Taliban targeted sanctions regime’ [and stop it from being] ‘seriously undermined by criticisms – and adverse European court rulings – asserting that procedures for listing and delisting names are not adequately fair and clear”. cited in Gavin Sullivan, *ebd. The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 169.
- Against this background, the political science literature classifies the establishment of the ombudsperson's office as judicial institution-building. Heupel in Heupel/Zürn

⁷² More decisions

⁷³ Kadi para

In addition, there were other rulings by regional and national courts that challenged the 1267 sanctions regime. Exemplary: Federal Court of Ottawa, *Entsch. v. 4.6.2009, Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580; UK Supreme Court, *Urt. v. 27.1.2010, UKSC 2 (2010) – Ahmed u.a. v. Her Majesty’s Treasury*; Schweizerisches Bundesgericht, *Urt. v. 14.1.2007, BGE 133 II 450 (457) – Nada v. SECO*; EGMR, *Urt. v. 12.9.2012, Nr. 10593/08 – Nada v. Schweiz*.

⁷⁴ Peter Wittig, *Making UN Sanctions Work: Germany's Chairmanship of the Al-Qaida/Taliban Sanctions Committee of the UN Security Council*, 55 *GERMAN Y.B. INT'L L.* 55 (2012), 561 (564); Emmerson Report, Rn. 23.

⁷⁵ Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making*, 2016, S. 164; Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 183. INTERVIEWEE: ... It’s not [legitimacy]. Legitimacy is more of an argument up there. It’s implementation. We want these things to be implemented and this is going to get in the way of the implementation. Zitiert in Sullivan, *ebd.*

in the most powerful UN body, by an independent oversight body. It appears that non-permanent members such as Austria and Mexico, as well as the Group of Like-Minded States, played a significant role in the diplomatic negotiation by exceeded the rather unimposing influence that non-permanent members typically have on other Security Council issues.⁷⁶ Still, the framework and central rules were negotiated in typical Security Council fashion in a small circle between the P5, with the decision-making dynamics remaining largely obscure to outsiders.⁷⁷

Among the P5, the United Kingdom and France were the strongest advocates for the ombuds mechanism. Given that they were bound by the ECJ's *Kadi* ruling, the two states hoped that establishing the Ombudsperson would dispel the ECJ's objections and resolve the conflict between the UN Charter and EU law.⁷⁸ The UK in particular was a key player in this process because their own domestic version of the *Kadi* case, the Ahmed proceedings was then pending before the British Supreme Court, and because the UK maintained a "special relationship" with the USA.⁷⁹

China and Russia required the most persuasion. Neither state saw a need to restrict the powers of the Security Council in order to ensure due process for listed individuals and appease a European court.⁸⁰ However, China was significantly less involved in the negotiations because they had barely made designations for the Consolidated List, if any, and therefore had less at stake.⁸¹ All three non-European P5s, China, Russia, and the U.S., initially took the stance that the *Kadi* case was a European problem that the Europeans should deal with themselves, though the U.S. understood that bringing an independent court in line in a liberal constitutional system may not be as simple.⁸² An additional source of institutional reluctance shared between the U.S. and Russia was the potential effects of the ombudsmechanism on the primacy of the Security Council. For both the U.S. and Russia, the Council is an inherently political body that should not be accountable to a quasi-judicial body and that is ill-suited for elements of checks and balances.⁸³

As the lead country in counterterrorism,⁸⁴ a central figure to the establishment of the 1267 sanctions regime, and the country that designated the most individuals on the Consolidated List, the United States was another key player in the negotiations for the establishment of an ombudsperson. Resolution 1904 ultimately passed because the U.S. threw its support behind the ombuds mechanism, assumed the role of key negotiator, and submitted an ambitious draft resolution that contained many elements that later appeared in the final resolution.⁸⁵ However, the U.S. support was not a given.⁸⁶ While the Bush administration likely would not have agreed to the establishment of the ombudsperson, there was even within the Obama administration serious skepticism.⁸⁷

⁷⁶ KatalinTünde Huber/ Alejandro Rodiles

⁷⁷ Interview 9, 6:187-91.

⁷⁸ Interview 8, 1:21-4

⁷⁹ Interview 7, 14:439-51.

⁸⁰ Interview 7, 13:410-9

⁸¹ Interview 8, 1:26-9

⁸² Interview 7, 3:74-80; 13:420-3; Interview 9, 24:750-1.

⁸³ Interview 7, 2:48-55; 15:467-8.

⁸⁴ Interview 9, 1:19-24; Tünde Huber/Rodiles, 127.

⁸⁵ KatalinTünde Huber/ Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: a Paradigm Shift?*, *Anuario Mexicano de Derecho Internacional* 2012, S. 107 (127)

⁸⁶ Interview 9, 24:728-33: "It's not hard to imagine a world where the United States just said, "No," they said, "Sorry," or not even going to take a tiny step down this path. ... My view is that United States could have said that, even the Obama administration. That is very possible that could have been the US position.."

⁸⁷ Interview 7, 1:26-7.

Underlying the internal U.S. decision-making process was an interdepartmental conflict between two of the most powerful departments of the U.S. government, the U.S. Department of State and the U.S. Department of the Treasury.⁸⁸ The former viewed the establishment of the ombudsperson as a means to end the legitimacy crisis of the 1267 sanctions regime, accommodate European partners, and realize President Obama's credo of a "false choice between safety and ideals."⁸⁹ Key advocates within the State Department included Susan Rice, who as U.S. ambassador to the UN in a Democrat administration had cabinet rank in the Obama administration, and Harold Koh, the legal adviser of the State Department of State.⁹⁰ By contrast, the U.S. Department of Treasury, a key actor in U.S. sanctions policy due to its financial dimension ("asset freeze"),⁹¹ opposed this reform for several reasons. First, based on the extensive intelligence available and the domestic listing process conducted by the U.S. Office of Foreign Assets Control (OFAC), which was subject to domestic judicial review, the Treasury was confident that their entries to the Consolidated List were correct.⁹² Second, the Treasury, as a bureaucratic entity, resented the additional workload that the ombuds process would expectedly create.⁹³ Third, the Treasury did not believe that "anything short of full independent judicial review" would "be sufficient to appeal to European courts."⁹⁴

Ultimately, the State Department prevailed. The US and the UK succeeded persuading Russia and China to hold "their noses" and go "along with this."⁹⁵ All P5 members were swayed by the expectation that the establishment of an ombudsperson would diffuse the objection of the ECJ and national courts, and overcome the legitimacy crisis of targeted sanctions, ensuring continued viability for targeted sanctions as security policy tool, while not overly impair existing sanctions practices.⁹⁶ In internal discussions with Treasury representatives, State Department representatives emphasized the parallels between the Ombudsperson and the Focal Point, describing the former as a "focal point on steroids" or a "beefed-up focal point process",⁹⁷ thereby suggesting that the Ombudsperson would not have fundamental institutional ramifications for the 1267-regime.

The Ombudsmechanism laid down in Resolution 1904 represents a delicately balanced compromise between the opposing camps. It was designed to meaningfully address the two shortcomings of the sanctions regime Kofi Annan identified in his non-paper: the neglect of the rights to be heard and the right to effective legal protection.⁹⁸ It was agreed that addressing these issues required the creation of "a neutral mediator-like position"⁹⁹ and a process in which the independent adjudicator would provide the listed persons with reasons and listen to their side of the story. Against this background, the U.S. State Department drafted Annex II of Resolution 1904 from scratch, envisioning a process that met minimum requirements of due process, without putting an undue burden on the member states.¹⁰⁰ The biggest concession for the skeptics of the Ombudsperson was

⁸⁸ Interview 7, 7:195-7; 8:225-8; Interview 8, 2:45-55; 2:36-8.

⁸⁹ President Barack Obama's Inaugural Address, available at: <http://www.whitehouse.gov/blog/inaugural-address> (last visited 30 November 2010).

⁹⁰ Interview 7, 7:207-17.

⁹¹ Interview 7, 7: 196-197.

⁹² Interview 7, 1:30-1; 2:33-46; Interview 9, 18:558-61.

⁹³ Interview 7, 2:59-70.

⁹⁴ Interview 7, 5:129-33.

⁹⁵ Interview 7, 15:460-2.

⁹⁶ Interview 7, 3:86-92.

⁹⁷ Interview 7, 5:138-9.

⁹⁸ Interview 8, 1:8-16.

⁹⁹ Interview 9, 3:67-9.

¹⁰⁰ Interview 9, 4:106-10.

agreeing to a “paradigm shift” for the Security Council,¹⁰¹ empowering a single individual to review, second-guess and potentially alter the listings of the Security Council.¹⁰²

However, the powers of the Ombudsperson under Resolution 1904 were carefully limited. The main issue the P5 had with the Ombudsperson was whether it should have the power to make recommendations, or just provide observations on delisting requests. Ultimately, the Resolution opted for the latter, the less intrusive alternative.¹⁰³ It was undisputed between the participants that recommendations were “the furthest we could go” and that anything beyond recommendations “would create the type of structural change that would really rock the boat, not only for some of our fellow council members, especially the Russians and Chinese, but also internally in the US government.” In addition, each member of the sanctions committee effectively kept a veto against the observations of the Ombudsperson as delisting decisions of the Sanctions Committee required unanimity.

Resolution 1904 was finally adopted unanimously on December 17, 2009. The language of the resolution indicates that the reform was a direct response to the ECJ’s Kadi judgment.¹⁰⁴ In diplomatic circles, the establishment of the Ombudsperson was described as a “sensation” that went far beyond what members of the Group of like-minded states had imagined.¹⁰⁵ At the same time, the P5’s hope that the ombudsperson would serve as a fig leaf and take the wind out of the sails of critics of the sanctions regime was not fulfilled. Instead, a remarkable institutional path dependency was set in motion.

In the end, Resolution 1904 did not achieve its purpose of appeasing the European courts nor did it stop the impending the legitimacy crisis of 1267 sanctions regime. In fact, as U.S. diplomats described, “before 1904 even had a chance to breathe, the drumbeat of European litigation did not slow down”¹⁰⁶ and “from the earliest days, there was pressure to move in the direction of something more binding”¹⁰⁷. About a month after the enactment Resolution 1904, the U.K. Supreme Court dismissed the new Ombudsmechanism noting that “[w]hile these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy”.¹⁰⁸ Even worse, the General Court of the EU in Kadi II found the Ombudsperson to fall short “of an effective judicial procedure for review of decisions of the Sanctions Committee,” repeatedly equating the focal point mechanism with the Office of the Ombudsperson and calling out the Security Council for not deeming “it appropriate to establish an independent and impartial body.”¹⁰⁹ In particular, the General Court criticized that the consensus requirement in the Sanctions

¹⁰¹ KatalinTünde Huber/ Alejandro Rodiles, *An Ombudsperson in the United Nations Security Council: a Paradigm Shift?*, *Anuario Mexicano de Derecho Internacional* 2012, S. 107

¹⁰² Interview 9, 3:89-92; 22:679-85.

¹⁰³ Interview 9, 3:82-3.

¹⁰⁴ The resolution’s preamble takes “note of challenges, both legal and otherwise, to the measures implemented by Member States” and expresses “its intent to continue efforts to ensure that procedures are fair and clear”. S/RES/1904 v. Dec. 17, 2009, 2. See also Susan Rice’s speech delivered on the occasion of the adoption of the resolution, according to which Resolution 1904 was adopted in particular also for the following reason: “[A]ddress concerns that have been expressed by some European courts.” See speech by Susan Rice v. Dec. 17, 2009, available at: usun.state.gov. Eyal Benvenisti, *Bottom-Up Constitutionalization of International Law: The Targeted Sanctions Regime as a Case Study*, *ASIL Proceedings* 104 (2010), 462 (463 f.), refers to this statement.

¹⁰⁵ Interview 10.

¹⁰⁶ Interview 9, 5:129-30.

¹⁰⁷ Interview 7, 15:477.

¹⁰⁸ 27 Jan 2010

¹⁰⁹ EuG (7. Kammer), Urteil vom 30. 9. 2010 – Rs. T-85/09, Rn. 128

Committee for delistings remained in place, and that the designating state did not need to provide evidence or inform the listed person of its identity.¹¹⁰

At the same time, the newly appointed Ombudsperson Kimberly Prost dispelled any notion early on that the Ombudsperson would not have an effect on the listings of the sanctions committee and that the 1267 sanctions regime could simply continue business as usual. In her first two years in office, she submitted 20 comprehensive reports to the sanctions committee, 17 of which proposed delisting, including some of the most controversial cases in the history of the Ombudsperson.¹¹¹ For the U.S., this was a surprising development as they had “a degree of confidence in the names that we had on the list that these were the right people and there was enough information,” and expected that “any delisting recommendation that would come from the Ombudsperson would be a very rare occasion.”¹¹² As a result, the P5 faced the worst of both worlds: continued court challenges and a legitimacy crisis, along with interference with their sanctions practices by the new Ombudsperson.

B. The Making of Resolution 1989 (2011)

This was the background against which the negotiations for Resolution 1989 took place in the spring of 2011. The developments since the adoption of Resolution 1904 had arguably hardened the stances and reinforced the determinations of the opposing camps. On one side, the EU members in the Security Council, U.K., France, Germany and Portugal, as well as the Group of Like-Minded States, intensified their push for strengthening the Ombudsperson in order to address the concerns raised by the General Court in *Kadi II* – particularly because at the time, the *Kadi II* case was pending for appeal before the ECJ.¹¹³ The U.S., impelled by the State Department, was concerned that the reform efforts had been in vain and were therefore determined solve the impending legitimacy crisis of the 1267-regime. Another important factor for the making of Resolution 1989 was the advocacy of ombudsperson Kimberly Prost who was pursuing a carrot and stick diplomacy, pushing strongly for reforms vis-à-vis the Council members internally, while defending the mechanism externally. Internally, she had already expressed her discontent with the consensus rule for adopting her observations in the Sanctions Committee, and indicated that she would say so publicly if no reforms were undertaken in reasonable time.¹¹⁴

On the other side, Russia and China were soured by the court challenges that continued to be mounted against the 1267-regime despite the establishment of the Ombudsperson. This left them questioning whether they should continue to help strengthen an accountability mechanism that was fundamentally at odds with their own preferences, without any guarantee that this further effort would end the legitimacy crisis of the 1267-regime. At one point during the negotiations on Resolution 1989, the Chinese deputy ambassador reportedly asked his British and French colleagues “[o]kay, let’s say we could agree to all of this, can you just make this problem with the judges go away?”¹¹⁵ Moreover, the working atmosphere between Russia and the three Western members of the P5 had deteriorated

¹¹⁰ *Id.*

¹¹¹ 1 denied, 1 withdrawn, 1 amended July 2010 until July 2012. See below

¹¹² Interview 7, 9:264-7. See also Prost/ Asser Institute: I don't think even the p5 really understood what they had done. ... for them, nothing much had changed and this process was a big change.

¹¹³ Interview 9, 5:134-5.

¹¹⁴ Interview 8, 5:146-9; Interview 9, 15:441-2: “It’s fair to say that Kim was a force of nature during all of this. Her advocacy and push for reform was one of the driving forces leading up to all of this change.”

¹¹⁵ Interview 9, 24:745-7.

due to the disagreement about the no-fly zone over Libya that had been established in March 2011 despite Russia's concerns.¹¹⁶

Still, the discussions about how to reform the Ombudsmechanism leading up to Resolution 1989 were described by U.S. diplomats as much more open-minded and wide-ranging in comparison to Resolution 1904.¹¹⁷ As a result, more fundamental reform ideas were floated such as making the delisting decisions of the Ombudsperson binding or including sunset clauses in all listings.¹¹⁸ The fact that the Ombudsmechanism had already been established made it easier in the negotiations “to convince people to take a few additional steps”.¹¹⁹ Ultimately, it became evident that the proposal to grant the Ombudsperson binding decision-making authority over the Security Council “was absolutely not acceptable.”¹²⁰ The bottom line for the diplomats involved in the negotiations was that the objections articulated by the EU General Court had to be addressed in a meaningful way. The compromise regarding the legal status of the Ombudsperson decision was upgrading them from observation to recommendation and, more importantly, making the recommendation more difficult to overturn. Instead of requiring unanimity in the sanctions committee when adopting a delisting recommendation (consensus), overruling a recommendation would now require an unanimous resolution (reverse consensus), thoroughly strengthening the mandate of the Ombudsperson.

Russia only agreed to this compromise in return for a concession as to the bifurcation of the Al-Qaeda and Taliban sanctions regime. Resolutions 1988 and 1989 split the sanctions regime into two separate regimes: one for Al-Qaeda (1989) and one for the Taliban (1988). As a result, the strengthened ombuds mechanism would only be in place for the Al-Qaeda-regime, and not at all for the Taliban regime. Publicly, the only justification for this bifurcation was to encourage the Taliban to participate in the Afghan reconciliation efforts. In reality, “a central motivation”¹²¹ behind the scenes was that Russia, who had designated most of the Taliban names to the 1267 list, was not willing to accept that its designations would be subject to the strengthened ombuds process.¹²² As a result, the human rights ramifications of this bifurcation were that the due process for listed persons associated with Al-Qaeda improved substantially, while those associated with the Taliban were left worse off, losing the due process guarantees that Resolution 1904 had provided.¹²³

IV. Non-judicial features

Although international courts and tribunals come in different types and shapes, most of us would agree that courts are characterized by particular institutional features. Arguably, the two most important features are their independence and their power to render binding judgments. The UN Human Rights Committee has held that a tribunal must be “independent of the executive and

¹¹⁶ Interview 8, 3:67-70.

¹¹⁷ Interview 9, 3:83-5.

¹¹⁸ Interview 7, 13:394-6; Interview 9, 3:87-9.

¹¹⁹ Interview 7, 15:479.

¹²⁰ Interview 9, 4:111-2: „[T]he furthest we could go is just give the ombudsperson the ability to issue a recommendation.“

¹²¹ Interview 9, 12:371.

¹²² Interview 9, 12:349-376.

¹²³ Interview 9, 13:387-91: “I remember having a conversation with her [Kimberly Prost] right after we adopted or on the evening before we were about to adopt these resolutions. I had a conversation probably close to midnight with Kim. At first, she was livid that we were separating out the Taliban names from the Al-Qaeda names, but then once she found out all of the additional provisions of 1989, I think she understood and was quite pleased with where we had ultimately landed.”

legislative branches of government”,¹²⁴ and that it “is incompatible with the notion of an independent tribunal” if “the latter is able to control or direct the former”.¹²⁵ The European Court of Human Rights determined in *Van de Hurk* that “the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a ‘tribunal’.”¹²⁶ In addition, most, albeit not all, judicial proceedings are characterized by a component of formality and an adversarial process.

As I will show below in more detail, the 1267-Ombudsperson does not exhibit any of these features: it is not institutionally independent, it has neither the power to compel evidence nor to issue legally binding judgments, its process is characterized by a high degree of informality and non-adversarialism. The official mandate conceives the ombudsperson as an auxiliary body to the Sanctions Committee,¹²⁷ which it “assists” by receiving and assessing delisting requests, Against this background, the European General Court concluded in *Kadi II* that „the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review.”¹²⁸

A. Lack of Independence

Independence is essential to the Ombudsperson's mandate as an adjudicatory review body tasked with ensuring due process, despite its non-judicial character.¹²⁹ Its importance has been emphasized by the Security Council.¹³⁰ The Ombudsperson reports¹³¹ and the Group of Like-Minded States¹³² have repeatedly criticized the current arrangement and called for institutional independence. Although the officeholders have acted in the spirit of independence and impartiality, the Office of the Ombudsperson itself is not, by any means, institutionally independent. However, an adequate guarantee of independence requires more than reliance upon the personal integrity of the officeholders.

The Office lacks essential requirements for institutional independence, leaving it vulnerable, at least in the abstract, to undue external interference. The term of office is not fixed for a sufficient and reliable period of time, the security of tenure is not guaranteed, and the ombudsperson has no legally guaranteed self-governing autonomy. The mandate of the Office of the Ombudsperson is always limited to 18 months and must be continually renewed by resolution.¹³³ The officeholder is employed by the United Nations as an external consultant by means of a consultancy contract.¹³⁴ This contractual arrangement does not allow for the institutionalization of a veritable office of the

¹²⁴ CCPR/C/GC/32, para. 18

¹²⁵ CCPR/C/GC/32, para. 19

¹²⁶ EGMR, *Van de Hurk* 16034/90, 19.4.1994, Rn. 45

¹²⁷ Res. 1904, Rn. 20

¹²⁸ Para. 128

¹²⁹ Ombudsperson 12th Report, Rn. 33.

¹³⁰ SR 2253 (2015), Rn. 59. Resolution 1904 is more ambivalent, providing that “the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government”. Rn. 20.

¹³¹ 21st Report, para. 41 (“the Ombudsperson’s contractual arrangements and the resultant working conditions are simply not appropriate for the function of the Ombudsperson as an independent reviewer.”); 18th Report, Rn. 34; 16th Report, Rn. 33 ff.; for example, S/2016/671, paras. 33 ff., especially paras. 40–42; S/2017/60, paras. 36 ff.

¹³² See S/2018/1094, annex (“[T]he current contractual arrangements as a consultant ... significantly impair the ability of the Ombudsperson to fulfil the mandate, in particular in terms of independence”); See also S/2015/867; S/2014/286 and S/2015/459.

¹³³ Critical Emmerson Report, Rn. 36

¹³⁴ 16th Report, Rn. 33

ombudsperson¹³⁵ and is contrary to established international norms developed to ensure judicial independence¹³⁶. The consultancy contracts are surprisingly short-term, ranging from one to 12 months,¹³⁷ without any legal guarantee of renewal. They include no health insurance, no pension, and no sick leave¹³⁸ but they entitle the officeholder to terminate the contract with two weeks' notice.

The general UN scheme for external consultants that applies to the ombudsperson is irreconcilable with the autonomy required for an independent institution to self-determine necessary expenditures, travel and working arrangements. As part of this scheme, the ombudsperson is subject to the general performance evaluation system of the UN Secretariat.¹³⁹ She is contractually obliged to work a set number of hours from her desk the office.¹⁴⁰ All work-related expenses are subject to approval and all travel must be pre-approved by routine procedures. As a consultant, the ombudsperson is not entitled to a laissez-passer for visiting foreign countries, occasionally requiring the ombudsperson to obtain tourist visas to travel to dialogue meetings with petitioners. In a recent article on the 1267-Ombudsperson published in *Foreign Policy* that focuses predominantly on the Ombudsperson's lack of independence and its various manifestations, these working conditions were described as "a Bureaucratic Nightmare".¹⁴¹

Moreover, the administration of the Office of the Ombudsperson also conflicts with established notions of independence. The staff, a Legal Officer and a Research Assistant, are formally employees of the Department of Political and Peacebuilding Affairs, which serves as the Security Council's international secretariat.¹⁴² In other words, the ombudsperson's staff is hierarchically integrated into and reports to the very institution whose listing decisions the ombudsperson is supposed to monitor as an independent adjudicatory body. Although informal arrangements and pragmatic compromises have been established between the UN secretariat and the ombudsperson to mitigate the institutional obstacles to independence, the question remains whether such day-to-day *modi operandi* conform to general legal requirement for an independent adjudicatory body that examines individual complaints and acts as a judicial substitute.

While the outlined contractual arrangement is, almost paradoxically provincial for a world organization, the rigid and inflexible bureaucratic culture of the United Nations is only one reason for the lack of institutional independence of the Ombudsperson. It appears that some member states in the Security Council are determined to "keep the position as weak as possible".¹⁴³ At least, the U.N. Secretariat, according to Colum Lynch, justifies its lack of action in this matter with its lack of political authority without express mandate from the Security Council and the predictable resistance from the U.N. budget committee, which is controlled by the member states.¹⁴⁴ If we inquire more closely into possible motives for why member states may prefer non-judicial adjudicatory bodies over

¹³⁵ See Letter dated 13 July 2015 from the Ombudsperson to the President of the Security Council, S/2015/533, Rn. 64

¹³⁶ Interview 2, 27:860-2: "Measured against the case law of the Court of Justice in Strasbourg and the Court of Justice in Luxembourg, the institutional framework under which the ombudsperson operates is completely inadequate." Critically also Emmerson Report, para. 36

¹³⁷ Interview 2, 27:849-51.

¹³⁸ Interview 2, 27:840.

¹³⁹ 12th Report, Rn. 36

¹⁴⁰ *Foreign Policy*

¹⁴¹ *Foreign Policy*

¹⁴² Expenses for travel and translation related to the Ombudsperson's activities must also be approved by the Department of Political and Peacebuilding Affairs.

¹⁴³ Interview 2, 26:816-21; Interview 3, 21:618.

¹⁴⁴ *Foreign Policy*

courts, one reason may be that the former carry less entrenched expectation about institutional design features such as the guarantee of independence - thus facilitating the softening of established standards to increase their level of control over an agent, even if this control mechanism may ultimately not be exercised.

B. Lack of process formality

The ombuds process is the product of the legal imagination of a few actors: U.S. lawyers and diplomats received substantial leeway from the other permanent members to invent a process with “no playbook on how to set any of this up”,¹⁴⁵ and the creative practice and advocacy of the acting Ombudspersons exploited the abundant wiggle room to create a fairer. It is essentially divided into two phases. In the first phase, which is referred to as Information Gathering, the Ombudsperson gathers the information relevant to the individual case from the states, from the monitoring team of the Sanctions Committee, and through independent research. In the second phase, the Dialogue, which was specifically introduced to address the listed persons’ right to be informed and right to be heard, she meets with the listed person to present the case against him and to listen to his own version of the relevant facts.¹⁴⁶

This section explores the established practices in the two procedural phases. As the section shows, both phases are characterized by their informality and its corresponding lack of formal procedural rules. The purpose of this informality is to accommodate the sensibilities of the member states by protecting their classified information and preserving their decisional autonomy with respect to the provision of relevant information for the ombudsperson process. As this section argues, this informality should not be considered a genuine strength of the ombudsperson process but a cause for various fairness dilemmas to the detriment of the petitioners.

1. Information gathering

One of the greatest challenges for the Ombudsperson is to gather relevant information required to make an informed decision on a delisting petition.¹⁴⁷ The information base of the listing process is often thin, especially for listings that are predominantly based on intelligence.¹⁴⁸ The official Narrative Summary of Reasons for Listing regularly contains only a cursory justification for the listing and is sometimes limited to unsubstantiated and unspecific allegations based on intelligence not provided.¹⁴⁹ Although the monitoring team provides the Ombudsperson with all its collected

¹⁴⁵ Interview 9, 4:106-7. The lawyers in the U.S. Office of the Legal Adviser, the U.S. State Department diplomats for the Mission to the United Nations, which drafted Annex II of Resolution 1904

¹⁴⁶ The procedure is prescribed in detail in Annex II of Resolution 1904 (2009). In the third phase, the ombudsperson hands over and explains the control result to the Sanctions Committee: a comprehensive report in which he or she either recommends that the listing be maintained or removed (Committee Discussion, Decision and Reasons).

¹⁴⁷ Second Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 1989, para. 26 (2011), UN Doc. S/2011/447 (2011).

¹⁴⁸ By contrast, some listings are based on domestic criminal court judgments, which are typically well-documented and describe the facts of the case in a detailed manner.

¹⁴⁹ Prost/Wilmhurst, p. 5 The biggest problem she has faced in the information-gathering process is the lack of specificity of the information she is provided due to confidentiality concerns; 17th Report, para. 34: the Ombudsperson notes that the underlying information upon which a listing is based, in some cases appears to derive exclusively from intelligence sources. ... for which no piece of evidence is made available to the Ombudsperson. The least problematic cases in this respect are those in which the listing was based on a national criminal investigation with a final conviction and a publicly available judgment.

information on a listed person or entity,¹⁵⁰ this information regularly contains only the official listing dossier.¹⁵¹

The most valuable source of information in the delisting process are States.¹⁵² However, states are often unwilling to provide relevant information to the Ombudsperson for various reasons. Some states are simply be disinterested in the Ombudsperson process, while others seek to save face in order not to expose the thin information base for listing. Arguably, the most important reason is the desire to protect intelligence, which is of paramount importance in the field of counterterrorism in a multilateral context.¹⁵³ The Security Council is composed not only of partners but also of rivals who distrust each other and therefore do not want a rival to obtain sensitive secret information through the ombudsperson process.

Although the crux of the information gathering phase is to get intelligence information, it is an element of the process that stands out for its informality. More formal rules and legal obligations concerning evidence production are viewed as incompatible with notions of state sovereignty. Resolution 1989 merely asks Member States "to provide all relevant information to the Ombudsperson, including providing any relevant confidential information, *where appropriate*."¹⁵⁴ Put differently, states are not legally required to provide relevant information for the delisting process. They may even withhold exculpatory information¹⁵⁵ or provide misleading information to the detriment of the petitioner¹⁵⁶ – without any consequences. Unlike a court, the ombudsperson cannot legally order, let alone compel, the provision of evidence in the fact-finding process. She also does not benefit from the information-gathering dimension of an adversarial proceeding in which actively participating parties voluntarily provide information to the court to make their case. The ombuds process does not resemble an adversarial process because the position of the petitioner is structurally weak, and even the designating states that initiated the listing regularly take a passive role. –

The Ombudsperson must ultimately rely upon the goodwill and cooperation of states.¹⁵⁷ She meets this challenge by playing an active, almost investigative role in obtaining both incriminating and exculpatory information, which would be difficult to reconcile with the judicial role,¹⁵⁸ by partially assuming, albeit in a modest form, the procedural roles of attorney and prosecutor.¹⁵⁹ She writes official letters to member states requesting case-relevant information, meets with diplomats and security officials from member states to emphasize the importance of a request and to build trusting relationships,¹⁶⁰ explains delisting recommendations set forth in comprehensive reports to designating

¹⁵⁰ Interview 6, 6:155-65.

¹⁵¹

¹⁵² Interview 5, 17: 601-2 and 612-3.

¹⁵³ Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 230 f.; Devika Hovell, *Due Process in the United Nations*, *AM. J. INT'L L.* 110 (2016), S. 27.

¹⁵⁴ See Security Council resolution 1989 (2011), para. 25. Emphasis added.

¹⁵⁵ Emmerson Report, para. 45.

¹⁵⁶ Interview 2, 24: 768-81.

¹⁵⁷ See Kipfer, Panel: "I do not have subpoena power nor coercive power. The Ombudsperson has to clarify the question whether the alleged facts are established like a judge has to do but the Ombudsperson does not have the means at the disposal of a judge to do so. The Ombudsperson is depending on the goodwill of designating and relevant state in this regard." See also Interview 8, 8:229-31.

¹⁵⁸ Interview 3, 27:820-1: "I would say there is a bit of negotiation with the states part in that role, which I don't think would fit well with a purely judicial role. "

¹⁵⁹ Interview 2, 37:1115-7; Interview 3, 28:849-59.

¹⁶⁰ Interview 5, 19:697-712.

states in private meetings while listening to their objections,¹⁶¹ concludes contractual agreements on access to classified information,¹⁶² and undertakes independent research on social networks.¹⁶³ The other side of the coin is, of course, that states can simply reject requests for information or retreat to unhelpful diplomatic phrases for justifying why they believe that a listing should be maintained.¹⁶⁴ They do not have to engage in a constructive process role and a rational legal discourse with the ombudsperson, and they regularly choose not to.

When the ombuds camp praises the ombudsperson's non-judicial modus of gathering information as a genuine institutional strength of the mechanism,¹⁶⁵ it overlooks that many international judges also regularly engage in trust-building conversations with state representatives¹⁶⁶ and magistrate judges in civil law systems also engage in significant investigative activities. More importantly, regular courts do not necessarily need to engage in such activities because they typically are legally empowered to order the provision of evidence.¹⁶⁷ What is described as an institutional strength can thus also be considered to be weak mechanisms to compensate for the ombudsperson's lack of authority to order evidence.

2. Dialogue

The information collected serves as the basis for the “dialogue” with the petitioner. The dialogue is compressed into an intensive face-to-face meeting between the Ombudsperson and the petitioner that lasts between several hours and two days,¹⁶⁸ and is typically also attended by the Ombudsperson's legal officer, the petitioner's attorney, and a translator.¹⁶⁹ Since the petitioners' listing restricts their ability to travel, the Ombudsperson travels to the petitioner's country of residence for the dialogue.¹⁷⁰

The dialogue is the phase in which procedural fairness is most prominently afforded to the petitioner.¹⁷¹ For many petitioners, it sets the stage for the only human encounter with a representative of the sanction regime in the entire listing and delisting process – creating an element of humanity for the listed person in an otherwise depersonalized sanctions regime.¹⁷² Here, the petitioner learns the core of the listing reason, is questioned about and can respond to incriminating information.¹⁷³ The

¹⁶¹ Interview 10: „, Meinungsführer im Ausschuss“

¹⁶² Total 21: Austria, Romania, Switzerland, Belgium, United Kingdom, Costa Rica, New Zealand, Germany, Australia, Portugal, Liechtenstein, France, Netherlands, Finland, Luxembourg, Ireland, Denmark, United States of America, Canada, Italy, Syria. See https://www.un.org/securitycouncil/ombudsperson/classified_information. While this agreements have an important symbolic significance for the Office of the Ombudsperson, they have no true legal value for the Ombudsperson. Interview 2, 38:1196-9.

¹⁶³ Wilmhurst/Prost, S. 5.

¹⁶⁴ Kipfer, Remarks 10th Anniversary, S. 6, 7; 17th Report, Rn. 33; 18th Report, Rn. 31; 16th Report, Rn. 29.

¹⁶⁵ Hovell, DUE PROCESS IN THE UNITED NATIONS, S. 28

¹⁶⁶ Source

¹⁶⁷ Interview 3, 27:808-10: „The courts can compel the production of information ... the ombudsperson can compel no one.“

¹⁶⁸ Although the dialogue forms part of the Ombudsperson's standard procedure, it is conducted in most, though not all, cases. In some cases Corona, in some cases that ended with a delisting recommendation written exchanges. Interview 4, 15:439-43; 14th Report, Rn. 24

¹⁶⁹ Interview 5, 21:764-6; Interview 4, 13:383-6.

¹⁷⁰ Kimberly Prost/ Elizabeth Wilmshurst, UN Sanctions, Human Rights and the Ombudsperson, May 17, 2013, <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/170513summary.pdf>, S. 6.

¹⁷¹ Prost/Wilmhurst, 6.

¹⁷² Prost-Wilmhurst, S. 6.

¹⁷³ Kimberly Prost/ Elizabeth Wilmshurst, UN Sanctions, Human Rights and the Ombudsperson, May 17, 2013, <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/170513summary.pdf>

dialogue typically commences with the Ombudsperson presenting the listing reason from the Narrative Summary to the petitioner, as well as the information gathered on it. The petitioner may then comment on the incriminating information, such as a tweet or a past telephone call, that indicates a radical mindset or contacts with terrorists. The petitioner is also given the opportunity to explain why he has disassociated himself or herself from Al-Qaeda or ISIL.¹⁷⁴

The dialogue itself is characterized by its informality and conversational nature.¹⁷⁵ There are no formal rules of procedure as there would be in court proceedings, and the adversarial trial role situation does not apply. Unlike the defendant in criminal proceedings, the petitioner faces the risk that a refusal to testify will be used as incriminating evidence against him.¹⁷⁶ Moreover, the petitioner is not an accused whose guilt must first be proven, but instead a party who must convince the Ombudsperson that he is not associated with Al-Qaeda or ISIL in order to be taken off the list.

The informality of the dialogue is a mechanism for resolving the dilemma between protecting classified information and ensuring procedural fairness for the petitioner. While some domestic jurisdictions resolve this dilemma by proscribing a court to rely upon on classified information not disclosed to the affected individual¹⁷⁷ or by assigning the person concerned a special lawyer with access to the confidential documents,¹⁷⁸ the ombudsperson has chosen a pragmatic path that resolves the dilemma predominantly to the petitioner's detriment. The incriminating intelligence information can be used in the ombudsperson proceedings, while the ombudsperson verbally describes the information to the petitioner and his lawyer.¹⁷⁹ Suffice it to say that this approach alleviates but does not cure the fairness dilemma that the ombudsperson is privy to certain information, but the petitioner is not. While the ombudspersons themselves believe that they convey the essence of the listing rationale to petitioners in sufficient detail,¹⁸⁰ petitioners' attorneys have expressed more skepticism.¹⁸¹

In any case, the price for the chosen arrangement is the vulnerable position of the petitioner, for whom the guarantees of the liberal constitutional state in criminal proceedings in favor of the accused do not apply. A petitioner must defend himself in part against detailed allegations, such as 15-year-old telephone conversations, without ever seeing the basis of the allegation, such as the transcript of the telephone conversation. From his perspective, the dialogue is more like an interrogation than a relaxed conversation.¹⁸² As important as dialogue is for procedural fairness in the ombuds process, it does not create equality of arms, let alone symmetry in the asymmetrical sanction regime.¹⁸³

¹⁷⁴ Interview 1, 11:337-41; Interview 4, 11:313-9; Interview 2, 13:387-400.

¹⁷⁵ Interview 5, 15:530-6; Interview 8, 14:343-8: “it's much more of a conversation. ... I was having a conversation. It wasn't like a questioning, like a direct examination or cross-examination in the courtroom. It was much more that kind of an exchange which you wouldn't have in in a court context.”

¹⁷⁶ Interview 2, 15:452-8.

¹⁷⁷ Germany

¹⁷⁸ UK

¹⁷⁹ However, according to the Ombudsperson, the rejection of a delisting request is not based solely on intelligence information. Interview 2, 19:588-610; Interview 2, 20:621-5; Interview 3, 6:159-62; Interview 4, 4:97-9: “there is often patchy information. No information, very little of what I would consider evidence being put forward to justify the decision to put my clients on the list.”

¹⁸⁰ Eighth Report of the Office of the Ombudsperson, *supra* note 130, para. 34; See S/2012/590, paras. 30-32

¹⁸¹ Emmerson Report, Rn. 43

¹⁸² Interview 4, 10:307-9: “Calling it a dialogue makes it sound nicer than it was. It was an eight-hour-long interrogation using and drawing from material which wasn't disclosed to us. It was very difficult..” See also Interview 4, 11:326-9.

¹⁸³ Gavin Sullivan, *The Law of the List*, 2020, S. 233.

C. Flexible standards of review

The central legal standard for listing and delisting decisions is whether a person or entity is affiliated with Al-Qaeda or ISIL.¹⁸⁴ This equally narrow and vague criterion provides the ombudsperson with little guidance but broad discretion.¹⁸⁵ The first Ombudsperson, the politically savvy Kimberly Prost, utilized this latitude to craft two standards of review that were designed to navigate the minefield that lay in the politics of the Security Council. Both standards have shaped the Office and are meticulously followed by her successors. First, she innovated a transnational, highly flexible, evidentiary standard that carefully avoids excluding evidence from the outset. Second, she introduced a temporal gap in her review of listings, focusing on the present situation only while strictly excluding an analysis of the legality of the original listing decision.

1. Unlimited admissibility of intelligence information

The Ombudsperson reviews the information it has gathered with a highly flexible and permissive standard. She assesses “whether there is sufficient information to provide a reasonable and credible basis for the listing.”¹⁸⁶ This unique standard of review is not a legal transplant but was invented by Prost and tailored to the specific context of the sanction regime.¹⁸⁷ It was a deliberate strategic choice aimed at providing the Office with a high degree of flexibility in evidentiary issues.¹⁸⁸

The ombudspersons justify this standard as appropriate balance between the preventive character of the sanctions and the required level of protection for the listed persons.¹⁸⁹ While the term “sufficient” creates the necessary degree of flexibility, so the official explanations of the Ombudsperson, the criterion of reasonableness and credibility demands a minimum degree of reliability and rationality of the information basis for the listing.¹⁹⁰ It is supposed to convey to states that mere suspicion or an unproven allegation is not sufficient in the ombudsperson process to uphold a listing.¹⁹¹

The Ombudsperson’s evidentiary approach with regard to the admissibility of intelligence information is a more generous than that typically applied by courts.¹⁹² While the application of stricter rules of evidence, including no reasonable doubt, would likely have the consequence that any

¹⁸⁴ Resolution 1904, para. Xxx.

¹⁸⁵

- When the first Ombudsperson began the role, the delisting procedure had not yet been spelled out – **‘they** [i.e. the Security Council] **didn’t give me any of that procedural stuff to fill in’**. *Gavin Sullivan*, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 226f.
- Res. 2083 (2012): The recommendation should state the Ombudsperson’s views with respect to the listing as of the time of the examination of the delisting request.
 - Subsequently codified

¹⁸⁶ Internet source

¹⁸⁷ As the Ombudsperson has candidly said: ‘I made it up.’ Hovell, *The Power of Process*, p. 150. The nominal reasons for doing so was to create ‘an international standard appropriate in this context’. Interview L. *Gavin Sullivan*, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 234.

¹⁸⁸ Kimberly Prost: It gives me, quite frankly, freedom and the flexibility. Zitiert in *Sullivan, Gavin: The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 1. Aufl., New York 2020. S. 235 f.

¹⁸⁹ <https://www.un.org/securitycouncil/ombudsperson/approach-and-standard>

¹⁹⁰ Ebd.

¹⁹¹ Explicitly ebd.

¹⁹² See Kent Roach, “The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations”, in *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, Nicola McGarrity, Andrew Lynch and George Williams, eds. (London, Routledge, 2010).

listing decision had to be overturned,¹⁹³ the point behind this highly elastic evidentiary standard for the ombudsperson is precisely not to bind itself to formal rules of exclusion of evidence.¹⁹⁴ Classified information, which is paramount in the Sanctions Committee, shall not be disqualified as insufficient for the ombuds process from the outset to ensure acceptance among the member states.¹⁹⁵ Given the power structures in the Security Council, a stricter evidentiary approach under which no or only few listings could be sustained would likely call into question the institutional viability of the Ombudsperson.

This approach has led to many misunderstandings. Critics have accused the ombudsperson of developing a speculative standard that allows suspicions to suffice¹⁹⁶ and even resorting to information obtained through torture.¹⁹⁷ They argue that only the highest possible standard of scrutiny is appropriate because of the quasi-criminal consequences of the listings.¹⁹⁸ Not every one of these allegations is true. The Ombudsperson does not knowingly use evidence obtained through torture¹⁹⁹ and requires incriminating circumstances that justify a listing to be overwhelmingly probable.²⁰⁰ It also will not recommend maintaining a listing that is exclusively based on confidential information. The criticism, however, is justified insofar that the vague standard of review, combined with the confidentiality of the ombudsperson's decisions, leaves outsiders uncertain as to how the ombudsperson values the available information, especially classified information.²⁰¹

2. Lack of accountability for original listing decision

The ombudsperson reviews delisting petitions *de novo*, analyzing the situation not retrospectively by looking into the past at the original listing decision, but rather just looking at the present. In other words, the Ombudsperson does not control the legality of the original listing

¹⁹³ Interview 2, 8:238-40: “If you take that as a baseline what is done today in the listing sanctions regime, any judicial review would result in repeal.”; Interview 3, 24:726-8: Only very few cases, which are extremely circumstantial or rarely have correct evidence of a the facts of the conduct, could retain a beyond reasonable doubt standard.”

¹⁹⁴ Considering the preventative nature of sanctions, I apply a standard which is lower than evidentiary standards generally applied to criminal cases. Marchi-Uhel, Open Briefing to Member States – 23 November 2015, S. 1, https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/20151123openbriefing_1.pdf. See also Interview 5, 23:875-6: “Kim's response was, ‘This is not a court of law, so we're not applying the standard of the court of law’.” for the Ombudsperson, the applicable standard in this domain has to be kept ‘a bit fuzzy and a bit lower’ than conventional criminal or civil standards. Interview Prost cited in. Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 239.

¹⁹⁵

- „I wanted to make sure that it was a standard that was realistic and practical for the states that were responsible for a number of listings.“ Zitiert in Sullivan, 235
- Ombudsperson-Webpage: “This standard must be one which is appropriate to the unique context of decisions by a Committee acting under the express direction of the Security Council.”

¹⁹⁶ Sullivan 239; In this direction also Emmerson Report, Rn. 56

¹⁹⁷ Emmerson, Rn. 46 ff.; Sullivan 237.

- G. Sullivan: Some of our clients had been listed on the basis of torture evidence.

¹⁹⁸ Emmerson Report, Rn. 57

¹⁹⁹ It is true that the Ombudsperson rejects evidence exclusion rules across the board, including for evidence obtained through torture, because of the preventive nature of the sanctions. However, the Ombudsperson considers such evidence to be of no informative value due to its unreliability and does not consider it for this reason. Siehe Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee, Approach to Analysis. **Check assessment of information.** Interview 5, 25:936-44

²⁰⁰ Interview 2, 32:1007-33.

²⁰¹ Zutreffend Emmerson Report, Rn. 56

decision, but only whether there is a sufficient basis for the listing in the present.²⁰² This exclusive focus on the present with simultaneous exclusion of the past is atypical for a court.²⁰³

From the perspective of the designating state, *de novo* review has the advantage that there is no pressure to justify the original listing recommendation and a face-saving procedure for false recommendations.²⁰⁴ From the perspective of the Ombudsperson, this approach avoids the numerous minefields that would have been erected with a legality review of the Security Council's original listing decision. From the perspective of the petitioner, however, this creates a serious justice gap as the unlawfulness of a listing cannot be established and reparations, let alone damages, cannot be made. It has the effects that there is no accountability for the Security Council or designating states for unlawful listings and that many listed persons who were delisted through the ombuds process cannot understand why they were placed on the UN terrorist list in the first place.²⁰⁵ For the ECJ, it is precisely this review limitation that is irreconcilable with notions of effective judicial protection.²⁰⁶ For the judicial camp, the purpose of this standard is to accommodate the prevailing power structures within the sanctions regime, by „consolidat[ing] the list as an exceptional governance technology.“²⁰⁷

D. Lack of binding decision-making power

The ombuds process concludes with a “comprehensive report” by the ombudsperson that bears striking similarities with a court judgment.²⁰⁸ In the report, the Ombudsperson outlines the standard of review, presents in detail the facts of the case, and sets forth a legal assessment as to there is sufficient information to provide a reasonable and credible basis for an association with Al-Qaeda or ISIL.²⁰⁹ Unlike a judicial ruling, however, the report merely ends with a recommendation in an individual case that the listing be maintained or revoked.²¹⁰ It is the 1267 Sanctions Committee that is responsible for deciding on whether to follow or reject it. The recommendation is best conceived of as an intermediate procedural step in a global administrative process. The body that formally wields the decision-making power is the Sanctions Committee.

However, the legal effect of these recommendations was significantly strengthened by the reverse-consensus rule that the Security Council had grudgingly introduced via Resolution 1989 in light of the criticism of the lack of bindingness of the Ombudsperson's recommendations. According to paragraph 23 of the Resolution, recommendations to delist a person from the Consolidated List can be overruled in two ways. First, the Sanctions Committee can overrule the recommendation by consensus. This reverse-consensus-rule has received the most attention in legal scholarship. Second,

²⁰² Prost, Reflections 474

²⁰³ Exception: detention review of investigative detentions

²⁰⁴ Sullivan 227, 230.

²⁰⁵ Interview 4, 23:684-90: “it means that will never find out why they were placed on this list in the first place. I've represented a number of people on this list who've come off and been delisted because of the *de novo* criteria or because of the innovations of the ombudsperson. If at the end of the procedure, they've each said to me, "I still don't have a clear idea of why I was targeted by this listing regime in the first place. I never understood the reasons why I was being targeted, why have the lives of my family have been interrupted for so many years in this way." That to me is a grave injustice.”

²⁰⁶ EuGH, Kadi II, Rn. 134 (It is part of the "essence of effective judicial protection [...] to enable the person concerned [...] to retroactively remove the challenged act from the legal order and [...] to have it judicially determined that the inclusion of his or her name on the list in question [...] is tainted with a violation of law, the recognition of which is capable of rehabilitating him or her [...])

²⁰⁷ Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 228.

²⁰⁸ Interview 2, 10: 312-3.

²⁰⁹ Ausführen Interview 2

²¹⁰ Interview 2

the Chair of the Sanctions Committee may, on the request of a single Committee member refer the matter to the Security Council, which will decide on the basis of its ordinary voting rules laid down in Art. 27(3) UN-Charter “the question of *whether to delist*.”²¹¹ In other words, the question put before the Security Council for a vote would not be “whether the name should be on the list, but whether the name should be removed from the list”.²¹² This careful wording ensures that each permanent member retains its veto power and can block a delisting recommendation.

V. An effective adjudicatory mechanism: Explanations and lessons for global governance

Part IV showed that the non-judicial features of the ombudsperson are troubling. The provincial contractual and administrative arrangement disregards the importance of institutional independence. The informality of the ombudsperson process leaves the petitioner in a vulnerable spot. The broad admissibility of confidential intelligence information and *de novo* create an inequality of arms and prevent the petitioner from challenging the legality of original listing decisions. As a result of the lack of bindingness of the ombudsperson recommendation, the political body responsible for listings is legally entitled to override the delisting recommendation of the responsible adjudicatory body. If we ended our analysis here, the ombudsperson would seem like a poor and inadequate substitute for a court.

Part V tells a different story. It takes an empirically grounded look into some of the effects of these non-judicial features. It shows that despite the non-binding character of its recommendations, the ombudsperson is a highly effective adjudicatory body with high delisting and compliance rates. It argues that the remarkable success rate can largely be explained by two factors: First, the combination of the high requirements for an override imposed by the reverse-consensus-rule and the legal expertise of the ombudsperson and, second, the politically shrewd institution-building by the ombudspersons who managed to gain the trust of the member states by accommodating their sensibilities, while exploiting the break-in-points in the legal framework to establish an outcome-oriented model of individual justice that succeeds in getting dozens of petitioners off the List through a procedurally efficient and substantively focused no-nonsense approach.

A. Compliance with recommendations

A central argument of advocates for a court against the ombudsperson for the 1267 sanctions regime is that the merely recommendatory nature of the report inhibits the ombudsperson from being an effective and independent accountability mechanism.²¹³ They contend that effective protection in cases of serious human rights violations requires legally binding decision-making powers on the part of the adjudicatory authority²¹⁴ and that independence is not ensured so long as the final decision rests with the sanctions committee.²¹⁵ Executive and judicial functions would remain united if the Sanctions Committee formally decided not only who is placed on the UN terrorist list, but also

²¹¹ Emphasis added.

²¹² Interview 9, 10:301-2

²¹³ Beleg G. Sullivan

²¹⁴ Beleg G. Sullivan

²¹⁵ Beleg G. Sullivan.

- One of the key criticisms of the Ombudsperson mechanism by lawyers and the courts is that is ... insufficiently independent to satisfy international human rights norms. *Gavin Sullivan, The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law, 2020, S. 223f.*

whether the listed persons should be removed from the list again.²¹⁶ This argument is persuasive in theory.

1. High delisting and compliance rates

In practice, however, no recommendation has ever been overruled so far even though the ombudsperson recommends delisting in most cases.

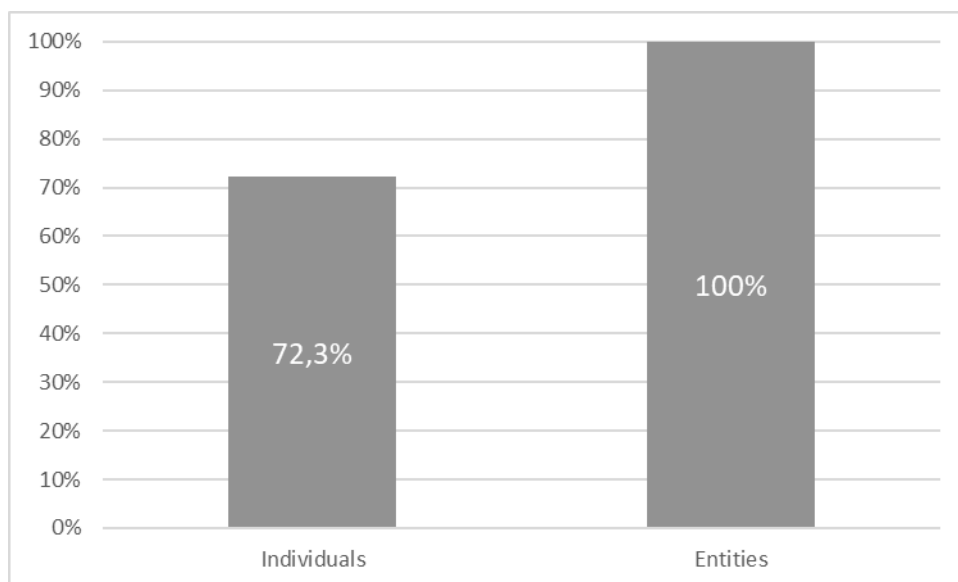


Figure 1: Rate of delisting recommendations

Figure 1 shows that in all completed cases, the Ombudsperson has recommended delisting in 65 out of 88 individual petitions, or 73.9%,²¹⁷ and in 7 out of 7 entity petitions, or 100%. From the petitioner perspective, it is a quite a remarkable success rate that no domestic administrative court comes close to matching.²¹⁸ What makes these numbers even more impressive is the fact that member states representatives believe that “the vast majority of these names were truly names of individuals who deserve to remain on the list.”²¹⁹ Even though the member states were opposed to vesting the ombudsperson with binding decision-making powers and retained fire-alarm controls, the Sanctions Committee has yet to overrule an Ombudsperson recommendation or refer the matter to the Security Council in a single case.

2. Compliance through persuasion?

It may be tempting to explain this compliance rate with persuasion and reputation costs given that member members have retained legal avenues for overriding the recommendations. In fact, advocates of the ombuds model argue that acceptance in the Security Council would ultimately not

²¹⁶ its Sanctions Committee, is responsible for designating individuals and entities on the Consolidated List and for adjudicating upon applications for their removal. This is inconsistent with any reasonable conception of due process, and gives the appearance that the Council is acting above and beyond the law. Emmerson Report

²¹⁷ specifically in 65 of the 88 cases (97 cases of which 4 are currently pending, 1 was withdrawn and 4 were rendered moot before the completion of the Ombudprocess). Entitäten Erfolgsquote 7 von 7

²¹⁸ Numbers on administrative court outcomes

²¹⁹ Interview 9, 19:592-3.

depend on the legal authority of the recommendations, but on its power of persuasion and the reputational costs resulting from an override.²²⁰

This assertion is partially correct, but the story is more complex. It is true that legal expertise and impartiality are critical resources for the Ombudsperson. Recommendations resemble the form of judgments. They are substantial legal documents, ranging between 20 and 50 pages, that engage in a careful analysis of the facts and systematic legal reasoning. Diplomats have praised the thorough legal analysis of the Ombudspersons. Overriding such a carefully reasoned decision of an independent legal expert who precisely was assigned with making this decision through the intergovernmental Sanctions Committee, acting out of brute political interest would, albeit legal, carry the breath of illegitimacy.

A look into the practice of Sanctions Committee, however, provides a more nuanced picture. Although the Sanctions Committee accepts the recommendations of the Ombudsperson without any objection in most cases,²²¹ two or three member states routinely vote against delisting recommendations.²²² The fact that some committee members object to the recommendations some of the time suggests that if the consensus rule of Resolution 1904 had not been substituted with the reverse-consensus-rule of Resolution 1989, several delisting recommendations would have been overridden, regardless of the persuasiveness of the Ombudsperson's comprehensive reports. It suggests that this rule has contributed substantially to providing the Ombudsperson with a robust mandate. Although legal expertise and reputational cost are important factors, the design of the voting procedure and the high requirements for an override imposed by the reverse-consensus-rule appear to be just as important.

Two cases that – due to the strict confidentiality requirements of the Ombudsprocess – have received little attention in legal scholarship further illustrate this point.

a. The *al-Faqih* case

In the *al-Faqih* case, the Sanctions Committee came very close to disregarding the delisting recommendation of the Ombudsperson, as 12 of the 15 committee members voted in favor of override, narrowly failing to meet the unanimity requirement.²²³ In no other case did the Sanctions Committee ever come nearly as close to overruling the Ombudsperson.²²⁴ The case has been described by participants as “the watershed case”²²⁵ and “the test case for the credibility of the Ombudsprocess”.²²⁶

The case concerned the Saudi citizen Saad al-Faqih, a former professor of medicine and outspoken critic of the Saudi government. The Saudi government had made it a high diplomatic priority to keep al-Faqih on the List, exerting pressure on the “very highest level” in the process,²²⁷ even calling the British prime minister and the German foreign minister, amongst others, only about this case.²²⁸ In the end, Saudi Arabia managed to persuade 12 members, including all P-5, to support

²²⁰ Hovell Due Process 26

²²¹ Gavin Sullivan, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 231.

²²² Interview 3, 21:638; Interview 2, 20:634-5

²²³ Interview 5, 9:298-300. Watson Repot Update S. 18, 20. “Saudi Dissident Faqih Removed From UN Sanctions List,” BBC, 3 July 2012, at: <http://www.bbc.co.uk/news/world-middle-east-18688045>

²²⁴ Interview 9, 17:507-8.

²²⁵ Interview 8, 12:367

²²⁶ Interview 10

²²⁷

²²⁸ Interview 10. Interview 9, 16:501-2.

its campaign. Many of the members were persuaded not because they strongly believed that al-Faqih belonged on the List, but only because they saw the diplomatic rationale in not alienating an important ally or state. Ultimately, however, Germany, South Africa and Guatemala voted in favor of upholding the delisting recommendation of the Ombudsperson even though this stand was not a given throughout the entire process.

Germany played a critical role, chairing the Sanctions Committee and representing the group of like-minded states on the Security Council. On the one hand, Germany was a strong supporter of the ombuds mechanism and determined to preserve its integrity. In addition, Germany found that Kimberly Prost's comprehensive report in the al-Faqih-case was well-researched and well-argued²²⁹ and the German federal intelligence agency did not discover any ties between Al-Qaeda and al-Faqih.²³⁰ Germany also sought to gain diplomatic recognition for its role as Chair of the Committee and to rebuild trust with its Western allies in the Security Council which had suffered from Germany's decision not to support the no-fly zone over Libya. Against this background, Germany internally took the following position: It would only support the Ombudsperson's recommendation if it was not the only member state to do so, for voting as the singular outcast against the entire committee in the role as Chair would have required, in Germany's view, to resign from the Chair, which Germany considered a cost too high. This raised the stakes of South Africa and Guatemala's votes but they did not buckle despite Saudi Arabia's considerable pressure.²³¹

The example of the decision-making process in the Sanctions Committee in the *al-Faqih* case indicates that it is not only persuasiveness that gives the ombudsperson's recommendations de facto force,²³² but rather that the mechanism of the reverse consensus rule is of decisive importance. This is supported by the fact that the states represented in the Security Council do not form a homogeneous community of interests, but have very different interests, particularly with regard to the ombudsperson. While some states regard a fair procedure for listed persons and a strengthening of the ombudsperson as essential,²³³ others reject the ombudsperson mechanism as an encroachment on the sovereignty of the Security Council and the procedural rights of petitioners as unnecessary.²³⁴ Against this political background, it appears almost unfeasible to build consensus in the Sanctions Committee for overruling a recommendation because at least one member of the Security Council will prioritize protecting the integrity of the Ombudsprocess and therefore vote against override. Put differently, the reverse-consensus rule transforms the ombudsperson's recommendations into quasi-binding decisions in the framework of the Sanctions Committee, which triggers a procedurally almost insurmountable voting requirement, especially in times of a deeply divided membership.²³⁵

However, the 12 member states that had voted to overturn the recommendation still had a second legal avenue readily available. Referring the matter to the Security Council where a majority of only nine members was needed, or the veto of a single permanent member would have sufficed for an override. So why did those member states decide not to pursue this path even though an override,

²²⁹ Interview 10 (sauber recherchiert)

²³⁰ Interview 10 (Spezialisten in Berlin).

²³¹ In one exchange at a break during a Security Council session, the Saudi ambassador barked at the guatemalan ambassador Gert Rosenthal, an experienced, oldschool-diplomat: "If you don't vote against the delisting, we'll break off diplomatic relations." Rosenthal settled the exchange, responding: "May I point out to you, Mr. Ambassador, that Guatemala and Saudi Arabia have no diplomatic relations at all." Interview 10

²³² So aber Hovell Beleg

²³³ Gruppe gleichgesinnter Staaten bis hin zu Staaten

²³⁴ Interview 5, 23:851-3.

²³⁵

at least based on their vote in the Sanctions Committee, would have been their preferred outcome? First, it should not be underestimated how difficult it is to put an issue on the agenda of the Security Council as the Council carefully weighs which issues merit its limited resource of time.²³⁶ For this reason, there was skepticism as to whether, as a structural matter, the Council would have more important issues to dedicate its precious time to than maintaining the listing of a single individual.²³⁷ Second, the referral of delisting cases to the Security Council has been described, at least by supporters of the Ombudsmechanism, as “nuclear option”,²³⁸ because it would disavow the authority of the Sanctions Committee.²³⁹ Some member states seriously pursued this path, while suggesting that this option was not as “nuclear” for them as for others. However, they were reportedly “talked down” from referring the case to the Security Council by the U.S. State Department and its Legal Advisor, which “saw the bigger picture and knew that it would have blown the whole process up.”²⁴⁰ Notwithstanding strong disagreement with the Ombudsperson in the al-Faqih case, the P-5 ultimately concluded that retaining Mr. al-Faqih was not important enough to risk damaging the credibility of the ombuds mechanism, not least because at that time the sword of Damocles of the pending Kadi II litigation was still hanging over the Security Council.²⁴¹

The voting and debates in the 1267-Sanctions Committee concerning the al-Faqih-case show two things: First, the member states in the Sanctions Committee appear to be less concerned about overturning the Ombudsperson’s recommendation by unanimity vote of the Sanctions Committee than through the Security Council by means of its ordinary voting procedures notwithstanding Resolution 1989 likewise legalizing both pathways. Meeting the high threshold of unanimity seems, in the view of the member states, to legitimate overturning the Ombudsperson’s recommendation, while referral to the Security Council is perceived more akin to power politics despite its legality. Second, the combination of the difficulty of putting issues on the tight agenda of the Security Council and the high legitimacy costs for overturning delisting recommendations provide a robust safeguard against override despite the lack of bindingness of the *recommendations*. At the same, the 1989-procedure evidently provides no guarantee that the Security Council will not deviate from its current practice if the circumstances change, illustrating the fragility of the ombuds process. If, for example, Saudia Arabia would have had P-5-status in the Council, it surely would have overturned the Ombudsperson’s recommendation, and if ever a case came up in the Sanctions Committee that was as important to a real P-5 as the al-Faqih-case was to Saudi Arabia, it would likely use its veto power – that is why they insisted on its presence in the first place.

b. The *Ali Ahmed Nur Jim’ale* case

Legally overriding the delisting recommendation of the Ombudsperson is not the only avenue for member states to keep persons on the list. The *Ali Ahmed Nur Jim’ale* case points to an alternative pathway to circumventing the delisting procedure that seems to contain significantly less legitimacy costs than voting to overturn the Ombudsperson’s delisting recommendation. The case concerned a

²³⁶ Interview 9, 16:492-3

²³⁷ Interview 9, 16:499-500.

²³⁸

²³⁹ Wittig 564. Interview 8, 12:379-80. See also *Francesco Giumelli/Filippo Costa Buranelli*, When states and individuals meet: The UN Ombudsperson as a ‘contact point’ between international and world society, *International Relations* 34 (2020), S. 59 f.

²⁴⁰ Interview 8, 12:380-3

²⁴¹ Interview 9, 16:496-8.

Somali businessman who allegedly financed Al Shabaab, a regional offshoot from Al-Qaeda. Similarly to *al-Faqih*.²⁴² It was marked by strong disagreement between the Ombudsperson and members of the Sanctions Committee. In that case, the Sanctions Committee formally followed the Ombudsperson's recommendation by delisting Ahmed Ali Jim'ale from the 1267-Consolidated List, but placed him on the List of the Sanctions Committee on Somalia and Eritria on the same day.²⁴³ U.S. diplomats have characterized this treatment as "our clever little way of getting around a very tricky problem".²⁴⁴ Although they have justified the relisting arguing that Jim'ale should have been on the Somalia sanctions list in the first place,²⁴⁵ this approach raises serious rule of law issues and exposes the double standards between the 1267-sanction regime that has an ombuds mechanism and the other sanctions regimes that lack such a mechanism.²⁴⁶

3. Beyond the binarity between bindingness and non-bindingness

In the domestic context of a liberal democracy that upholds the rule of law and the separation of power, it would be unacceptable for the executive branch to overturn judicial decisions. In the afore-mentioned *Van de Hurk* judgment, the European Court of Human Rights reiterated that even the mere existence of a provision that allows executive override of a judicial decision to the detriment of an individual is incompatible with the notion of effective judicial protection even if this provision "was never applied at any time during the forty years that it remained 'on the statute book'".²⁴⁷ From a purely normative perspective, it is hard to justify political override of the decisions of the 1267-Ombudsperson because the legitimacy of the override mechanism ultimately depends upon that the Sanctions Committee does not actually trigger its "fire-alarm"-exception. The *al-Faqih* case illustrates this point. But if this is true, then why not make the recommendation binding from the outset?

Although control mechanisms for overriding judicial decisions for political reasons to the detriment of individuals are problematic from a normative point a view, they are a reality of international politics that international lawyers must live with. States may include such safety-valves to counteract principal-agent dynamics and the associated risk that the judicial agent exceeds the limits of the authority delegated by the state principal.²⁴⁸ In the negotiations to Resolution 1989, the safety-valve of paragraph 23 was one of the "most heavily negotiated paragraphs of the entire text".²⁴⁹ Especially for the U.S. and Russia, retaining this fire-alarm control proved to be *conditio sine qua non*

²⁴² But see Watson Report; <https://allafrica.com/stories/201202211542.html>

²⁴³

Fall 1: <https://www.un.org/press/en/2014/sc11241.doc.htm>

Fall 2: Watson Repot Update S. 19; In one other case, all participants, including the Ombudsperson affirm One case was uncontroversial

Prost: I remember one where he was delisted and immediately went back on the list for new reasons. ... I argued in favor. I said, "Listen if there's new information, this is the way it should work because then the ombudsperson process works and then you add them back on." I forget who it was, but that was proper.

²⁴⁴ Interview 9

²⁴⁵ Interview 9: there were multiple governments who felt strongly that this was someone who needs to remain on a sanctions list and that it was probably more appropriate for him to be on the Somalia-Eritrea sanctions list anyway. Even though I think Kim probably viewed this as a sneaky backhanded way to undermine her recommendation, practically the result was not wrong.

²⁴⁶ Kimberly Prost: "That exposed what remains my major complaint ... You can't have one list where you have a fair process that decides and then you just get put on another list. That one was very frustrating."

²⁴⁷ EGMR, *Van de Hurk* 16034/90, 19.4.1994, Rn. 45

²⁴⁸ Hovell, *Due Process*, 26

²⁴⁹ Interview 9, 12:351-3

for agreeing to the resolution.²⁵⁰ They could not bring themselves to agree to a mechanism that would “upset or cheapen the power of the veto”.²⁵¹ For the U.S. the thought that they could have voluntarily stripped themselves of veto power for delistings and then “someone [could] recommend[] removing Osama bin Laden from the list”,²⁵² was simply unacceptable. In addition, there is also an important symbolic dimension. Allowing the Sanctions Committee and the Security Council to overrule the Ombudsperson underlines that the Security Council, and not the ombudsperson, has the final say in a delisting decision and does not subject itself to another institution. Against this background, the art of the compromise consisted in strengthening the recommendatory powers without relinquishing veto power and the right to overrule the Ombudsperson.

The practice of compliance with the Ombudsperson’s recommendations indicates that fire alarm-controls may only have limited practical significance. As we have seen above, the recommendations of the Ombudsperson were observed by the Sanctions Committee in all cases (with the exception of *Ali Ahmed Nur Jim’ale*) despite the high rate of delisting recommendations. The *al-Faqih* case illustrates the resilience of procedural safeguards falling short of bindingness against override despite high political pressure in the diplomatic arena. It is not clear whether the status of legal bindingness would have immunized the delisting decisions of the Ombudsperson against political override. The *Ali Ahmed Nur Jim’ale* case shows that the member states in the Sanctions Committee have means such as re-listing at their disposal that arguably would be equally effective against binding decisions.

The 1267-Ombudsperson serves as an example of how to create meaningful decision-making power that fall within a continuum between the binary poles of bindingness and non-bindingness. In settings in which states have strong reservations against vesting adjudicatory bodies with binding decision-making powers such as in the case of the 1267-Ombudsperson, recommendations that trigger heightened procedural requirements for override may constitute a promising balance between the interests of states in retaining some form of fire-alarm control on one hand and concerns about effective human rights protection on the other hand that should also be explored for other global governance settings. From an institutional design perspective, proceduralized safety-valves may also be viewed as an interim arrangement that initially eases states’ worries about delegating authority to an adjudicatory body, and may hence be replaced with binding decision-making powers once states have grown comfortable with the new institution.²⁵³

B. A model for institution-building: Building trust with member states notwithstanding rigorous legal review

A second central factor for the effectiveness of the ombuds process is the politically shrewd institution-building by the acting ombudspersons, which have all accepted the political dimension of their job.²⁵⁴ While the relevant resolutions regulate central issues of the mandate at best in broad

²⁵⁰ Interview 9, 12: 374-6; Interview 10 (Komfort)

²⁵¹ Interview 9, 10:297-8.

²⁵²

²⁵³ Example of Human Rights Commission in the context of ECHR.

²⁵⁴ See Kimberly Prost. “If I had come in and just applied a purely judicial approach, it wouldn’t have gone anywhere, because you did need to have some [politics]. You know how I conducted certain things. You had to have a bit of a pragmatic approach and practicality. I would always reach independent conclusions. But how I might frame things would take into account sensitivities.” Cited in *Gavin Sullivan, The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law, 2020, S. 227.*

strokes, the ombudspersons, especially Kimberly Prost have exploited the break-in points in the legal framework, “filling in a lot of the blanks in the mandate,”²⁵⁵ to get many petitioners of the list, while managing, at the same time, to build trust with the member states.

While Part III.C.2 explained how *de novo* review shields the Security Council from accountability and prevents the petitioner from challenging the legality of the original listing decision, this section argues that *de novo* review has also benefited petitioners in important ways and seems to have contributed substantially to the high delisting rate (1.). In addition, the section suggests, based on the high delisting rate, that the ombudsperson may have succeeded in accommodating the vulnerable position of the petitioner caused by the informality of the ombudsperson process, while, at the same time, gaining the trust of the member states through a rigorous legal review (2.).

1. Turning the Tide: The petitioner-protective side of *de novo* review

De novo review is a clever legal innovation that has played a critical role in turning the ombudsperson process into an effective mechanism for the protection of listed persons, helping dozens of individuals to be removed from the UN terrorist list. It was carefully tailored to the legal situation of listed petitioners, most of whom claim to have disassociated themselves from Al-Qaeda or ISIL since their original listing. It ties in with the preventive and non-criminal classification of sanctions set forth in the relevant Resolutions and takes the Security Council at its word. If the nature of the sanctions is preventive, its existence can only be justified by a persistent threat. But if a person no longer poses a terrorist danger, there is no reason to continue imposing anti-danger sanctions. From the perspective of the petitioners, the advantage of *de novo* reviews lies in the fact that new information may be presented, and the ombudsperson’s review is not limited by the Security Council’s prerogative to assess the original listing decision.²⁵⁶ The delisting decision does not hinge on the past, making burdensome and likely fruitless investigations into the Security Council’s decision-making superfluous.²⁵⁷

At the same time, *de novo* review puts pressure on the member states to continuously update the justification for the listing in the presence, benefitting the petitioner if they fail to provide new information. When member states assert that because “[w]e do not have updated information, therefore the grounds for the listing remain,”²⁵⁸ they entirely miss this point. The crux of *de novo* review is precisely that the grounds for the listing disappear if states fail to justify the listing in the presence.

In combination with her strong recommendation power, the ombudsperson has leveraged *de novo* review to create strong incentives for member states that wish to maintain a listing to provide sufficient information even if they are legally not obliged to do so.²⁵⁹ In the absence of sufficient

²⁵⁵ Interview 9, 6:160-1. Interview 9, 6:159-63: „Someone like Kim who was a very serious jurist, very well-respected, and had a great reputation, great legal mind. ... It is not hard to imagine someone who could have been in that job who would have interpreted the mandate in a different way that would have resulted in a much less serious process.“

²⁵⁶ Wilmshurst, S. 5

²⁵⁷ Interview 8, 8:245-250 and 9:282-286.

²⁵⁸ Interview 2, 7: 201-2

²⁵⁹ Interview 8 15:469-474: “I had a couple of cases in which states made a conscious decision not to provide new certain information and that triggered delisting but not that many. ... By and large, states are very keen especially in the big cases to keep people on the list. They do what they can to give you the information.”

Interview 2, 37: 1153-6: “If the information is not sufficient, then you get a delisting, that means the member states have an interest to provide information if they want to retain the listing, and if they don’t, then they know, it will lead to a delisting.” See also Interview 3, 27:808-17.

information, the Ombudsperson can bring about the delisting of a listed person with her strict reverse consensus requirement for recommendations. Another informal procedural rule created by the Ombudsperson that caught some member states off guard is that she made it clear early on that allegations without provision of the underlying intelligence are not considered in the ombuds process, ending any illusion for member states that they could keep a person on the List simply by asserting “[d]on’t worry, we got info on this guy.”²⁶⁰ The flip side of the coin is that the focus on disassociation places the question of the petitioner’s credibility at the center of the review and thus carries the risk that the listed person’s convictions will ultimately determine whether he or she remains on the terrorist list or is removed.

2. Balancing member states’ sensibilities and due process

At the same time, the ombudspersons have nonetheless managed to accommodate the sensibilities of the member states in various ways, while providing listed petitioners with a fair process to the greatest extent possible within the challenging framework set by the Security Council.²⁶¹

First, *de novo* review disentangles, as I have explained above, the concern of providing an effective legal remedy to listed persons from the concern of holding the Security Council accountable for its original listing decisions. The Ombudsperson succeeds in getting listed persons off the list without providing a meaningful accountability forum against the Security Council, making it easier for the member states to accept the Ombudsperson’s interventions.

Critics see *de novo* review as a counterproductive attempt by the ombudsperson to reconcile the power structures in the Security Council in favor of states with providing a fair process in favor of listed individuals, thereby legitimizing an otherwise illegitimate sanctions regime.²⁶² This raises the question whether Kimberly Prost has developed *de novo* review in anticipatory obedience to protect the interests of member states or whether she made the most of the framework set by the Security Council by cleverly setting the course to benefit the petitioners.

On one hand, it is true that Prost has taken a pragmatic rather than a principled approach.²⁶³ On the other hand, there is much to suggest that the Security Council would never have accepted legality review of the listing decisions of its Sanctions Committee. In any case, the Security Council has long vehemently resisted any form of judicial review.²⁶⁴ All ombudspersons are firmly convinced that review of original listing decisions would be politically unenforceable.²⁶⁵ Consequently, the narrative that the ombudsperson has succeeded, through politically shrewd moves, including *de novo* review and carving out a niche to guarantee basic procedural rights for listed persons is more plausible than a case of anticipatory obedience.

²⁶⁰ Interview 8, 3:86-101.

²⁶¹ Prost, *A Reflection on Innovations in the Security Council*, 473: “The whole philosophy I had from the time I took up the position was I’m going to take what the Security Council gave me in the resolution, and I’m going to use it as much as I possibly can to meet those fundamental principles of fairness.” See also Interview 5, 15:514; Interview 3, 15:438; Interview 2, 36:1134-6.

²⁶² *Gavin Sullivan*, *The Law of the List*, 2020, S. 227.

²⁶³ Sullivan 227

²⁶⁴ Source Hovell

²⁶⁵ Interview xxx, 22:831-3: “She knew that if she was going to go in and start reviewing decisions of the security council, her position would not last. The states and the council would just not accept that.”; Interview xxx, 8:234-5: “Making the original listing decision judicially reviewable is a no-go politically.”; Prost: “I would not have been in the job long if I had attempted to start reviewing the initial listing decisions”. cited in Sullivan 228.

Second, the Ombudsperson does not *a priori* exclude intelligence information as evidence, thereby accommodating member states sensibilities with respect to intelligence information. Instead, the motto is that all available information is lumped together so that the ombudsperson can use this information base to form the broadest possible impression of whether the listing should be revoked or upheld. Unrestricted “truth”-finding enjoys priority over strict rules on the admission of evidence. It is a concession to member states, which value the accuracy of the sanctions list higher than procedural fairness for the listed person. At the same time, the latter must rely on the professional sensitivity of the ombudsperson to properly assess the inherently unreliable sources of evidence.²⁶⁶

Third, there is a similar interplay in the dialogue phase. The informality and conversational nature of the dialogue, albeit disregarding procedural safeguards that criminal defendants enjoy in judicial proceedings, impel the petitioners to engage in intensive discussions with the ombudsperson, through which important information for the case can be obtained and the credibility of the listed person assessed.²⁶⁷ Although this procedural arrangement likely provides the ombudsperson with a fuller picture of the facts of the case, possibly boosting the accuracy rate of the sanctions list,²⁶⁸ it also increases the responsibility of the ombudsperson to take the vulnerable position of the petitioner sufficiently taken into account.²⁶⁹ The high delisting rate suggests that the ombudsperson has at least partially succeeding in this difficult balance.²⁷⁰

Finally, the ombudspersons do not act as human rights advocates with a bias toward the petitioners. They are ideologically not opposed to targeted sanctions but view those, in principle, as legitimate international legal instrument so long as due process is provided. Instead, they all have, not surprisingly given their prior professional background as criminal judges, approached delisting petitions with the self-conception of a judge.²⁷¹ Pervaded by the value of impartiality, they were as determined to provide listed persons with due process as they were worried about recommending the delisting of an actual terrorist. Their professional skills in conducting rigorous interrogations and assessing the credibility of criminal defendants reassured member states.

While this common judicial background has shaped the Office of the Ombudsperson, it was not a given from the outset. In fact, the U.S. had initially preferred “someone who comes from a government counter-terrorism agency, and someone who understands counter-terrorism and understands how intelligence works and how we identify these people”.²⁷² However, the designation of a candidate with a judicial background was a critical issue for the EU member states, and they ultimately prevailed. They “wanted a judge [...] to show that even if this isn’t an actual judicial

²⁶⁶ Interview 2, 14:22-3: “The ‘legal’ rather has a small space [in the proceedings].”

²⁶⁷ Check: These face-to-face meetings are very important to a proper assessment of the case. Interview 2, 13:415-7; Interview 1, 12:355-6; Interview 1, 5:132-4; Interview 5, 22:813-4.

²⁶⁸ Interview 5, 15:554-565.

²⁶⁹ Interview 5, 16:574-7: “the ombudsperson has a bit of a role of guarantor of the rights as well, but it's a big responsibility you're putting on one person. It's not written anywhere. There's no obligation. It's somebody's professionalism and belief that these rights should be respected, that are going to have that happen.” Critical Interview 4, 29, 881-3: “There needs to be proper interrogation and review of that underlying information that we can't just leave it up to a particular technique of an ombudsperson.”

²⁷⁰ Verweis nach unten

²⁷¹ Interview 8, 7:212-3.

²⁷² Interview 9, 6:164-7

process, this is about as close as the Security Council can get to creating this quasi-judicial process”.²⁷³

C. Procedural efficiency

One justification for establishing an ombudsinstitution in lieu of a court is the comparative ease of access and the speed of the proceedings. Whilst courts are said to face manifold structural limitations relating to access, *Hovell* specifically credits the 1267-Ombudsperson for being “far more accessible than courts.”²⁷⁴ And as court proceedings have been criticized in various contexts for taking too long, Annex II of Resolution 1904 sets short deadlines for the ombudsprocess.²⁷⁵ Procedural efficiency is deemed paramount.

This section shows, on the one hand, that the focus on procedural efficiency in the context of the 1267-Ombudsperson has led to a very low access threshold for petitioners and to a very swift process – according to *Hovell* much lower and swifter than in a court of law.²⁷⁶ On the other hand, it demonstrates based on available data that only a modest number of listed petitioners and entities actually initiate an ombuds proceeding, pointing to structural limitations of the ombudsperson in addressing the legitimacy vacuum created by the 1267-sanction regime.

1. Ease of access

Although the 1267-Ombudsperson is only entitled to act upon receiving a petition,²⁷⁷ it compensates for this petition requirement is the low threshold for admissibility of petitions. A short e-mail from the petitioners identifying themselves and briefly explaining the reason for the petition – even if only translated via Google Translate – is sufficient to establish the competence of the ombudsperson.²⁷⁸ Even if the information contained in the first e-mail is inadequate, the ombudsperson and the legal officers will make proactive efforts to rectify the situation.²⁷⁹ In any case, first-time petitions do not fail due to the admissibility requirements.²⁸⁰ Those who seek access to the ombudsperson receive it. This means that the threshold for access to the ombudsperson, despite the petition requirement, is significantly lower than for a court. In addition, the ombudsperson facilitates legal assistance for interested petitioners who cannot afford a lawyer by referring them to criminal defense attorney that have volunteered to take ombuds cases pro-bono.²⁸¹

²⁷³ Interview 9, 7:214-6. Interview 9, 6:173-4: „That inevitably made this process more judicial-like than I think some might have expected”. The official terms of reference for the Ombudsposition provide that a judicial background is considered advantageous. Interview 3, 11:312-4

²⁷⁴ *Devika Hovell*, Due Process in the United Nations, AM. J. INT'L L. 110 (2016), S. 24.

²⁷⁵ The information gathering phase and the dialogue phase are both attributed a two-month period, each with an extension possibility for up to two additional months.

²⁷⁶ *Devika Hovell*, Due Process in the United Nations, AM. J. INT'L L. 110 (2016), S. 24.

²⁷⁷ See Annex II Res. 1904 (2009): the Office of the Ombudsperson shall be authorized to carry out the following tasks upon receipt of a delisting request

²⁷⁸ <https://www.un.org/securitycouncil/ombudsperson/application>. See also Interview 8, 9:260-3.

²⁷⁹ Interview 8, 14:443-5: “I never reject. Sometimes I had to go back two or three times and have a conversation, but ultimately I think everyone who approached me, I accepted they were under another regime. I ultimately was able to get enough information to start the process.” See also Interview 5, 7:205-10; 7:226-30; 8:242-6; Interview 3, 13: 386-95.

²⁸⁰ Interview 5, 8: 247-51. The admissibility requirements are stricter for repeat requests in which a petitioner files a new petition after the Ombudsperson had previously recommended to retain him on the list. In those case, the Ombudsperson requires “new information”. Interview 5, 8: 239-41. See also Interview 3, 13: 396-99; Interview 3, 15:432-3.

²⁸¹ G. Sullivan, Asser Inst.: Most of the people who I've dealt with have no resources or less than the resources, so they're not in the position to engage lawyers.

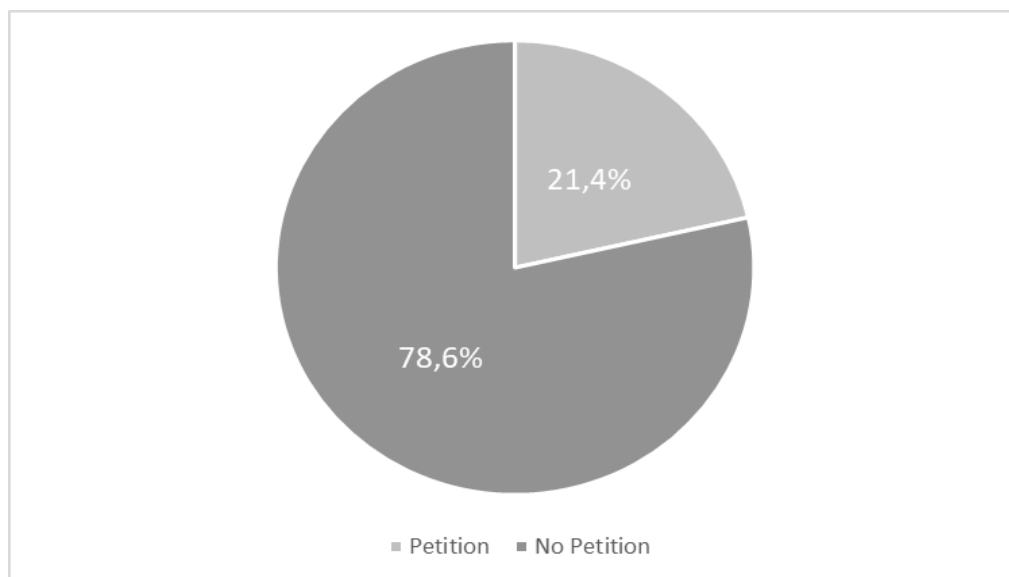


Figure 2: Rate of Petitions among all listed individuals

Figure 2 shows that, to date, 92 of all 429 listed individuals, or 21.4%, have initiated ombuds proceedings.²⁸² The number for entities is even lower (29 out of 166 listed entities, or 17.5%).

The interpretation of this data is burdened by uncertainty because little is known about most listed persons outside the security community. On one hand, the fact that more than one in five of all listed individuals have petitioned the ombudsperson can be considered a success story if we assume that most listed persons are leading figures in terrorist organizations or militant terrorist fighters for whom initiating an UN ombuds proceeding is not an option they would even contemplate, either because they regard the entire sanctions regime as illegitimate, or they are concerned about otherwise revealing their current location to foreign intelligence agencies. In addition, 110 individuals were delisted by the Sanctions Committee without completing the ombudsprocess as part of the annual triennial review established by Resolution 1822 (2008), thus removing the grounds for an ombuds petition. In other words, the number of persons still listed who did not petition should be around 60%, although this number contains some uncertainties.

On the other hand, the data may point to a significant access barrier which an ombuds mechanism that includes a petition requirement cannot remove. If this is true, a key factor for this access barrier is likely the listing regime. In fact, many listed individuals are never informed about the listing. Another serious legal protection issue is that, on average, petitioners did not initiate delisting proceedings until about nine years after they were placed on the Consolidated List. 20 individuals have been on the List for more than 20 years.²⁸³ Even if one replaces the actual listing date with the start date of the operation of the 1267-Ombudsperson, when a meaningful legal remedy actually existed, it still previously took 2.8 years on average to file a delisting petition, although they legally

²⁸² Provided that no one petitioned a second time or even more.

²⁸³ The solution to this problem, which many have advocated, is the creation of sunset clauses, which would allow for listings to automatically lapse unless reconfirmed by consensus. The draft text of Resolution 1989, proposed by the US, originally contained such a general sunset clause. Unfortunately, by the time Resolution 1989 was adopted this sunset clause was nowhere to be seen. Lisa Ginsborg, *The United Nations Security Council's counter-terrorism ISIL (Da'esh) and Al-Qaida sanctions regime*, in: Ben Saul (Hrsg.), *Research Handbook on International Law and Terrorism*, Cheltenham 2020, 550 (563)

would have been entitled under the ombudsmechanism to file a delisting petition immediately after their listing.²⁸⁴

In part, this can be explained by cases in which the petitioners did not disassociate themselves from Al-Qaeda or ISIL until sometime after the listing, so the delisting reason occurred later. Other probable reasons include i) lack of knowledge of the existence of the ombudsperson, ii) lack of prospects of success of an ombudsperson procedure, iii) lack of legitimacy of the procedure from the perspective of the listed persons, and iv) the risks involved for members of Al-Qaeda or ISIL of revealing its identity and address.²⁸⁵ If one considers the ombudsperson as a solution to the legitimacy vacuum for listed persons caused by the 1267 sanctions regime, then the ombudsperson encounters structural limitations in that it only conducts review for a fraction of the listed persons and entities.

2. Swift process

Once a petition is filed with the Ombudsperson, the review process is conducted swiftly.

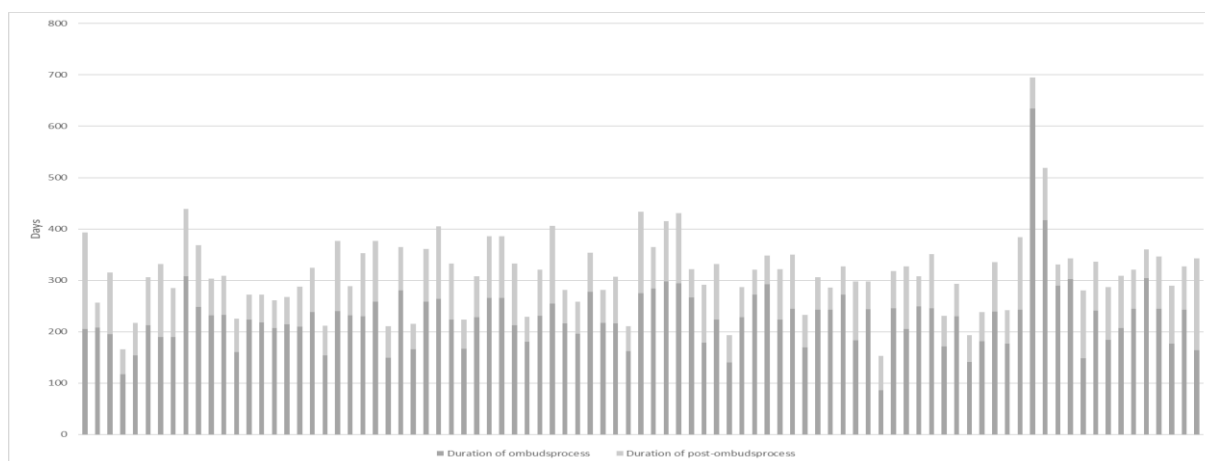


Figure 3: Duration of ombuds process

Figure 3 shows the duration of all ombuds proceedings to date, distinguishing the core ombuds process and the process in the 1267-Sanctions Committee after the ombudsperson's recommendation. On average, it takes only 7.4 months from receipt of the petition to the ombudsperson's recommendation²⁸⁶. After completion of the ombudsperson's Comprehensive Report, which is ultimately decisive for the outcome of the proceedings given the strong recommendation power of the ombudsperson, another three months pass on average before a petitioner is delisted. This leads to a total of just 10.6 months between petition receipt and delisting. It is doubtful that a sanctions court

²⁸⁴ Interview 1, 17:511-2.

²⁸⁵ Cf. Interview 4, 7:200-1; Interview 6, 15: 455-75.

²⁸⁶ Cases 79 and 80 that took much longer than the other cases are no exception to this rule. Instead, they are manifestations of other shortcomings of the ombudsperson regime, more specifically the lack of proper rules for the transfer of functions from the old to the new officeholder. The delay was caused by a vacancy of the post between August 2017 and July 2018, indicating not only a lack of institutional consolidation of the Office but also the human costs with person being required to endure the impairments of the List longer than necessary. Critically 16th Report, Rn. 24 f. During the vacancy period, only two delisting petitions were filed due to the absence of the ombudsperson authorized to make a decision. In one case, where the petitioner was removed from the Consolidated List after the end of the proceedings, the proceedings were delayed by 7 ½ months due to the vacancy. Cf. Case 80, <https://www.un.org/securitycouncil/sc/ombudsperson/status-of-cases>. The longest lasted just under two years. See Case 79. Start date: 27 March 2017; 20 February 2019 - Decision by the Committee.

would be capable to match this swiftness as a judicial process would likely involve different expectations about formal procedural rules and transplanted legal traditions that would inevitably prolong the process.²⁸⁷ From the perspective of petitioners who typically have already been on the Consolidated List for several years prior to initiating the ombuds proceedings, such a speedy and pragmatic process may best serve their interests.

VI. Limits

As Part V explained, the ombuds mechanism is remarkable story of institution-building and has emerged into an effective adjudicatory mechanism despite its non-judicial features. However, we should also be careful not to unequivocally declare the Ombudsperson as an institutional success story that is superior to a court, while disregarding the broader politics of the List. Part VI explores the achievements of the ombudsperson in the broader context of the 1267-sanctions regime. It finds that viewed from a broader perspective, the ombudsperson ultimately remains a lone fighter for a fair process in the asymmetrical power structures of the sanctions regime, with effective but limited capacities to alleviate the legitimacy vacuum created by the regime (A.). The section concludes against this background that the ombudsperson walks a fine line between a legitimizing facelift for existing power structures and a fundamental improvement in legal protection for listed individuals (B.).

A. The Ombudsperson in the context of the List

Figure 4 contextualizes the delisting activities of the Ombudsperson and relates them to the listing activities of the 1267-Sanctions Committee over time.

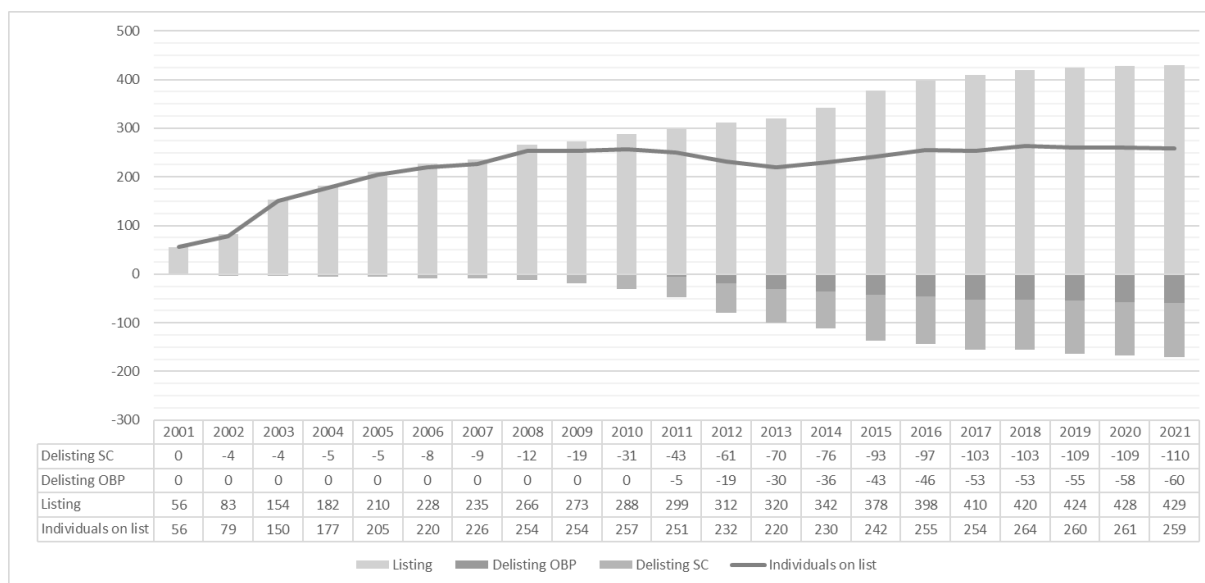


Figure 4: Listings and delistings per year

The Figure shows that in the period from 2001 to 2008, the size of the Consolidated List grew steadily and significantly (Ø 32 persons per year, a total of 254 persons), while hardly any persons were removed from the list (1 ½ per year, a total of 12 persons). In the period from 2009 when the Ombudsperson was established (Dec. 2009) until 2021, the number of listings decreased significantly

²⁸⁷ Cf. Interview 8, 9:263-8; Interview 6, 25:817-9.

(Ø 12 ½ persons per year, a total of 163 persons), while persons and entities were delisted to a significant extent (Ø 12 persons per year, a total of 158 persons), essentially keeping the number of listings and delistings – and hence the size of the List - in balance since 2009.

The establishment of the ombudsperson thus correlates in time with a more restrictive listing practice and a more extensive delisting practice beyond the ombudsprocedure. It is not clear, however, whether and to what extent the Ombudsperson or other intervening factors are responsible for this development. As described above, the Ombudsperson has concluded a total of 89 delisting proceedings since taking up its duties in July 2010, while 97 proceedings have been initiated.²⁸⁸ As a result, a total of 60 out of 429 listed individuals and 28 out of 166 listed entities were delisted through the ombuds procedure from the Consolidated List, which currently still contains 260 individuals and 89 entities. At the same time, 110 individuals were delisted by the Sanctions Committee without completing the ombuds process, most as part of the annual triennial review under Resolution 1822. In other words, the Ombudsperson was only responsible for 35.3% of all individual delistings, while 64.7% of all delisted individual were exclusively removed from the List by the Sanctions Committee.

One explanation that attributes the delisting practice of the Sanctions Committee to the Ombudsperson consists in potential anticipatory effects of ombuds review. Put differently, the prospect of external review by the ombudsperson encourages the Sanctions Committee, so the argument, to consider more carefully whether a person truly belongs on the List or whether a person should be removed from the List through the 1822 procedure, thus attributing an effect of the Ombudsperson beyond its delisting recommendations.²⁸⁹ However, this interpretation likely understates the distinctive role of the changed listing and delisting practices of the Sanctions Committee.²⁹⁰ It also disregards that member states do not actually engage in substantive review of listings under the 1822 procedure, leaving limited opportunities for implementing anticipatory effects in their delisting process. Moreover, the confidentiality of the ombuds proceedings makes it unlikely that delisting recommendations by the Ombudsperson cause meaningful reputational costs for designating states that would inhibit listing designations. It seems more plausible to assume that the impact of the Ombudsperson on the size of the List is largely limited to adjudicated cases. Considering that only 21.4% of all listed individuals and only 17.5% of all listed entities have petitioned the Ombudsperson, most of them only many years after they were placed on the List, its impact on the 1267-sanctions regime is substantial but limited.

It appears then that the Ombudsperson is only partially capable of alleviating the structural legitimacy and legal protection vacuum created by the Security Council's targeted sanctions – if only because the ombudsperson is not involved in the listing process and can only act upon receiving a petition. It remains much easier to be placed on the List than to be removed from it.²⁹¹ While there may be some valid reasons for giving a highly political and diplomatic, almost apotheosized intergovernmental institution like the UN Security Council the mandate to maintain international

²⁸⁸ Of the nine unresolved cases, four cases are still pending, in four other cases the Sanctions Committee removed the petitioners from the sanctions list before the conclusion of the Ombudsperson proceedings, and in one case the petitioner withdrew his petition after the Ombudsperson submitted her report to the Sanctions Committee.

²⁸⁹ For this proposition, see Interview 5, 12:434-13:437 („I think after the ombudsperson process was created, states were much more careful in proposing names for listing because they knew there would be some kind of review, potentially, so you look a bit stupid if you're just posing a name on very flaky grounds.“).

²⁹⁰ Interview 6, 24:771-5.

²⁹¹ *Gavin Sullivan, The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law, 2020, S. 232.*

peace and security,²⁹² the Sanctions Committee is institutionally wholly unsuited to individualized administrative action causing serious human rights violations.²⁹³

In the academic controversy over whether a court or the ombudsperson represents the preferable institutional model for the 1267 sanctions regime, proponents of the ombuds model underestimate these broader legitimacy issues when they deem the ombuds mechanism as superior to a court even from a normative perspective. Many of the claimed merits of the ombudsperson model are, in part, little more than inferior compensatory mechanisms for a lack of legal authority. Many legal innovations invented by the Ombudsperson are compromises made to ensure the institutional viability of the Office in the difficult power-political context of the Security Council.²⁹⁴

B. The Ombudsperson as a fig-leave?

Proponents of the judicial camp make the valid point that the ombudsperson may have the counterproductive effect of stabilizing the dubious 1267-sanctions regime by restoring and strengthening its authority and legitimacy (in the sociological sense). More specifically, Gavin Sullivan argues that the due process provided by the Ombudsperson alleviates then tension between supporters and critics of the sanctions regime, thus preventing “legal fragmentation and political conflict”²⁹⁵ and „mitigat[ing] the threat of judicial review ... by dissipating potential norm conflicts before they reach court“²⁹⁶. In a nutshell, his argument is that the legitimacy crisis and domestic judicial contestations experienced by the sanction regime before the establishment of the ombudsperson were so grave and existential that they likely would have led to the demise of the entire sanction regime had the ombudsperson not been established.

Interviews with diplomats working on the 1267-sanctions regime tend to confirm his viewpoint, albeit as a more modest version. In 2009, U.S. diplomats were deeply concerned about the viability of the sanction regime and felt that its “legitimacy had been eroded”.²⁹⁷ They credit the establishment of the ombudsperson with “relieving a degree of the pressure from the courts in Europe” and “restor[ing] legitimacy to a very important sanctions tool”.²⁹⁸

Although these diplomatic accounts suggest that the 1267-sanction regime was in serious trouble in 2009 prior to the establishment of the Ombudsperson, the question remains whether in the counterfactual scenario that the ombudsperson had never been created, the Security Council truly would have been forced to abandon, or at least to significantly alter the regime, or whether the prevailing power structures rather would have enabled a continuation of the regime. Perhaps what makes the latter scenario seem more likely is that, on one hand, targeted sanctions have become a central tool of international security politics over which the P-5, by virtue of their status as permanent members, exert and, on the other hand, the political and legal accountability of the Security Council is weak and, accordingly, the pressure to changes established practices low. Moreover, the fact that 13

²⁹² Simon Chesterman, *Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law*, 14 *GLOBAL GOVERNANCE* 39 (2008), S. 45.

²⁹³

²⁹⁴ Cf. Interview 3, 2:43-4 (“this is a process where they are not going to be able to achieve the type of fairness you would have in a decent process.”).

²⁹⁵ *Gavin Sullivan*, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 223.

²⁹⁶ *Gavin Sullivan*, *The Law of the List. UN Counterterrorism Sanctions and the Politics of Global Security Law*, 2020, S. 232.

²⁹⁷ Interview 9, 21:639-41.

²⁹⁸ Interview 9, 19:566-9.

UN sanctions regimes without any ombuds mechanism currently exist aside from the 1267-regime raises doubts as to whether the latter truly would have become politically untenable without the ombudsperson.

Sullivan's argument is also problematic for another reason. Depicting the ombudsperson, to put it slightly provocatively, as a mere fig-leave for an illegitimate sanction regime seems almost cynical from the perspective of the 60 individuals and 28 entities who were removed from the List because of the ombudsperson. In addition, the 1267-sanction regime has, at least in the past decade largely, if not exclusively, targeted the leadership level and the operationally active auxiliary support network space of Al-Qaeda and ISIL,²⁹⁹ two terrorist networks which have been responsible for causing much human suffering, and has proven to be an effective multilateral instrument for drying up financial flows in their favor.

VII. Conclusion

The 1267-Ombudsperson teaches us valuable lessons about institution-building in a highly politicized context. One institutional lesson from this case may be that softer, more flexible, and thus more adaptable adjudicatory bodies such as the ombudsperson can be more easily transplanted into existing institutional structures without, as it were, upsetting power structures because they do not entail inherited norms and expectations of *modus operandi* to the same extent as a court.³⁰⁰ In the specific Security Council context, for example, cornerstones such as broad political discretion in international security matters, the exclusion of member state accountability for original listing decisions, and the admissibility of intelligence information in the ombudsperson process while– or despite – guaranteeing their confidentiality are less likely to be tested by the ombudsperson than by a court.³⁰¹ From a *realpolitik* perspective, the ombudsperson model thus appears as an attractive adjudicatory model for the exercise of international authority beyond the state.³⁰²

It does not follow from this, however, that the ombudsperson is a mere fig-leave for the 1267-sanction regime or only a poor substitute for a court. The court camp is fixated on a politically unrealizable goal and tends to disparage the remarkable achievements of the ombudsperson simply because they do not correspond to certain institutional design features of courts. Although a court embodies perhaps more potential for institutionally transforming the 1267-sanctions regime as it would come along with non-negotiable expectations about the implementation of judicial traditions such as the publicness and bindingness of judicial decisions and the power of a court to compel evidence, it is not clear whether the delisting rate would necessarily increase under a court.³⁰³ The ombudsperson has established an outcome-oriented model of individual justice that has proven to be remarkably successful in many petitioners off the List in a swift and focused process.

Many of the non-judicial shortcomings of the ombudsperson have not nearly affected the process as negatively as critics had suggested. Even though the ombudsperson cannot issue legally binding decisions, the recommendations have *de facto* been observed in all but one case as a result of their legal persuasiveness and the procedural safeguard of the reverse-consensus rule. The lack of

²⁹⁹ i.e., the operationally active "money manager, the propaganda boss. Interview 6, 14:438.

³⁰⁰ On this point: Harlow, *Global Administrative Law*, S. 209. Spezifisch für das 1267-Sanktionsregime: *Devika Hovell*, *Due Process in the United Nations*, *AM. J. INT'L L.* 110 (2016), S. 25f.

³⁰¹ Hovell, *Due Process*, 29; Hovell – *Power of Process*, 166 f.

³⁰² French/Kirkham, S. 60

³⁰³ Many domestic courts in security contexts do not have an impressive record.

institutional independence and the risks for petitioners arising out of the informality of the process have been countered by the personal integrity and professional diligence of the officeholders. Overall, it seems fair to say that the ombudsperson is a remarkable example of how politically skillful and persistent incremental institution-building can succeed in carving out a due process niche in the institutionally difficult and highly political environment of the Security Council, providing listed persons with at least basic features of a fair delisting procedure and an effective means of legal protection.