

# Security Council Resolution 1904 (2009): A Significant Step in the Evolution of the Al-Qaida and Taliban Sanctions Regime?

Adele J. Kirschner\*

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## I. Introduction

As stated in the preamble of Security Council resolution 1904 (2009) the Security Council is “taking note of challenges both legal and otherwise to the measures implemented by Member States”<sup>1</sup> under the so-called *1267 sanctions regime*. This new resolution can be seen as a response to the increasing number of cases before domestic and regional courts regarding the inclusion of certain individuals or entities on the so-called “Consolidated or Black List”. Before introducing resolution 1904 (2009) (III) this article will offer a brief overview of the United Nations (UN) framework to fight transnational terrorism and in particular the listing and delisting procedure

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\* Research Fellow at the Max Planck Institute for Comparative Public and International Law in Heidelberg.

<sup>1</sup> SC Res. 1904 (2009), preamble 9<sup>th</sup> recital.

of this regime including the procedural changes that have been made since the sanctions were first imposed (II).

As is known, this regime was adopted against the background of the terror acts committed in the late 1990s. These were specifically the United States (USA) Embassy Bombings in Dar-es-Salaam, Tanzania and Nairobi, Kenya and later the 9.11 attacks in New York and Washington D.C. It has been criticized frequently for failing to comply with human and legal rights standards and as disregarding the rule of law.<sup>2</sup> Major points of contention have been and to some extent still are that the system lacks transparency, that individuals are not notified about the case against them, that they are not given the opportunity to be heard as well as that they are denied legal remedies.

However one may recognize a development that the regime's procedures are improving.<sup>3</sup> Various new resolutions have been adopted since 1999 gradually enhancing the procedures to enable better protection of the listed individuals or entities. Whereas part of this development is certainly owed to an overall trend in UN policy making to ameliorate the adverse effects of targeted sanctions,<sup>4</sup> the *1267 sanctions regime* has also attracted particular

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<sup>2</sup> Recent articles and reports examining the human rights concerns of the regime include: *T. J. Biersteker/S. E. Eckert*, White Paper "Addressing Challenges to Targeted Sanctions: An Update of the Watson Report", prepared by the Watson Institute, Brown University of October 2009, 14. The paper is available at: <http://www.watsoninstitute.org>; *I. Cameron*, UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights, *Nord. J. Int'l L.* 72 (2003), 159 et seq.; *B. Fassbender*, Targeted Sanctions and Due Process: The Responsibility of the UN Security Council to Ensure that Fair and Clear Procedures Are Made Available to Individuals and Entities Targeted with Sanctions under Chapter VII of the UN Charter, study commissioned by the United Nations Office for Legal Affairs, Office of the Legal Counsel, Humboldt-Universität zu Berlin, 20.03.2006; see also *B. Fassbender*, Targeted Sanctions Imposed by the UN Security Council and Due Process Rights, *International Organizations Law Review* 3 (2006), 437 et seq.; *J. A. Frowein*, The UN Anti-Terrorism Administration and the Rule of Law, in: P. M. Dupuy/B. Fassbender/M. N. Shaw/K. P. Sommermann, *Völkerrecht als Wertordnung. Common Values in International Law. Festschrift Essays in Honour of Christian Tomuschat*, 2006, 785 et seq.; *C. A. Feinagle*, The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Law for the Protection of Individuals, *GLJ* 9 (2008), 1514 et seq.; *L. J. v. d. Herik*, The Security Council's Targeted Sanctions Regimes in Need of Better Protection of the Individual, *LJIL* 20 (2007), 797 (804); *J. Reich*, Due Process and Sanctions Targeted against Individuals Pursuant to U.N. Resolution 1267, *Yale J. Int'l L.* 33 (2008), 505 et seq.

<sup>3</sup> See *J. A. Frowein*, UN Verwaltung gegenüber dem Individuum – legibus absolutus?, in: H.-H. Trute/T. Gross/H. C. Röhl/C. Möllers (eds.), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts*, 2008, 334 et seq.

<sup>4</sup> On this issue see *D. Cortright/G. A. Lopez/L. Gerber*, Refinement and Reform in UN Sanctions: The State of the Art, Paper delivered at the Seminar "Sanctions and the Political Economy of Crisis", co-organized by the Center for International Studies and Research and

attention. This is due to the fact that it differs from the currently existing ten other targeted sanctions regimes<sup>5</sup> as it lists quite a high number<sup>6</sup> of individuals and entities. Moreover another special feature of the regime is that, after the Taliban were removed from power in Afghanistan, there is no longer a link between individuals and entities with a certain country.<sup>7</sup> Thus, individuals of any nationality and entities residing anywhere in the world can be listed.<sup>8</sup> This entailed a number of prominent complaints lodged by individuals and entities all over the globe which created quite a stir and pressured the Security Council to react.<sup>9</sup> Hence it is not very surprising that the 1267 *sanctions regime* is now in fact the most developed of all sanctions regimes.<sup>10</sup>

## II. Development of the Sanctions Regime

The following section shall give readers an overview of the former sanctions regime and underscore the key developments and procedural changes that have been introduced over the last decade.

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the International Peace Academy, Paris 22.-23.11.01. The paper can be found at: <http://www.fourthfreedom.org>.

<sup>5</sup> The UN system currently totals eleven sanctions regimes (e.g. against Somalia and Eritrea, Sierra Leone, Liberia, Congo, Sudan). They target *inter alia* individuals and entities usually imposing a travel ban, an assets freeze and/or an arms embargo. Black Lists listing the names of these individuals and entities have been established in ten of the eleven regimes (compare [www.un.org](http://www.un.org)).

<sup>6</sup> Currently 497 individuals and entities are listed on the 1267 Consolidated List compared to for example only 4 on the Sudan sanctions list established according to SC Res. 1591 (2005) or 76 on the Iran sanctions list established according to SC Res. 1737 (2006).

<sup>7</sup> Compare *B. Fassbender* (note 2), 437 (442).

<sup>8</sup> *L. v. d. Herik* (note 2), 797 (800).

<sup>9</sup> Prominent cases are *inter alia*: ECJ Joined Cases C-402/05 P and C-415/05 P ECR 2008, I-06351, (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of European Union and Commission of European Communities*); ECJ Joined Cases C-399/06 P and C-403/06 P (*Hassan and Ayadi v. Council of European Union and Commission of European Communities*); *Mohammed Jabar Ahmed and others v. Her Majesty's Treasury and Hani El Sayed Sabaei Youssef v. Her Majesty's Treasury*, (27.1.2010), [2010] UKSC 2, [2010] WLR (d) 12; Federal Tribunal Lausanne, case 1A.45/2007, BGE 133 II 450 (*Nada v. SECO Staatssekretariat für Wirtschaft*). For a comprehensive overview see Watson White Paper 2009 (note 2), 46 et seq.; *Global Relief Foundation Inc. v. Paul H. O'Neill, Secretary of the Treasury et al.*, (31.12.2002), U.S. Court of Appeals, Seventh Circuit Court 315 F.3d 748, No. 02-2536.

<sup>10</sup> Watson White Paper 2009 (note 2), 14.

## 1. Security Council Resolution 1267 (1999)

The Regime's initial and name giving *resolution 1267* from 1999 imposed a funds and financial assets embargo next to a travel ban and arms embargo on the Taliban. The reach of these sanctions was later enlarged to freezing the funds of *Osama bin Laden*, Al-Qaida and their associates,<sup>11</sup> as well as imposing a travel ban and an arms embargo on these designated individuals and entities.<sup>12</sup>

## 2. The Institutional Framework

### a) The Sanctions Committee

The administration of these sanctions was conferred to a special committee of the Security Council. The so-called *Taliban and Al-Qaida Sanctions Committee*<sup>13</sup> was established in accordance with Art. 29 Charter of the United Nations (UN Charter) and serves as a subsidiary organ to the Security Council. It consists of all the members of the Security Council.<sup>14</sup> The Committee monitors the sanctions regime. It is in charge of registering individuals and entities associated with the Taliban, Al-Qaida or *Osama bin Laden* in an updated list, the above mentioned Consolidated or Black List. This list catalogues the subjects against whom the sanctions apply. The sanctions are then enforced by Member States.

According to the Committee's website the Consolidated List currently contains 497 entries. Of these entries 257 individuals and 103 entities are associated with Al-Qaida and 137 individuals are associated with the Taliban.<sup>15</sup> There are at present no entities registered to be associated with the Taliban.

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<sup>11</sup> See SC Res. 1333 (2000), para. 8(c).

<sup>12</sup> See SC Res. 1390 (2002), para. 2(b-c).

<sup>13</sup> For the purpose of this Article, the Taliban and Al-Qaida Sanctions Committee shall hereinafter be referred to as "the Committee".

<sup>14</sup> See SC Res. 1267 (1999), para. 6.

<sup>15</sup> The List can be found on the Committee's Website at: <http://www.un.org>. It was last updated on 4.6.2010 and last visited on 15.6.2010.

## b) The Monitoring Team

The Committee is supported by the *Analytical Support and Sanctions Monitoring Team* (Monitoring Team). A team of eight experts appointed by the Secretary General with specialized knowledge in counter-terrorism, financing of terrorism and other related issues.<sup>16</sup> It operates under the direction of the Committee and assists it by submitting reports assessing the Member States' implementation of the sanctions regime, as well as by reviewing the effectiveness of committee procedures and proposing new measures of improvement.<sup>17</sup>

## 3. The Procedural Regime

The listing and delisting procedure is laid down in the Committee's working guidelines adopted on 7.11.2002 for the first time and basically updated on a yearly basis in the subsequent years (2003, 2005, 2006, 2007 and 2008). Currently the Committee still works with the version as amended on 9.12.2008, since it has not yet updated the guidelines to implement the new procedures introduced by resolution 1904.<sup>18</sup>

### a) The Listing Procedure

Section six of the Committee's working guidelines contains the procedure for the submission of listing requests and other listing issues. Each state is entitled to propose individuals or entities to be included on the Consolidated List,<sup>19</sup> but it is the Committee which decides whether a name is to be added or not.<sup>20</sup> The Committee normally meets and takes decisions in closed session.<sup>21</sup>

The initial Security Council resolution did not contain clear criteria on the basis of which a name was to be listed.<sup>22</sup> For example the early resolu-

<sup>16</sup> SC Res. 1526 (2004), para. 7.

<sup>17</sup> Compare SC Res. 1526 (2004), para. 8 and annex.

<sup>18</sup> Compare Security Council Report on Counter Terrorism, May 2010. The Report can be found at: <http://www.securitycouncilreport.org>.

<sup>19</sup> Compare SC Res. 1735 (2006), para. 5; Committee Guidelines in the amended Version of 9.12.2008, 6(a), (c).

<sup>20</sup> Compare Committee Guidelines (note 19), 6 (c).

<sup>21</sup> Compare Committee Guidelines (note 19), 2 (a).

<sup>22</sup> *L. v. d. Herik* (note 2), 797 (804).

tion 1390 from 2002 stated that any individual, group, undertaking or entity *associated with* Al-Qaida, the Taliban or *Osama bin Laden*, could be listed and would accordingly be subjected to sanctions.<sup>23</sup> This wording left the Committee with a large margin of discretion and was obviously not very precise. Nevertheless it was not until resolution 1617 in 2005 that the Security Council gave clearer criteria as to what the term “*associated with*” meant, explicitly that it included such acts or activities as:

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
  - supplying, selling or transferring arms and related materiel to;
  - recruiting for; or
  - otherwise supporting acts or activities of;
- Al-Qaida, *Osama bin Laden* or the Taliban, or any cell, affiliate, splinter group or derivative thereof.<sup>24</sup>

Although the wording is still very wide,<sup>25</sup> it at least gives some legal certainty as to the standards applicable to the listing.<sup>26</sup>

Regarding the issues of fairness and transparency of the regime, a resolution adopted in early 2004 (SC Res. 1526) modestly improved the situation as it calls upon all states, when submitting new names to the Consolidated List, to include identifying background information to the greatest extent possible that demonstrates a link between the individual or entity and Al-Qaida, the Taliban or *Osama bin Laden*.<sup>27</sup> States were also *encouraged* to inform, to the extent possible, the individuals and entities on the Consolidated List of the measures imposed on them.<sup>28</sup> Yet it was not until resolution 1735 in 2006 that notification of those listed was actually *required*.<sup>29</sup> This resolution also called for state proposals for listing to include an extensive *statement of case* with specific information supporting a determination that the individual or entity is linked with Al-Qaida, Taliban or *Osama bin Laden*.<sup>30</sup> The proposals should also indicate the nature of the information (e.g. from intelligence source or other) and identify which parts of the statement of case can be made public for the purposes of notifying the listed

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<sup>23</sup> SC Res. 1390 (2002), para. 2.

<sup>24</sup> SC Res. 1617 (2005), para. 2.

<sup>25</sup> See also *L. v. d. Herik* (note 2), 797 (805).

<sup>26</sup> *C. A. Feinangle* (note 2), 1514 (1527).

<sup>27</sup> SC Res. 1526 (2004), para. 17.

<sup>28</sup> SC Res. 1526 (2004), para. 18. Emphasis added.

<sup>29</sup> Compare SC Res. 1735 (2006), para. 11. Emphasis added.

<sup>30</sup> SC Res. 1735 (2006), para. 5.

individual or entity.<sup>31</sup> Even though this does not amount to a full disclosure of the reasons for listing *vis-à-vis* the individuals or entities concerned, they at least have the chance to receive more detailed information regarding their listing. Further procedural improvements were brought about with resolution 1822 in June 2008. It required the Committee to develop narrative summaries which are published on the Committee's website following a new listing and explain the reasons for the listing of a certain individual or entity.<sup>32</sup>

## b) The Delisting Procedure

In its first two years the *1267 sanctions regime* did not offer a delisting procedure. In November 2002 the Committee then finally introduced a mechanism for delisting when it refined its guidelines.<sup>33</sup> Initially the delisting procedure had to be initiated by the petitioner (individual(s), groups, undertakings, and/or entities on the Committee's Consolidated List)<sup>34</sup> by asking the state of residence or citizenship to request a review of the case before the Committee.<sup>35</sup> Additionally to requesting support for delisting, the petitioner had to provide for sufficient justification and offer relevant information for this request.<sup>36</sup>

Against the background of increasing criticism concerning this procedure from scholars, governments, international organizations and through national and regional courts, and pursuant to recommendations of the Monitoring Team, the Security Council (upon a proposal from France which was supported by the United States)<sup>37</sup> decided to address the shortcomings and establish a so-called *Focal Point*<sup>38</sup> within the UN Secretariat's Subsidiary Organs Branch to improve the accessibility of remedy and to provide fair and clear procedures for delisting.<sup>39</sup> This new procedure allowed individuals to directly petition for delisting through the Focal Point instead of needing

<sup>31</sup> SC Res. 1735 (2006), para. 6.

<sup>32</sup> SC Res. 1822 (2008), para. 13; Committee Guidelines (note 19), para. 6(h).

<sup>33</sup> Compare Security Council Press Release SC 7571 (15.11.2002), available at: <http://www.un.org>; Watson White Paper 2009 (note 2), 14, 56.

<sup>34</sup> Compare Committee Guidelines (note 19), para. 7(a).

<sup>35</sup> Compare Committee Guidelines (note 19), para. 7(h).

<sup>36</sup> Compare Committee Guidelines (note 19), para. 7(d).

<sup>37</sup> Watson White Paper 2009 (note 2), 12; *L. v. d. Herik* (note 2), 797 (805).

<sup>38</sup> It may be noted that the Focal Point serves all sanctions committees, not just the *1267 Sanctions Committee*. An overview of all existing sanctions committees can be found at: <http://www.un.org/sc/committees/index.shtml>.

<sup>39</sup> SC Res. 1730 (2006), para. 2.

to submit a delisting request through their state (the petitioner is however free to choose the previous delisting procedure via his/her government).<sup>40</sup> From a formal point of view this definitely facilitated the accessibility of remedy for the individual, since before this resolution an individual was dependent on his/her state to file a petition on his/her behalf.<sup>41</sup> However the Focal Point does not itself conduct an independent review and does not have the authority to decide about the delisting request.<sup>42</sup> Its tasks are mainly *to receive delisting requests* from petitioners,<sup>43</sup> *to acknowledge receipt of the request*, *to inform the petitioner* of the general procedure for processing that request,<sup>44</sup> *to forward the request* to the designating government(s)<sup>45</sup> and to the government(s) of residence and citizenship<sup>46</sup> and to *inform the petitioner of the Committee's decision* to grant the delisting petition or to dismiss it.<sup>47</sup> Moreover the Focal Point does not even have the authority to forward the delisting request to the Committee.<sup>48</sup> The choice of whether or not to recommend delisting is solely made by the designating government(s) and the government(s) of residence and citizenship.<sup>49</sup> A delisting request will only be successful if it is not objected by the Committee members. In cases a unanimous decision can not be reached, the Chairman may submit the matter to the Security Council for decision.<sup>50</sup>

Furthermore it is quite noteworthy that it took the Security Council until 2006 to finally establish formal delisting criteria.<sup>51</sup> Resolution 1735 disclosed the factors which the Committee may consider when determining

<sup>40</sup> SC Res. 1730 (2006), annex 1<sup>st</sup> recital.

<sup>41</sup> *L. v. d. Herik* (note 2), 797 (805).

<sup>42</sup> *D. Cortright/E. de Wet*, Human Rights Standards for Targeted Sanctions, Report of the Sanctions and Security Research Program, January 2010, 10. The report can be found at: <http://www.fourthfreedom.org>; *C. A. Fein角度* (note 2), 1530; *L. v. d. Herik* (note 2), 797 (805); *C. Michaelsen*, Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council's 1267 Sanctions Regime with European Due Process Guarantees, *Melbourne Journal of International Law* 15 (2009), 329 (333).

<sup>43</sup> SC Res. 1904 (2009), annex II para. 1. Emphasis added.

<sup>44</sup> SC Res. 1904 (2009), annex II para. 4. Emphasis added.

<sup>45</sup> The designating government is the government proposing the listing.

<sup>46</sup> SC Res. 1904 (2009), annex II para. 5. Emphasis added.

<sup>47</sup> SC Res. 1904 (2009), annex II para. 8. Emphasis added.

<sup>48</sup> *C. A. Fein角度* (note 2), 1513 (1530).

<sup>49</sup> Committee Guidelines (note 19), para. 7(g).

<sup>50</sup> Committee Guidelines (note 19), para. 3(a).

<sup>51</sup> Compare *G. A. Lopez/D. Cortright/A. Millar/L. Gerber-Stellingwerf*, Overdue Process: Protecting Human Rights while Sanctioning Alleged Terrorists, a Report to Cordaid from the Fourth Freedom Forum and Kroc Institute for International Peace Studies at the University of Notre Dame, April 2009, 12. The report can be found at: <http://www.fourthfreedom.org>.



whether to remove names from the Consolidated List, e.g. mistaken identity, whether an individual or entity no longer meets the listing criteria and if the individual is deceased or has severed all association with Al-Qaida, the Taliban or *Osama bin Laden*.<sup>52</sup> These are however no clear legal standards but remain factors which the Committee may or may not consider.<sup>53</sup>

### c) Committee Review

A fairly recent development in the listing and delisting procedure was generated through resolution 1822 in June 2008. This resolution directed the Committee to undertake a comprehensive review of all listed names and to review each entry again after three years in order to ensure that the Consolidated List is as updated and accurate as possible as well as to confirm that listing remains appropriate.<sup>54</sup> Interestingly the adoption of this new review mechanism has apparently had a quite significant impact on the culture of committee meetings, rather than only reporting instructions from capitols, meetings are now held with much greater discussion and deliberation.<sup>55</sup>

### d) Humanitarian Exemptions

In 2002 the Security Council recognized that individuals targeted by the *1267 sanctions regime* could not be deprived of basic needs and adopted resolutions 1390 and 1452, which provided for a number of exemptions to the travel ban and the assets freeze. Resolution 1452 standardized the necessities for basic living expenses in a list of specific purposes including *inter alia* payments for foodstuffs, rent or mortgage, taxes, medicine as well as medical treatment.<sup>56</sup> Additional extraordinary expenses can also be granted on a case by case basis.<sup>57</sup> In contrast to the specific exemptions included on the list, which may be granted by Member States upon notifying the Committee, extraordinary expenses require a positive statement of approval by the Committee.<sup>58</sup> Exemptions to the travel ban can for example be granted

<sup>52</sup> Compare SC Res. 1735 (2006), para. 14.

<sup>53</sup> Compare *J. Reich* (note 2), 505 (507).

<sup>54</sup> Compare SC Res. 1822 (2008), paras. 25 f.

<sup>55</sup> Watson White Paper 2009 (note 2), 17.

<sup>56</sup> Compare SC Res. 1452 (2002), para. 1(a).

<sup>57</sup> Compare SC Res. 1452 (2002), para. 1(b).

<sup>58</sup> Committee Guidelines (note 19), para. 10(a), (b).

for attending a judicial process or for a religious obligation.<sup>59</sup> This shall however also be determined on a case by case basis.<sup>60</sup> The exemptions to the travel ban are granted by Member States but need to be approved by the Committees.<sup>61</sup>

The introduction and establishment of general criteria for exemptions was an important step in the development of the *1267 sanctions regime*. The exemptions contribute to the proportionality of the individual sanctions since they reduce the possibility of an inappropriate interference with fundamental rights.<sup>62</sup> This can however only be the case as long as individuals and entities are able to avail themselves of the right to petition for an exemption.<sup>63</sup> The responsibility of advancing an individual's request lies with the Member States and unfortunately forwarding is not guaranteed.

### III. Resolution 1904 (2009) Content and Reforms

Security Council resolution 1904 was adopted unanimously on 17.12.2009. It amends the *1267 sanctions regime* and in particular the delisting procedure. It was mostly sponsored by the USA and Austria.<sup>64</sup> The resolution is comparatively long and divided into eight parts.<sup>65</sup> The following section will concentrate on the key provisions of the text, being the introduction of an ombudsperson to the delisting procedure (1) as well as some amendments to the listing (2) and review procedure (3).

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<sup>59</sup> Compare SC Res. 1452 (2002), para. 1(b).

<sup>60</sup> Compare SC Res. 1452 (2002), para. 11.

<sup>61</sup> Compare SC Res. 1452 (2002), para. 1(a).

<sup>62</sup> Compare *T. Bierstecker/S. Eckert*, White Paper "Strengthening Targeted Sanctions Through Fair and Clear Procedures", prepared by the Watson Institute Targeted Sanctions Project, Brown University of March 2006, 31. The paper is available at: <http://watsoninstitute.org>.

<sup>63</sup> Compare Watson White Paper 2006 (note 63), 31.

<sup>64</sup> Compare Statement by Ambassador *Susan E. Rice*, United States Permanent Representative to the United Nations, 17.12.2009, New York. The statement can be found at: <http://usun.state.gov>.

<sup>65</sup> Measures (para. 1-7); Listing (para. 8-19); Delisting/Ombudsperson (para. 20-27); Review and Maintenance of the Consolidated List (para. 28-32); Measures Implementation (para. 33-42); Coordination and Outreach (para. 43-46); Monitoring Team (para. 47); Reviews (para. 48-49); Annex I and II.

## 1. The Ombudsperson and the Amended Delisting Procedure

The resolution introduced an independent and impartial Ombudsperson to assist the Committee in its consideration of delisting requests,<sup>66</sup> and in particular to mediate between individuals, entities and the Committee. The Ombudsperson shall replace the Focal Point.<sup>67</sup> The Focal Point shall therefore no longer receive requests from petitioners who seek to be removed from the *1267 sanctions regime's* Consolidated List, yet it shall continue to receive requests from individuals and entities seeking to be removed from other sanctions lists.<sup>68</sup>

The Ombudsperson's office shall be established for an initial period of 18 months and he/she is to be appointed by the UN Secretary General in close consultation with the Committee.<sup>69</sup> He/She shall be an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions.<sup>70</sup>

### a) Background

The idea of introducing an ombudsperson as a review or complaint-handling mechanism<sup>71</sup> is not entirely new.<sup>72</sup> It did however not gain particular importance until the last decades.<sup>73</sup> The growing importance of human rights and the emergence of the concept of "good governance" contributed greatly to a remarkably rapid widespread of the concept.<sup>74</sup> Various forms and adaptations of the ombudsperson mechanism exist today in nearly all

<sup>66</sup> SC Res. 1904 (2009), para. 20.

<sup>67</sup> SC Res. 1904 (2009), para. 21.

<sup>68</sup> SC Res. 1904 (2009), para. 21.

<sup>69</sup> SC Res. 1904 (2009), para. 20.

<sup>70</sup> SC Res. 1904 (2009), para. 20.

<sup>71</sup> Compare: *K. Wellens*, Remedies against International Organizations, 2002, 178.

<sup>72</sup> The first ombudsperson office was established in Sweden in 1809 to ensure adequate supervision over public officials. See on this issue *P. Bonmor*, Ombudsmen and the Development of Public Law, *European Public Law* 9 (2003), 237-267; *J. Stern*, Schweden, in: *G. Kucsko-Stadlmayer* (ed.), *Europäische Ombudsman-Institutionen*, 2008, 359-366.

<sup>73</sup> Compare *G. Kucsko-Stadlmayer*, Die rechtlichen Strukturen der Ombudsmann-Institutionen in Europa – Rechtsvergleichende Analyse, in: *G. Kucsko-Stadlmayer* (note 72), 1 et seq.; *D. Pearce*, The Ombudsman: Review and Preview. The Importance of Being Different, in: *L. C. Reif* (ed.), *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute*, 73 (73).

<sup>74</sup> Compare *G. Kucsko-Stadlmayer* (note 73), 1.

cultures and legal systems of the world.<sup>75</sup> Typically, the ombudsperson has no power to issue a binding decision. Against this background the widespread of this complaint-handling mechanism may appear to be quite surprising. Moreover, citizens will mostly also have the possibility to seek review of a decision before a national or regional court. Yet the ombudsperson has some distinguished advantages relative to other dispute resolution mechanisms. The mechanism is generally quite quick, informal and more easily accessible than for example a court. The lack of ability to issue a binding decision may even be regarded as a central strength,<sup>76</sup> since the ombudsperson is forced to resort to other means such as the application of reason. Through the application of reason, the results can be a lot more powerful than through the application of coercion.<sup>77</sup> When recommendations are well founded and based on thorough investigations and review of a case this can lead to persuasion of the counterpart and change a way of thinking.<sup>78</sup> Whereas a coercive process will create a loser who will not necessarily be willing to embrace recommendations in future actions.<sup>79</sup>

More recently, international organizations have also begun to adopt the ombudsman mechanism.<sup>80</sup> The most prominent role model is probably the office of the European Ombudsman established by the Maastricht Treaty.<sup>81</sup> The European Ombudsman acts as an intermediary between the European Citizen and the European Institutions in an extra-judicial capacity alongside the traditional role of the courts.<sup>82</sup> The Ombudsman's role is to investigate complaints of maladministration in institutions and bodies of the European Union.<sup>83</sup> All residents of Member States and companies registered in a Member State are able to submit, even confidentially, a com-

<sup>75</sup> The ombudsperson mechanism is not only used in the national public law sector, where the concept was developed, but also in international organizations and the private law sector. See on this issue *D. Pearce* (note 73), 73-99.

<sup>76</sup> *D. Pearce* (note 73), 73 (73).

<sup>77</sup> Compare *S. Owen*, *The Ombudsman: Essential Elements and Common Challenges*, in: *L. C. Reif* (note 73), 51 (52).

<sup>78</sup> Compare *S. Owen*, (note 77), 51 (52).

<sup>79</sup> Compare *S. Owen*, (note 77), 51 (52).

<sup>80</sup> See on this issue *L. C. Reif*, *The Ombudsman, Good Governance and the International Human Rights System*, 2004, 334 et seq.

<sup>81</sup> Formerly Art. 195 EC, now Art. 228 TFEU. The European Ombudsman was the first to operate at supranational level.

<sup>82</sup> Compare *K. Wellens* (note 71), 178.

<sup>83</sup> This excludes complaints against the European judicial institutions (CFI and ECJ). Compare Art. 2 (2) Statute of the European Ombudsman, Decision on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by the European Parliament on 9.03.1994 (OJ L 113, 4.5.1994, p. 15) and amended by its decisions of 14.03.2002 (OJ L 92, 9.4.2002, p. 13) and 18.6.2008 (OJ L 189, 17.7.2008, p. 25).

plaint on maladministration.<sup>84</sup> The ombudsperson investigates the case and issues non-binding recommendations addressed to the institutions concerned. Various other international organizations like the World Health Organization, the International Monetary Fund or the International Bank for Reconstruction and Development have established ombudsperson's offices yet these ombudsperson's powers are so far limited to the informal settlement of employment disputes.<sup>85</sup>

At UN level<sup>86</sup>, Denmark was the first state to put forward a proposal to establish an independent review mechanism in form of an ombudsperson, when it joined the Security Council in 2005.<sup>87</sup> Likewise, the *Watson Institute for International Studies* at Brown University issued a white paper in 2006 sponsored by the governments of Germany, Sweden and Switzerland (*Watson White Paper*) that assessed *inter alia* different options of review mechanism (e.g. ombudsperson, an advisory panel or judicial review body).<sup>88</sup> It stated that the appointment of an ombudsperson would probably be the simplest and easiest review mechanism to implement since it would meet minimum independence with the smallest institutional infrastructure.<sup>89</sup> This is most likely also due to the fact that as an advisory mechanism the Ombudsperson is not necessarily perceived as very infringing upon the Security Council's authority.

The proposals were however not supported until 2009 and resolution 1904.

## b) Responsibilities

The full responsibilities and tasks of the Ombudsperson's office are set out in Annex II of the Resolution. The Office of the Ombudsperson will

<sup>84</sup> Compare Art. 2 (2), (3) Statute of the European Ombudsman (note 85).

<sup>85</sup> Compare *L. C. Reif* (note 80), 339; *K. Wellens* (note 71) 180.

<sup>86</sup> Strictly speaking there is already quite an established ombudsperson system at UN Level. Several UN agencies have established their ombudsman mechanisms. In 2002 the Secretary General appointed a UN Secretariat Ombudsman. His powers are however limited to the settlement of internal employment disputes and do not regard Security Council actions. See [www.un.org/ombudsman](http://www.un.org/ombudsman); *L. C. Reif* (note 80), 344 et seq.

<sup>87</sup> See Statement of H. E. Permanent Representative of Denmark to the UN Ambassador *Ellen Margrethe Loj* to the Security Council on 19.12.2006. The Statement can be found at: <http://www.missionfnnewyork.um.dk>; Fourth Report of the Monitoring Team, 10.3.2006, S/2006/154, para. 46, available at: <http://daccess-dds-ny.un.org>.

<sup>88</sup> *Watson White Paper 2006* (note 62). A further and updated version of this report was issued in 2009: *Watson White Paper 2009* (note 2).

<sup>89</sup> *Watson White Paper 2006* (note 62), 4, 45; *Watson White Paper 2009* (note 2), 32.

receive delisting requests from individuals or entities subject to the sanctions regime and assist the Committee through information gathering and engaging in dialogue with the interested parties. The Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.<sup>90</sup> In detail the Ombudsperson's role in the amended delisting procedure encompasses the following three steps:

#### *Information Gathering Period*

Upon receiving a delisting request the Ombudsperson shall acknowledge its receipt to the petitioner, inform the petitioner of the general procedure and answer any questions which may arise.<sup>91</sup> In case the request is incomplete or repeated and does not contain any additional information it shall be returned to the petitioner for his/her consideration.<sup>92</sup> In all other cases the Ombudsperson shall forward it to the Committee, designated states of residence and citizenship or incorporation, relevant UN bodies as well as the Monitoring Team immediately. The Ombudsperson shall then ask these entities to provide within two months any additional information relevant to the request (e.g. court decisions and proceedings, news reports, information that states or relevant international organizations have previously shared with the Committee).<sup>93</sup> At the end of this two-month period, the Ombudsperson shall present a written update to the Committee on the progress to date, this period may be extended once for two months if he/she assesses that more time is needed to gather information.<sup>94</sup>

#### *Dialogue Period/Period of Engagement*

Following the information gathering period, the Ombudsman shall facilitate a two-month period of engagement, which may include dialogue with the petitioner and shall contribute to increase the flow of information between the Committee and the listed person or entity.<sup>95</sup> At the end of this period, which can also be extended for another two months upon the Ombudsperson's request, the Ombudsperson with the assistance of the Monitoring Team shall draft and circulate a *comprehensive report* to the Commit-

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<sup>90</sup> SC Res. 1904 (2009), para. 20.

<sup>91</sup> SC Res. 1904 (2009), annex II para. 1(a-c).

<sup>92</sup> SC Res. 1904 (2009), annex II para. 1(e).

<sup>93</sup> SC Res. 1904 (2009), annex II paras. 1, 2, 3.

<sup>94</sup> SC Res. 1904 (2009), annex II para. 4.

<sup>95</sup> Compare SC Res. 1904 (2009), annex II para. 5.

tee.<sup>96</sup> This report shall contain a summary of all information available to the Ombudsperson that is relevant for the delisting request, all by respecting confidential elements of state communications with the Ombudsperson, as well as a report on the Ombudsperson's activities and including an analysis of the principal arguments concerning the delisting request.<sup>97</sup>

#### *Committee Discussion and Decision Period*

After the Committee has had thirty days to review the *comprehensive report*, the chair of the Committee will place it on the agenda for consideration.<sup>98</sup> The Ombudsperson will then present it to the Committee in person and answer any questions the members have regarding the request.<sup>99</sup> The Committee will then take the final decision. If the Committee decides to grant the request, it will inform the Ombudsperson who will on his part inform the petitioner.<sup>100</sup> If the Committee rejects the request, it informs the Ombudsperson likewise, but it shall convey its decision including explanatory comments, any further relevant information as well as an updated narrative summary of reasons for the listing.<sup>101</sup> The Ombudsperson shall then inform the petitioner of the Committee's decision including its reasoning, by letter within 15 days. The letter shall describe to the extent possible the processes and publicly releasable factual information gathered by the Ombudsperson.<sup>102</sup>

#### c) Evaluation

In the *Watson White Papers* assessment of “*pros and cons*” of the review mechanism ombudsperson it reads that a “*con*” consists in “the Ombudsperson's limited ability to provide effective remedy since its *recommendations* are non-binding”.<sup>103</sup> It is true that the introduction of an ombudsperson does not amount to the introduction of a fully independent and impartial judicial review mechanism, but the new amended delisting procedures might still be able to provide effective remedy.

<sup>96</sup> SC Res. 1904 (2009), annex II para. 7.

<sup>97</sup> SC Res. 1904 (2009), annex II para. 7.

<sup>98</sup> SC Res. 1904 (2009), annex II para. 8.

<sup>99</sup> SC Res. 1904 (2009), annex II para. 9.

<sup>100</sup> SC Res. 1904 (2009), annex II para. 11.

<sup>101</sup> SC Res. 1904 (2009), annex II para. 12.

<sup>102</sup> SC Res. 1904 (2009), annex II para. 13.

<sup>103</sup> Compare *Watson White Paper 2009* (note 2), 28. Emphasis added.

As has been said, the current procedure involves the Ombudsperson as well as the Committee. The effectiveness of a review procedure depends on several factors. Most relevant is the independence and impartiality of the reviewing body. Further the procedure must be easily accessible, speedy, and address due process concerns.<sup>104</sup> The decisions findings must be based on good reasoning and the mechanism must provide for appropriate remedy.<sup>105</sup> Finally, a quality decision must clearly indicate the reasoning on which any finding is based.<sup>106</sup>

Even though the Ombudsperson is appointed in close consultation with the Committee, he/she may be regarded as independent. Nevertheless his/her role is limited to the gathering and presenting of information and he/she can not even give a real recommendation. The Ombudsperson's primary role is that of an independent investigator.<sup>107</sup> The actual delisting decisions are still taken confidentially and by consensus<sup>108</sup> by the Committee judging its own case.<sup>109</sup> Impartial judicial review requires that matters are decided on an impartial basis, based on facts, without restriction or improper influences.<sup>110</sup> The Committee can not be regarded as an impartial body in this matter, since it is made up of members of the Security Council, which is a political body acting on behalf of state interests.

Regarding the factors of accessibility and speed, the situation was improved by the introduction of an ombudsperson. As with the focal point, petitioners can access the UN system directly and are not entirely dependent on diplomatic protection from their country of residence or citizenship. Yet it is a novelty that they can now even engage in dialogue with the Ombudsperson. An advantage of the review mechanism ombudsperson compared to other review mechanisms is its speed due to the informality of the procedure.<sup>111</sup> The new procedures provide for a fairly speedy decision

<sup>104</sup> A. Byrnes, *An Effective Complaints Procedure in the Context of International Human Rights Law*, in: A. F. Bayefsky (ed.), *The Human Rights Treaty System in the 21<sup>st</sup> Century*, The Hague 2000, 139 (143); B. Fassbender (note 2), 437 (480).

<sup>105</sup> B. Fassbender (note 2), 437 (480).

<sup>106</sup> A. Byrnes (note 104), 139 (143); B. Fassbender (note 2), 437 (480).

<sup>107</sup> S. Owen, (note 77), 51 (54).

<sup>108</sup> In effect this gives each Committee member a veto power.

<sup>109</sup> Compare SC Res. 1904 (2009), para. 22; Committee Guidelines (note 19), para. 3(a).

<sup>110</sup> Principle 2 of the Basic Principles of Independence of the Judiciary adopted by the Seventh UN Congress on the prevention of Crimes and treatment of Offenders, Milan 1985, UN Doc. A/conf.121/22/Rev.1 and endorsed by UN General Assembly Resolutions 40/32, 40/146; see also B. Fassbender (note 2), 437 (480, 481); on judicial impartiality in general P. Rädler, *Independence and Impartiality of Judges*, in: D. Weissbrodt/R. Wolfrum (eds.), *The Right to a Fair Trial*, 1998, 727 et seq.

<sup>111</sup> L. C. Reif, *Introduction*, in: L. C. Reif (note 73), xxiii (xxiii).



and try to avoid exposing the petitioner to a long period of uncertainty. As had been said, the Ombudsperson shall for example inform the petitioner of the Committee's decision including its reasoning, by letter within 15 days.<sup>112</sup> Under the focal point no time frame was set for informing the petitioner.

A problematic point remains the mechanism's adherence to due process. Both parties should be given an equal opportunity to put forward their case to permit full consideration of disputed issues of fact and law.<sup>113</sup> Whereas the petitioners may have the opportunity to engage in dialogue with the Ombudsperson to convey him/her their arguments, they are not given the opportunity to put forward their case before the actual decision-making body, the Committee. This task is conferred to the Ombudsperson. At least the petitioners could have the chance to receive more detailed information concerning their listing with the Ombudsperson acting as an independent intermediary between the Committee, States and the petitioner he/she could pass on this information to the latter. This chance is however not a very big one, since states will often receive relevant information from intelligence sources which they will most likely want to keep confidential.<sup>114</sup> Even though the new resolution provides for measures to safeguard this information as the Ombudsperson is urged to respect the confidentiality of Committee deliberations as well as any confidential communications between the Ombudsperson and Member States,<sup>115</sup> this does not mean that states will suddenly communicate the information they have on a certain individual or entity to the Ombudsperson in an extensive fashion. Up until now one has to wait and see how states will react, whether they are indeed willing to share information and cooperate with the Ombudsperson so that this could actually help to ensure that the delisting requests are more fully considered by the Committee,<sup>116</sup> or if all this is just wishful thinking.

Finally it is to be welcomed, that Committee members now at the least have to convey their reasons for objecting a delisting request. This contributes to the transparency of the decision-making process and gives the listed

<sup>112</sup> Compare SC Res. 1904 (2009), annex II para. 13.

<sup>113</sup> Compare *A. Byrnes* (note 104), 139 (143); *B. Fassbender* (note 2), 437 (480).

<sup>114</sup> Compare SC Res. 1904 (2009), annex II No. 13, 14; *C. A. Feinäugle*, *Hoheitsgewalt im Völkerrecht – Das Sanktionsregime der UN und seine rechtliche Fassung* (to be published shortly in: *A. v. Bogdandy/R. Wolfrum* (eds.), *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, 2010, Teil III. G. 2. d) cc) (Festgestellte Mängel im Ist-Zustand des 1267-Sanktionsregimes).

<sup>115</sup> SC Res. 1904 (2009), annex II, paras. 7(a), 14.

<sup>116</sup> *D. Cortright/E. de Wet* (note 42), 10.

individuals or entities the possibility to retrace the lawfulness of the decision, thereby adding to its general quality.

From an overall perspective, the new Ombudspersons Office has a very low remedial potential. Similar to the Focal Point, the Ombudsperson still has more of an auxiliary role to play in the delisting procedure.<sup>117</sup> The delisting procedure might have become more transparent and easily accessible for the petitioner, but it can still not provide him/her with effective remedy through an independent and impartial review mechanism. Yet, the new procedures also show that the regime is gradually improving and at least demonstrate that the Security Council is willing to ameliorate the sanctions regime. If one compares in particular the current procedural delisting regime to the inchoate one barely existing almost a decade ago, the Security Council's commitment to develop fairer and clearer procedures becomes quite evident.<sup>118</sup>

## 2. The Amended Listing Procedure

The new resolution also includes measures aiming to streamline the listing process.<sup>119</sup> Among other things, para. 14 of the resolution directs the Committee, in assistance of the Monitoring Team and in coordination with designated states to make accessible on the Committee's website, *at the same time* a name is added to the Consolidated List, a narrative summary of reasons for the listing. This shall also be done and continued to be done in retrospect of entries added before resolution 1822 in 2008.<sup>120</sup> Further the Member States are called upon to use a new standard form for listing, which is to be placed on the Committee's website, when proposing names to the Committee for inclusion on the Consolidated List.<sup>121</sup>

Previous amendments as well as the introduction of a new standard form for listing and the requirement of a concomitant provision of a narrative summary with the listing show that measures for the protection of the individual are continuing to improve. The new standard form makes sure that the Committee is provided with the same detailed factual background on

<sup>117</sup> For the Focal Point C. A. *Feinäugle* (note 2), 1513 (1530).

<sup>118</sup> See also C. A. *Feinäugle*, (note 114), Teil III. F. II (Zusammenfassung zur rechtsstaatlichen Entwicklung des Sanktionsregimes bis zum Ist-Zustand); J. A. *Frowein* (note 3), 334.

<sup>119</sup> Security Council Press release SC/9825, 17.12.2009.

<sup>120</sup> SC Res. 1904 (2009), para. 14; Resolution 1822 (2008) amended the listing procedure by requiring the Committee to post narrative summaries of the reasons for listing on its website following a new listing, see above II. 3. a).

<sup>121</sup> SC Res. 1904 (2009), para. 12.

every subject and that nothing is forgotten.<sup>122</sup> This allows for a more accurate and positive identification and at the same time reduces the risk that wrong persons or entities are listed. The requirement of providing a narrative summary of the reasons for listing *concomitantly with*, and no longer as soon as possible after or rather *following* the listing, is a significant step in the right direction, aiming to comply with human rights standards. It contributes to the fairness of the procedure and enables the subjects to initiate action against their listing at an early stage. As the European Court of Justice (ECJ) has stated in its prominent *Kadi Case*, one should however not expect the authorities to notify the persons or entities *prior* to their listing since this would jeopardize the listings very effectiveness.<sup>123</sup> Consequently it is hard to imagine that the regime will advance any more in this respect.

### 3. Committee Review and Monitoring Team

Finally the Security Council directed the Committee to complete its review of all names on the Consolidated List by 30.6.2010, and upon completion to continue the annual review of all names that have not been reviewed for three or more years.<sup>124</sup> The Council also decided to extend the mandate of the Monitoring Team for a further period of 18 months.<sup>125</sup>

Although the workload related to review has been extraordinary and the current review has not yet been completed,<sup>126</sup> the Security Council has fortunately directed the Committee to continue with the review process. The review process is a very useful way to ensure that the Consolidated List remains as updated and accurate as possible thus also greatly contributing to its overall quality and legitimacy. The extension of the Monitoring Team's mandate is also good news. By frequently pointing out that its primary task of monitoring and providing support for more effective sanctions can not be fulfilled without ameliorating the procedural regime, and in particular

<sup>122</sup> Already *C. A. Feinangle* (note 2), 1527.

<sup>123</sup> ECJ *Yassin Abdullah Kadi und Al Barakaat International Foundation v. Council of European Union and Commission of European Communities* (note 9), margin numbers 338-340. The measures are seen to be taking advantage of the surprise effect.

<sup>124</sup> SC Res. 1904 (2009), paras. 29, 32.

<sup>125</sup> SC Res. 1904 (2009), para. 47.

<sup>126</sup> Compare: Watson White Paper 2009 (note 2), 16; Briefing by *H. E. Mr. Thomas Mayr-Harting* to the Security Council, 11.5.2010, para. 2. The Briefing can be found at: <http://www.un.org>.

the listing and delisting procedure, it has played a central role in promoting the regime's development.<sup>127</sup>

#### 4. Overall Evaluation

Mr. *Thomas Mayr-Harting* (Austria), current chairperson of the Committee and Austria's Permanent Representative to the UN, welcomes the new resolution and says it is a significant step forward in the fairness and transparency of the sanctions regime, thus improving effectiveness and legitimacy.

This may be true in part, nonetheless it can still be questioned that the new measures satisfy international standards of procedure under the rule of law, such as the right to fair trial and impartial independent judicial review and remedy.<sup>128</sup> These rights form the very basis of due process of law and are guaranteed by leading international legal agreements,<sup>129</sup> including the Universal Declaration of Human Rights, the United Nations Covenant on Civil and Political Rights as well as the European Charta on Human Rights.<sup>130</sup> Even though the UN is not a party to these agreements, the Security Council can not totally disregard their enshrined rights and values.<sup>131</sup> The promotion and respect of human rights constitutes a purpose of the UN<sup>132</sup> and Art. 24 (2) of the UN Charta obliges the Security Council to act

<sup>127</sup> *D. Cortright/G. A. Lopez/L. Gerber-Stellingwerf/E. Fackler/S. Persinger/J. Weaver*, Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures, report of the Sanctions and Security Research Program, November 2009, 9; The report can be found at: <http://www.fourthfreedom.org>. Check to find Report of Monitoring Group as an example.

<sup>128</sup> See also *D. Cortright/E. de Wet* (note 42), 10.

<sup>129</sup> See *D. Cortright/G. A. Lopez/L. Gerber-Stellingwerf/E. Fackler/S. Persinger/J. Weaver* (note 127), 2.

<sup>130</sup> Compare Arts. 8 and 10 UDHR, Arts. 2 (3) and 14 ICCPR, Arts. 6 and 13 ECtHR. Whereas it is questionable that the targeted sanctions fall within the realm of Art. 6 ECtHR, Art. 14 ICCPR and Art. 10 UDHR (since they only apply to cases where a criminal charge or civil obligation is involved and the Security Council characterizes the sanctions as being preventive in nature), Arts. 8 UDHR, Art. 2(3) ICCPR and Art. 13 ECtHR still pose certain procedural requirements. On this issue Watson White Paper 2006 (note 62), 10 et. seq; *L. v. d. Herik* (note 2), 797 (806 et. seq.).

<sup>131</sup> On this issue *A. Bianchi*, Security Councils Anti-terror Resolutions and Their Implementation by States, *Journal of International Criminal Justice* 4 (2006), 1044 (1061 et seq.); *B. Fassbender* (note 2), 437 (445 et seq.); *A. Reinisch*, Developing Human Rights and Humanitarian Law: Accountability of the Security Council for the Imposition of Economic Sanctions, *AJIL* 95 (2001), 851 et seq.; *G. Thallinger*, Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council, *ZaöRV* 67 (2007), 1015 et seq.

<sup>132</sup> Art. 2 para. 3 UN Charta.

in accordance with this purpose. The Security Council has thus a duty to develop the 1267 *sanctions regime* accordingly. However the delisting criteria are still applied by the same entity which has also created them. The Ombudsperson's role in the procedure is in essence supplementary and ultimately the delisting decision remains a political one taken on behalf of state interests. No matter how you look at it, the Committee is still *index in causa sua*.

It remains to see how regional and domestic courts will react to this new resolution, especially to the introduction of the Ombudsperson. In fact, the United Kingdom Supreme Court has already discarded the introduction of an Ombudsperson as being an essential step towards creating a regime that provides for effective judicial remedy.<sup>133</sup> In its judgment it partly quashed two Orders in Council implementing the UN sanctions regime for being *ultra vires* the executive and going beyond the purview of the specific Security Council resolution and insofar also beyond the purview of primary legislation (UN Act 1946) from which it derived its authority. Even though the resolution was not seen to affect the outcome of the case, the court noted it, "welcomed" the move, but still considered the regimes, effects to be "drastic", "oppressive" and "draconian"<sup>134</sup> and saw further scope to improve the transparency of decisions made by the Committee and the effectiveness of the delisting procedure.<sup>135</sup>

#### IV. Recent Developments and Outlook

So far the Committee has not put resolution 1904 into practice. It is currently still updating its working guidelines to implement the new procedures.<sup>136</sup> However, the process is gaining momentum. On 7.6.2010 the Security Council finally announced the Secretary General's appointment of the Ombudsperson. Judge Ms. *Kimberly Prost* from Canada will soon be assisting the Committee in its consideration of delisting requests.<sup>137</sup>

<sup>133</sup> *Mohammed Jabar Ahmed and others v. Her Majesty's Treasury and Hani El Sayed Sa-baei Youssef v. Her Majesty's Treasury*, (note 9).

<sup>134</sup> *Mohammed Jabar Ahmed and others v. Her Majesty's Treasury and Hani El Sayed Sa-baei Youssef v. Her Majesty's Treasury* (note 133), paras. 5, 39.

<sup>135</sup> *Mohammed Jabar Ahmed and others v. Her Majesty's Treasury and Hani El Sayed Sa-baei Youssef v. Her Majesty's Treasury* (note 133), para. 78.

<sup>136</sup> Compare Security Council Report on Counter Terrorism, May 2010. The report can be found at <http://www.securitycouncilreport.org>.

<sup>137</sup> Security Council Press release SC/9947, 7.6.2010. Ms *Prost* has previously served as an *ad litem* judge at the ICTY.

One can only speculate about the impact resolution 1904 will eventually have. Should Member States be willing to work closely with the Ombuds-person especially concerning information exchange, and should the Committee in turn truly consider the arguments brought forth by the Ombuds-person regarding delisting, this could lead to a reduction of the number of listed individuals and entities.<sup>138</sup> Accordingly the number of proceedings before domestic and regional courts would decline. However, some cases will always remain, where a delisting request will be declined and the affected subjects will continue to seek redress through domestic and regional courts. As long as there is no guarantee of impartial and independent review at UN level, national and regional courts will most likely continue to play a role in reviewing listing and delisting decisions.<sup>139</sup> A situation in which these courts constantly challenge the UN regime, even if only indirectly, can, however, not be seen as being the most viable one, a way must be found for them to get along.<sup>140</sup> To put it in the words of the Monitoring Team, “one reason to create a review mechanism is simply to get ahead of the law in this area, to establish it, rather than allow national and regional courts or Member States practice to do so (...) the Committee might be well advised to establish the desired standard of review, rather than effectively cede this role to others”.<sup>141</sup> A Court is not the only option<sup>142</sup> and the establishment of an Ombudsperson’s Office is certainly a good beginning. The ideal would be some kind of body/person with a certain independence and impartiality that can actually *substantively* review delisting requests.<sup>143</sup>

Nevertheless one has to admit, that it seems very unlikely that the Security Council members will accept any form of review mechanism with more than an advisory role. Anything else would probably be opposed to as being too much of an infringement upon the Security Council’s authority. The remaining shortcomings must thus be addressed in a creative but also pragmatic way. Respective proposals exist and have been recommended by various experts.<sup>144</sup> These proposals range from expanding the role of the Monitoring Team, to include the evaluation of delisting requests, to the creation

<sup>138</sup> *D. Cortright/E. de Wet* (note 42), 10.

<sup>139</sup> *D. Cortright/E. de Wet* (note 42), 10.

<sup>140</sup> *L. v. d. Herik* (note 2), 807; *A. Tzanakopoulos*, The UK Supreme Court Quashes Domestic Measures Implementing UN Sanctions, EJIL, Talk! Blog of the European Journal of International Law, 23.2.2010, available at <http://www.ejiltalk.org>.

<sup>141</sup> Tenth Report of the Analytical Support and Monitoring Team, 31.7.2009, UN Doc.S/2009/502, para 42. The report is available at: <http://daccess-dds-ny.un.org>.

<sup>142</sup> See different options assessed and presented in the Watson White Paper 2009 (note 2).

<sup>143</sup> *L. v. d. Herik* (note 2), 807. Emphasis added.

<sup>144</sup> See for example Watson White Paper 2009 (note 2); *G. A. Lopez/D. Cortright/A. Millar/L. Gerber-Stellingwerf* (note 51).

of a subgroup of Security Council members or an advisory panel to consider delisting requests that can make recommendations to the Security Council.<sup>145</sup> That the Security Council will agree to expand the role of the Monitoring Team so that it can evaluate and recommend delisting to the Committee seems rather unlikely. Even though this would be an administratively easy thing to do it would not only distract the Monitoring Team from its core mission of assisting the Committee in enhancing the effectiveness of measures and their implementation by Member States,<sup>146</sup> but also greatly conflict with the Ombudsperson's powers. Creating a subgroup of approximately three Security Council members to consider Committee denial of delisting requests and to make respective recommendations to the Security Council seems on the one hand a little more likely.<sup>147</sup> A group of Member States not including the state which had proposed the listing would not necessarily be considered *index in causa sua* and be regarded less partial. On the other hand, one could question adequate independence since other Security Council members will often have concurred in the original listing decision.<sup>148</sup> Moreover the actual decision-making authority would rest with the Committee. Potentially such a subgroup could also be administratively complicated if each delisting request necessitated a new subgroup.<sup>149</sup> The establishment of the Office of the Ombudsperson will, however, be the strongest factor against the creation of another advisory review mechanism. For the same reason the establishment of an advisory panel is also improbable. Realistically the procedures could be amended insofar as the Ombudsperson would be given the authority to give real recommendations and to publish these in form of public summary reports. This is, however, only a prediction and eventually it is the Security Council who has to set the course. The recent developments have shown that the Security Council is also genuinely committed to ameliorate the *1267 sanctions regime* and resolution 1904 should not mark the end of all reform. After all, improving due process procedures is the best way to strengthen the effectiveness and credibility of the Security Council's targeted sanctions.<sup>150</sup>

<sup>145</sup> Compare Watson White Paper 2009 (note 2), 27 et seq.; G. A. Lopez/D. Cortright/A. Millar/L. Gerber-Stellingwerf (note 51), 8 et seq.

<sup>146</sup> Compare Watson White Paper 2009 (note 2), 27.

<sup>147</sup> Compare Watson White Paper 2009 (note 2), 27.

<sup>148</sup> Watson White Paper 2009 (note 2), 27.

<sup>149</sup> Watson White Paper 2009 (note 2), 27.

<sup>150</sup> Compare D. Cortright/G. A. Lopez/L. Gerber-Stellingwerf/E. Fackler/S. Persinger/J. Weaver (note 127), 9.

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