

THE UNITED NATIONS AL-QAIDA SANCTIONS REGIME AFTER U.N. RESOLUTION 1989: DUE PROCESS STILL OVERDUE?

*Dominic Hoerauf**

I. INTRODUCTION

Having already established a rigorous sanctions regime targeting persons and entities with ties to the Taliban or Osama bin Laden in 1999¹ and to Al-Qaida in 2000,² the U.N. Security Council was among the first actors to address the emergence of global Islamic terrorism prior to September 11, 2001. Even after September 11, 2001, when other state actors became engaged in the war on terror, this framework still stood out as “the sole vehicle for truly global action against the twin threats of Al-Qaida and the Taliban.”³ What remained unaddressed within this regime for quite some time, however, was the implementation of corresponding procedural due process guarantees for natural and legal persons subject to this sanctions regime. Even though designation by the Security Council’s Sanctions Committee (Sanctions Committee) as a suspected terrorist associate, and consequent placement on the Committee’s sanctions list (Consolidated List), triggered considerable restrictions of individual rights,⁴ practically no due process safeguards were in place. This did not change until late 2009 when Security Council resolution 1904 (Resolution 1904)⁵ was adopted. With Resolution 1904, the Security Council for the first time made a truly substantial effort to enhance procedural fairness by establishing the Office of the Ombudsperson to assist the Sanctions Committee in reviewing delisting requests issued by states, listed individuals, and listed entities.⁶

Twenty months later, Security Council resolution 1989 (Resolution 1989) was

* B.A. ’05 (Wiesbaden/Germany), German Legal State Examination (J.D. equivalent) ’09 (Berlin/Germany), Ph.D. ’11 (Humboldt University Berlin), LL.M. ’12 (Columbia Law School).

1. See Jimmy Gurulé, *The Demise of the U.N. Economic Sanctions Regime to Deprive Terrorists of Funding*, 41 CASE W. RES. J. INT’L L. 19, 27 (2009) (discussing the 1999 sanctions as a response to the attacks on U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania in August 1998 committed by Al-Qaida, which was given safe haven by the Taliban); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (creating the sanctions regime against the Taliban).

2. See S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (creating the sanctions regime against Al-Qaida).

3. U.N. Security Council, Analytical Support and Sanctions Monitoring Team, *Report of the Analytical Support and Sanctions Monitoring Team Appointed Pursuant to Security Council Resolutions 1617 (2005) and 1735 (2006) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, ¶ 2, U.N. Doc. S/2007/677 (Nov. 29, 2007) (by Johan Verbeke).

4. See Joined Cases C-402/05 P & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-06351, ¶ 358 [hereinafter *Kadi v. Council*].

5. S.C. Res. 1904, U.N. Doc. S/RES/1904 (Dec. 17, 2009).

6. *Id.* ¶ 20.

adopted.⁷ Recognizing both the important role that the Ombudsperson (OP) played in improving fairness and transparency during her first months as well as the obstacles she was still facing in terms of acceptance,⁸ Resolution 1989 intended to strengthen the Office of the OP, to increase its effectiveness, and perhaps also, while never officially stated as a reason, to react to the harsh criticisms prominently voiced by the European Court of Justice.⁹ In pursuit of these goals, the Security Council has empowered the OP to issue recommendations in addition to observations.¹⁰ Although these recommendations regarding whether a listee should be delisted are technically not binding on the Sanctions Committee, they are an improvement to the non-binding observations, because the Sanctions Committee can overturn the OP's recommendation only by unanimous decision or referral to the Security Council.¹¹ While this can be seen as a remarkable step towards more procedural due process, some shortcomings of the delisting system remain unaddressed.

For instance, the procedure the OP has to follow is still prescribed in broad brushstrokes, leaving unanswered crucial questions, such as with whom the burden of proof should rest and which standard of review should apply.¹² Moreover, states have no obligation to pass on relevant information in their possession.¹³ Accordingly, delisting recommendations sometimes must be made on a questionable informational basis.¹⁴ In addition, the final call to delist still rests with the Security Council,¹⁵ which is not only taking up the role of the quasi-court of first instance, but also of the quasi-court of appeals.

In light of the progress that has been made, as well as the remaining shortcomings, this Article assesses the impact of Resolution 1989 and recommends solutions to the unresolved issues mentioned above. To that end, Part I introduces the Al-Qaida sanctions regime, its mandate, and its listing, as well as delisting procedures prior to Resolution 1989. Part II analyzes Resolution 1989 and the changes it produced with respect to the level of due process involved. Part III

7. S.C. Res. 1989, U.N. Doc. S/RES/1989 (July 1, 2011).

8. See Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II-05177, ¶ 128 [hereinafter *Kadi v. Comm'n*] (noting that “[i]n essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body”).

9. *Kadi v. Council*, *supra* note 4, ¶¶ 318–19, 322–25 (holding that the review mechanism in place does not offer the guarantees of judicial protection. So long as “the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned [are] having no real opportunity of asserting their rights”).

10. S.C. Res. 1989, *supra* note 7, ¶ 21.

11. *Id.* ¶ 23.

12. *Id.* ¶¶ 21–23, Annex II.

13. See Vanessa Baehr-Jones, Note, *Mission Impossible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, 2 HARV. NAT'L SEC. J. 447, 453 (2011) (claiming that “[a] state, therefore, is not mandated to submit classified intelligence evidence should the state decide it cannot release the information, and in practice, the amount of information provided can vary greatly—from one conclusory paragraph to over a page of information. As a result, the UN receives heavily redacted information with vague details.”).

14. *Id.*

15. S.C. Res. 1989, *supra* note 7, ¶ 23.

ascertains whether these changes have been a step forward, or have in fact raised more questions than they have answered. Finally, Part IV concludes by formulating recommendations regarding what must be done to further improve the mechanisms already in place so that we, as rule-of-law guided democracies, can stay true to ourselves.

II. THE U.N. AL-QAIDA SANCTIONS REGIME

Assessing the level of procedural due process before and after Resolution 1989 first requires familiarization with the sanctions regime at large, and the changes it has undergone since its establishment. As due process questions may arise in the process of designation as well as during its revocation, both the Sanctions Committee's listing and delisting procedures are relevant for the inquiry. Therefore, Part A starts by taking a brief look at the early stages of the then-called Taliban Sanctions Committee's mandate, including its major reforms. Part B discusses how the Committee operates today with respect to its listing procedures, while Part C discusses delisting procedures prior to Resolution 1989. After that, Part D sets the stage for Resolution 1989, by examining why commentators still criticized the Al-Qaida sanctions regime prior to Resolution 1989's adoption.

A. What the Committee Does: Genesis and Today's Scope of the Committee's Sanctions Mandate

1. History and evolution of the Taliban Sanctions Committee's mandate

In 1999, when Security Council resolution 1267 (Resolution 1267) was adopted under Chapter VII of the U.N. Charter in a rather innovative way,¹⁶ air and financial embargoes,¹⁷ designed to make the Taliban turn over Osama bin Laden, were first imposed.¹⁸ At that time, no mention was made of Al-Qaida.¹⁹ Resolution 1267 urged all Member States to deny access to funds and permission for aircrafts to utilize their territory, provided that the therewith established Sanctions Committee, a fifteen-person subsidiary organ to the Security Council,²⁰ had designated either the funds or the aircraft as associated with the Taliban. As a result, the Taliban Sanctions Committee, the predecessor of the Al-Qaida

16. Kimberly Prost, *Fair Process and the Security Council: A Case for the Office of the Ombudsperson*, in COUNTER-TERRORISM, INT'L LAW AND PRACTICE 409, 410 (Ana María Salinas de Frai, Katja L.H. Samuel, & Nigel D. White eds., 2012).

17. S.C. Res. 1267, *supra* note 1, at ¶¶ 4–5.

18. *Id.* ¶ 2.

19. See S.C. Res. 1267, *supra* note 1 (showing a lack of information on any specifics about Al-Qaida).

20. U.N. Security Council, Al-Qaida Sanctions Comm., *Guidelines of the Committee for the Conduct of Its Work*, ¶ 4(b) (Nov. 30, 2011) [hereinafter *Committee Guidelines*]; Rules of Procedure of the General Assembly, G.A. Res. 520/Rev.17, U.N. Doc. A/520/Rev.17 (2008) (stating that the Committee itself was established pursuant to rule 28 of the Security Council's provisional rules of procedure).

Sanctions Committee, was born.²¹

Shortly thereafter, in 2000, Security Council resolution 1333 (Resolution 1333) expanded these embargoes to include a new arms embargo over the territory of Afghanistan, as well as the authorization to freeze the funds of Osama bin Laden, his associates, and the Al-Qaida organization.²² It also directed the Sanctions Committee to establish and maintain an updated list of individuals and entities designated by the Committee as being associated with Osama bin Laden or Al-Qaida.²³ That was the first time the Consolidated List was mentioned. Its first entries were published on March 8, 2001.²⁴

Less than thirteen months after Resolution 1333 was adopted, Security Council resolution 1390 (Resolution 1390) replaced the broad aircraft-based air embargo with a more tailored travel ban on designated individuals and entities.²⁵ Similarly, it introduced a more targeted ban on the supply or sale of weapons to individuals or entities on the Consolidated List²⁶ in lieu of the broader territory-based approach applied under Resolution 1333.²⁷ In 2005, Security Council resolution 1617 (Resolution 1617) further increased the reach of sanctions over Afghanistan by stipulating that entities owned or controlled by persons or entities associated with Al-Qaida or the Taliban were also eligible for designation.²⁸ Additionally, it extended the mandate of the Analytical Support and Sanctions Monitoring Team,²⁹ established pursuant to Security Council resolution 1526

21. *Committee Guidelines*, *supra* note 20, ¶ 4.

22. S.C. Res. 1333, *supra* note 2, ¶ 8(c).

23. Hereinafter referred to as “listees.” Note that at this time, according to the language of S.C. Res. 1333, only bin Laden associates were eligible to be put on the list; individuals and entities associated with the Taliban however, were not. *See id.* (requesting the Committee “to maintain an updated list, based on information provided by States and regional organizations, of the individuals and entities designated as being associated with [O]sama bin Laden, including those in the Al-Qaida organization”); *see also id.* ¶ 16(b) (again requesting the Committee “[t]o establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with [O]sama bin Laden, in accordance with paragraph 8(c) above”). Yet, this changed with S.C. Res. 1390, ¶ 2, U.N. Doc. S/RES/1390 (Jan. 16, 2002) (stating that “all States shall take the following measures with respect to [O]sama bin Laden, members of the Al-Qaida organization and *the Taliban* and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) to be updated regularly by the Committee established pursuant to resolution 1267”) (emphasis added).

24. *See* Press Release, Security Council, Security Council Committee, Established by Resolution 1267 (1999) Concerning Afghanistan, Issues Consolidated List, U.N. Press Release SC/7028 (Mar. 8, 2001); *see also Kadi v. Council*, *supra* note 4, ¶ 30.

25. S.C. Res. 1390, *supra* note 23, ¶ 2(b).

26. *Id.* ¶ 2(c).

27. S.C. Res. 1333, *supra* note 2, ¶ 5(b) (requiring states to “[p]revent the direct or indirect sale, supply and transfer to the territory of Afghanistan under Taliban control, as designated by the Committee, by their nationals or from their territories, of technical advice, assistance, or training related to the military activities of the armed personnel under the control of the Taliban.”) (emphasis added).

28. S.C. Res. 1617, ¶ 3, U.N. Doc. S/RES/1617 (July 29, 2005).

29. *Id.* ¶ 19.

(Resolution 1526), to assist the Committee with its tasks.³⁰

2. Security Council resolution 1989: Splitting the Taliban Sanctions Committee into two separate sanctions committees

In 2011, Security Council resolutions 1988³¹ and 1989³² (Resolution 1988 and Resolution 1989) split the functions of the original Taliban and Al-Qaida Sanctions Committee so that one committee would deal solely with sanctions relating to the Taliban (Taliban Sanctions Committee), and the other exclusively with sanctions relating to Al-Qaida (Al-Qaida Sanctions Committee).³³ Both committees' mandates, however, were identical.³⁴ As a result, the changes made to the Taliban Sanctions Committee's mandate throughout its existence, in particular those made by Resolutions 1333, 1390, and 1617, shaped the mandate of the Al-Qaida Sanctions Committee into what it is today: a regime set up to impose asset freezes, travel bans,³⁵ and arms prohibitions on individuals or entities on the Committee's list due to their association with Al-Qaida.³⁶

B. How the Committee Operates: The Current Listing Procedure

But how does the Al-Qaida Sanctions Committee actually operate? How does it decide whose name to put on the list? Which procedures, if any, have to be followed? Are there safeguards against erroneous listings?

Proposals of new names to be included on the list can only be submitted by U.N. Member States.³⁷ When proposing names, the designating Member State(s) should provide the Committee with as much relevant information as possible³⁸ to ensure an informed and accurate decision. Upon submission, such a proposal is circulated amongst the Committee members, who are supposed to scrutinize the material supporting the designation.³⁹ If a Committee member does not raise an

30. S.C. Res. 1526, ¶¶ 6–7, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

31. S.C. Res. 1988, U.N. Doc. S/RES/1988 (June 17, 2011).

32. S.C. Res. 1989, *supra* note 7.

33. S.C. Res. 1988, *supra* note 31, ¶ 30 (Taliban); S.C. Res. 1989, *supra* note 7, ¶ 2 (Al-Qaida).

34. *See generally* S.C. Res 1988, *supra* note 31; S.C. Res. 1989, *supra* note 7 (containing identical mandates).

35. Note that S.C. Res. 1373, ¶¶ 1(c)–(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001) also authorizes asset freezes and travel bans by U.N. Member States. However, unlike S.C. Res. 1267, *supra* note 1, ¶¶ 10, 13, and S.C. Res. 1333, *supra* note 2, ¶ 19, S.C. Res. 1373 does not require Member States to submit enforcement information to a committee. Therefore, the Member States' obligation to impose sanctions under S.C. Res 1373 takes place outside the U.N. Sanctions Regime. *See* Gurulé, *supra* note 1, at 31 (explaining that Resolution 1373 does not require the sanctioned individuals to be placed on a U.N. administered list).

36. S.C. Res. 1989, *supra* note 7, ¶ 1(c).

37. *See* S.C. Res. 1904, *supra* note 5, ¶ 8 (encouraging Member States to submit names of individuals or entities with ties to Al-Qaida, Osama bin Laden, the Taliban, or other associated entities for inclusion on the Consolidated List).

38. *Id.* ¶ 11.

39. *See id.* ¶ 17 (“Committee [must] . . . extend the period of time for members of the

objection within ten working days, then the listing is approved,⁴⁰ as a decision by consensus.⁴¹

The Committee decides whether to accept or object to a listing proposal on the basis of the “associated with” formula defined in Resolution 1617.⁴² Since inclusion on the list is not intended to be a punishment for a crime,⁴³ the standard applied to establish the elements of the “associated with” formula is a “reasonable grounds” or “reasonable basis” standard.⁴⁴ A criminal charge or conviction is not necessary for the Committee to find that someone meets the criteria for listing.⁴⁵

Unless the Committee decides otherwise, it meets in closed sessions.⁴⁶ Yet, whenever the sanctions list is updated with additions or removals, the Committee makes the update promptly available on the Committee’s web site.⁴⁷ If such an update entails the inclusion of a new name on the list, then the Committee must also make accessible on its web site a narrative summary of reasons for its listing decision.⁴⁸ Individuals and entities that have been placed on the list are subject to the sanctions implemented by U.N. Member States.⁴⁹ As of March 2012, the

Committee to verify that names proposed for listing merit inclusion on the Consolidated List”).

40. *Committee Guidelines*, *supra* note 20, ¶ 6(n) (limiting consideration period to ten working days); *id.* ¶ 4(c) (adopting proposals when no objection is received within consideration period).

41. *Id.* ¶ 4(a). If consensus cannot be reached, then a Committee Member may refer the matter to the Security Council. *Id.*

42. S.C. Res. 1617, *supra* note 28, ¶¶ 2–3 (establishing that an entity is associated with terrorists when, *inter alia*, that entity participates with, supplies, recruits for, or otherwise supports Al-Qaida, Osama bin Laden, or the Taliban, or is controlled by an associated entity); *see also* BIBI VAN GINKEL, *THE PRACTICE OF THE UNITED NATIONS IN COMBATING TERRORISM FROM 1946 TO 2008: QUESTIONS OF LEGALITY AND LEGITIMACY* 236 (2010) (explaining that S.C. Res. 1617 extended the scope of what activities amounted to association with Al-Qaida, Osama bin Laden, or the Taliban).

43. *See* S.C. Res. 1989, *supra* note 7, pmb. (“[sanctions] are preventative in nature and are not reliant upon criminal standards set out under national law.”); *see also* U.N. Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *Fact Sheet on Listing*, ¶ 3, *available at* http://www.un.org/sc/committees/1267/fact_sheet_listing.shtml (last visited Mar. 15, 2012) (“A criminal conviction is not for inclusion on the Al-Qaida Sanctions List”); Office of the Ombudsperson of the Security Council’s 1267 Comm., *Approach to and Standard for Analysis, Observations, Principal Arguments and Recommendation* (August 2011), *available at* <http://www.un.org/en/sc/ombudsperson/approach.shtml> [hereinafter Office of the Ombudsperson] (explaining that purpose of sanctions is to hinder and change conduct of those associated with Al-Qaida, not to determine criminal guilt).

44. Gurulé, *supra* note 1, at 41 (citing Financial Action Task Force, the Interpretive Notes on the Special Recommendations on Terrorist Financing, *Interpretive Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets*, ¶ 2 (2010), *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/9%20Special%20Recommendations.pdf>).

45. Office of the Ombudsperson, *supra* note 43.

46. *Committee Guidelines*, *supra* note 20, ¶ 3(b).

47. *Id.* ¶ 5(b).

48. *Id.* ¶ 6(q).

49. S.C. Res. 1904, *supra* note 5, ¶ 1 (directing states to implement asset freezes, travel bans, and weapons prohibitions on those individuals or entities included on the Consolidated

Consolidated List contained 328 entries related to Al-Qaida.⁵⁰

C. Steps Towards Transparency and Procedural Due Process Prior to Security Council Resolution 1989

With this background on the Al-Qaida Sanctions Committee's mandate and its listing procedure, the first, albeit small, steps towards transparency and procedural due process taken prior to Resolution 1989 can be analyzed. As noted, while the sanctions imposable under the U.N. regime were intended to be preventive⁵¹ rather than punitive, their impact on an individual's life can be quite severe,⁵² particularly due to the sanctions' indeterminate length.⁵³ While the Security Council did not take immediate action, it became apparent that *some* kind of process must be due.⁵⁴ To that end, a number of Security Council resolutions tried to address the matter: first, by increasing the transparency of the listing decisions; second, by implementing procedural safeguards to prevent, or at least reduce, the risk of erroneous listings, even though these safeguards fell short of concrete judicial guarantees; and third, by introducing a delisting procedure. Yet, it

List); *see also* Prost, *supra* note 16, at 412 (explaining that Article 25 of the U.N. Charter obliges Member States to implement Security Council sanctions through domestic laws and regulations).

50. U.N. Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, *The List*, available at <http://www.un.org/sc/committees/1267/AQList.htm> (last visited Mar. 28, 2012) (listing 259 individuals and sixty-nine entities).

51. *See supra* note 43 for a discussion of the preventative, rather than punitive, intentions of the sanctions imposed by the Al-Qaida Sanctions Committee.

52. Indeed, the sanctions violate individual rights recognized by the U.N. Convention on Civil and Political Rights, including the right to an effective remedy, the right to freedom of movement, and the right to privacy. *See* U.N. High Comm'r on Human Rights, International Convention on Civil and Political Rights, art. 2(3)(a) (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> (recognizing the right to an effective remedy); *id.* art. 12(2) (recognizing the right to freedom of movement); *id.* art. 17 (recognizing the right to privacy); *see also* Human Rights Comm., Sayadi v. Belgium, Commc'n No. 1472/2006, 94th Sess., U.N. Doc. CCPR/C/94/D/1472/2006, ¶ 10.8 (Oct. 13-31, 2008) (concluding that an individual's rights to privacy and freedom of movement were violated by the sanctions imposed pursuant to the individual's presence on the Consolidated List); Landon Thomas Jr., *A Wealthy Saudi, Mired in Limbo Over an Accusation of Terrorism*, N.Y. TIMES, Dec. 12, 2008, available at <http://www.nytimes.com/2008/12/13/world/middleeast/13kadi.html> (reporting the story of a wealthy listee who was sanctioned with asset freezes and a travel ban); *Kadi v. Council*, *supra* note 4, ¶ 358 (recognizing that asset freezes constitute a considerable deprivation of the right to personal property).

53. Office of the Ombudsperson, *supra* note 43.

54. *See, e.g.*, Rep. of the High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, 59th Sess., ¶ 152, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/> (“[Listing and delisting procedures] raise serious accountability issues and possibly violate fundamental human rights norms and conventions [sic.]”); *see also* Peter Fromuth, *The European Court of Justice Kadi Decision and the Future of U.N. Counterterrorism Sanctions*, 13 ASIL INSIGHT (Oct. 30, 2009), available at <http://www.asil.org/files/insight091030pdf.pdf> (stating that the Security Council sanctions impose penalties without due process, thereby intruding on a state's sovereign power to decide citizen's liberty and property rights).

was not until 2004 that these first steps were taken.

1. Security Council resolution 1526 and Security Council resolution 1617: Formal notice, statement of case, and defining the “associated with” standard

By encouraging all designating Member States to inform listees of the measures imposed on them under the Al-Qaida Sanctions Regime, Resolution 1526 recommended, for the first time, giving formal notice to persons affected by the Committee’s measures.⁵⁵ A year and a half later, Resolution 1617 added that this notice should be given in writing,⁵⁶ and that it ought to entail information about the Committee’s guidelines and the delisting procedure,⁵⁷ as well as information about the exemption provisions of Security Council resolution 1452.⁵⁸

Furthermore, Resolution 1617 provided guidance regarding how the Committee interpreted the “associated with” standard,⁵⁹ perhaps to enhance transparency of the listing decisions in an effort to increase legal certainty. In addition, it required the designating Member States to submit along with their proposed names for inclusion on the list a statement of case describing the proposal’s basis.⁶⁰

2. Security Council resolutions 1730, 1735, and 1822: Narrative summary, periodic review, and regulation of the delisting procedures

In late 2006, Security Council resolution 1730 (Resolution 1730) was the first to stress the Security Council’s commitment “to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.”⁶¹ It adopted a new delisting procedure⁶² and directed the Committee to establish a Focal Point to receive and administer delisting requests.⁶³ The Focal Point’s role was to forward the request to the designating government(s) and to the government(s) of citizenship and residence for information and comments.⁶⁴ If, after these consultations, any of these governments recommended delisting, then that

55. S.C. Res. 1526, *supra* note 30, ¶ 18.

56. S.C. Res. 1617, *supra* note 28, ¶ 5.

57. *Id.* As early as 2002, the Security Council accepted delisting requests from the states of residence or nationality. *See Prost, supra* note 16, at 418. In 2006, the Security Council began accepting delisting applications brought directly by an individual or entity without state support.

58. S.C. Res. 1617, *supra* note 28, ¶ 5; *see also* S.C. Res. 1452, ¶ 1, U.N. Doc. S/RES/1452, (Dec. 20, 2002) (providing exemptions from sanctions for certain minimum expenses).

59. S.C. Res. 1617, *supra* note 28, ¶¶ 2–3.

60. *Id.* ¶ 4; *see also* Gurulé, *supra* note 1, at 37–38 (explaining what information is requested in the statement of case to justify the proposed listing).

61. S.C. Res. 1730, pmb., U.N. Doc. S/RES/1730 (Dec. 19, 2006).

62. *Id.* ¶ 1.

63. *Id.*

64. *Id.*

government was to forward its reasoned view to the Sanctions Committee.⁶⁵ The delisting request was then to be placed on the Committee's agenda for decision.⁶⁶ Again, these decisions of whether or not to delist had to be made by consensus.⁶⁷

Only three days after Resolution 1730 had been passed, the Security Council adopted Security Council resolution 1735 (Resolution 1735), which requested designating Member States to submit more detailed statements of case.⁶⁸ It also asked these Member States to identify, at the time of submission, the parts of the statement of case that may be publicly released for the purpose of notifying the listee.⁶⁹ This again must be regarded as a step intended to enhance the quality of the listee's notification.

Additionally, Resolution 1735 made it mandatory for the U.N. Secretariat, within two weeks after a name is added to the Consolidated List,⁷⁰ to notify the Permanent Mission of the country where the listee is believed to be located, and include with this notification, *inter alia*, a copy of the publicly releasable portion of the statement of case and the procedures for delisting requests.⁷¹ The states, after being given this information, were called upon to pass this information on to the listee.⁷² By providing the Committee with circumstances it may consider when deciding a delisting request,⁷³ Resolution 1735 effectively narrowed, albeit to a small extent only, the Committee's discretion in the delisting procedure.

Building on the requirement for designating states to provide a statement of case upon submission, Security Council resolution 1822 (Resolution 1822) ordered the Committee in 2008 to make accessible on the Committee's website a narrative summary of reasons for adding a name to the Consolidated List.⁷⁴ This order applied retroactively for entries added to the Consolidated List before the adoption of Resolution 1822.⁷⁵ Resolution 1822 also reiterated the Committee's obligation to consider petitions for the removal from the Consolidated List of listees no longer meeting the relevant criteria.⁷⁶ In light of this obligation, it directed the Committee to conduct a review of all names on the Consolidated List within the following two years in order to ensure that the list was as up to date and accurate

65. *Id.*

66. *Id.* ¶ 6(a).

67. Committee Guidelines, *supra* note 20, ¶ 4(a).

68. S.C. Res. 1735, ¶ 5, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

69. *Id.* ¶ 6.

70. This time period was later reduced to three days. S.C. Res. 1904, *supra* note 5, ¶ 5.

71. S.C. Res. 1735, *supra* note 68, ¶ 10.

72. *Id.* ¶ 11 (“[T]ake reasonable steps according to [a state’s] domestic laws and practices to notify or inform the individual or entity of the designation.”).

73. *Id.* ¶ 14 (identifying instances of mistaken identity and failing still to meet the requisite criteria needed to be on the list as circumstances to consider; relevant information relating to this criteria includes whether a person is deceased and whether a person has severed their ties with “Al-Qaida, [O]sama bin Laden, the Taliban, and their supporters.”).

74. S.C. Res. 1822, ¶ 13, U.N. Doc. S/RES/1822 (June 30, 2008).

75. *Id.*

76. *Id.* ¶ 21.

as possible.⁷⁷ Upon completion of this review, the Committee was further instructed to conduct an annual review of all names on the Consolidated List that had not been reviewed in the previous three or more years.⁷⁸ These reviews were important since nearly 270 of the then 488 entries on the list had been added in 2001 before the information requirements were introduced.⁷⁹

3. Security Council Resolution 1904: Establishment of the Ombudsperson and adoption of a quasi-speedy “trial” provision

In 2009, the United States drafted Resolution 1904,⁸⁰ which led to the establishment of the Office of the Ombudsperson,⁸¹ an independent and impartial body,⁸² to replace the Focal Point in its task to assist the Committee when considering delisting requests from the Consolidated List.⁸³ Unlike the Focal Point, the OP has both a procedural and substantive role to play.⁸⁴ Upon receipt of a delisting request issued by a listee,⁸⁵ the OP must gather relevant information within two months from the Committee, designating state(s), state(s) of residence and nationality, and from relevant United Nations bodies to ascertain their position regarding whether the delisting request should be granted.⁸⁶ The OP must also forward the delisting request to the Monitoring Team, which must provide to the OP all available and relevant information.⁸⁷ After this two-month information gathering period is over, the OP facilitates a two-month period of dialogue with the petitioner, in which she may ask remaining questions⁸⁸ via written correspondence, emails, or live interviews.⁸⁹ Upon completion of this period, the OP drafts a

77. *Id.* ¶ 25.

78. *Id.* ¶ 26.

79. Prost, *supra* note 16, at 418 (highlighting that these reviews led to forty-five names and entities being removed from the list and an additional sixty-three names and entities' fates on the list were still pending as of Sept. 2010); Rep. of the Analytical Support and Sanctions Monitoring Team, ¶ 25, U.N. Doc. S/2010/497 (Sept. 29, 2010).

80. William Diaz, *Dualist, but not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime*, 5 LIBERTY U. L. REV. 333, 344 (2011).

81. The Watson Institute for International Studies at Brown University recommended the creation of the Office of the Ombudsperson. THOMAS BIERSTEKER & SUE ECKERT, ADDRESSING CHALLENGES TO TARGETED SANCTIONS—AN UPDATE OF “THE WATSON REPORT,” 32 (2009) (“Among the various options for an advisory mechanism . . . the appointment of an Ombudsperson would be simplest and easiest to implement. It would also meet minimum standards of independence with the smallest institutional infrastructure.”).

82. S.C. Res. 1904, *supra* note 5, ¶ 20.

83. However, the Focal Point remains in place for other regimes. For that reason, it continued to receive requests from individuals and entities seeking to be removed from other sanctions lists. *Id.* ¶ 21.

84. Prost, *supra* note 16, at 419.

85. S.C. Res. 1904, *supra* note 5, at Annex II, pmb1.

86. *Id.* ¶ 2.

87. *Id.* ¶ 3.

88. *Id.* ¶¶ 5–6.

89. Prost, *supra* note 16, at 421 (explaining the potential modes of dialogue employed by the Ombudsperson when communicating with listees); *but see* S.C. Res. 1989, *supra* note 7, at Annex II ¶ 6(c) (indicating that the Security Council prefers that the Ombudsperson actually meet

comprehensive report that summarizes all relevant information and states observations with respect to the delisting request. Subsequent to the OP's presentation of this report to the Committee, the Committee decides whether to approve the request through its normal decision-making procedure.⁹⁰ Outside the OP procedure, Resolution 1904 also directed the Committee to amend its guidelines so as to ensure that no matter is left pending before the Committee for a period longer than six months.⁹¹

D. Why Commentators Still Criticized the Sanctions Regime Prior to Security Council Resolution 1989

Despite all these changes, the Security Council's efforts never succeeded in silencing the critics. Especially—but not only—in the aftermath of the European Court of Justice's (ECJ) Kadi I decision, commentators continued to criticize the sanctions regime for its insufficient level of due process.⁹² William Diaz, for instance, decried the lack of transparency⁹³ as well as the “amorphous threshold for listing,”⁹⁴ especially in relation to the limited due process level afforded in the delisting process.⁹⁵ Vanessa Baehr-Jones noted that there was no right to defense.⁹⁶ As authors Genser and Barth concluded, “[i]f due process is to be taken seriously, targets must be afforded as full an opportunity as possible to defend their rights.”⁹⁷ However, according to these authorities, due process was not guaranteed, even with the establishment of the OP under Resolution 1904.⁹⁸

Switzerland's Federal Supreme Court ruled the same way, holding that the sanctions mechanisms “still show major shortcomings in terms of fundamental rights.”⁹⁹ Peter Fromuth similarly observed that the Al-Qaida sanctions regime only “contains minimal allowance for due process: decisions to list or delist a party are made by Committee consensus; little information about the grounds for listing

with the listee when conducting its dialogue, even though other options exist).

90. S.C. Res. 1904, *supra* note 5, pmb.

91. *Id.* ¶ 41.

92. See, e.g., Giacinto della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Yassin Abdullah Kadi & Al Barakaat International Foundation v. Council*, 15 COLUM. J. EUR. L. 511, 515 (2009) (criticizing that “[w]hen the listing procedure starts, all those individuals and other legal entities whose listing is proposed receive no notice, nor have any opportunity to contest it. This accentuates not only the risk of arbitrariness, but also the possibility of errors, thereby making the burden of the courts still heavier.”).

93. Diaz, *supra* note 80, at 343 (relying on BIERSTEKER & ECKERT, *supra* note 81, at 8).

94. *Id.*

95. *Id.*

96. Baehr-Jones, *supra* note 13, at 449.

97. Jared Genser & Kate Barth, *When Due Process Concerns Become Dangerous: The Security Council's 1267 Regime and the Need for Reform*, 33 B.C. INT'L & COMP. L. REV. 1, 33 (2010).

98. *Id.*

99. Bundesgericht [BGer] [Federal Supreme Court] Nov. 14, 2007, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 450 (Switz.).

is shared with the listed parties; listees are not represented before the Sanctions Committee; and no judicial review or remedy is available.”¹⁰⁰

The U.N. Human Rights Committee, in raising a different issue, pointed to the lack of both legitimacy and checks and balances in the Sanctions Regime. It stated:

It is more than a little disturbing that the executive branches of 15 Member States appear to claim a power, with none of the consultation or checks and balances that would be applicable at the national level, to simply discard centuries of States’ constitutional traditions of providing bulwarks against exorbitant and oppressive executive action.¹⁰¹

A report prepared by the Watson Institute (Watson Report) noted that even though “committee procedures have improved[,] the persistent perception of unfairness and potential violation of due process associated with targeted sanctions means there is a political problem that needs to be addressed.”¹⁰² The report further stated that “[f]ailure to make the sanctions process more transparent, accessible, and subject to some form of review threatens to undermine the credibility and effectiveness of UN sanctions generally.”¹⁰³

As noted, the Courts of the European Union were also skeptical of the Sanctions Regime. The Court of First Instance (CFI)¹⁰⁴ concluded in its *Kadi I* judgment that “there is no judicial remedy available to the applicant.”¹⁰⁵ Similarly, the ECJ found that the review mechanism in place does not offer the guarantees of judicial protection. So long as “the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned [are] having no real opportunity of asserting their rights.”¹⁰⁶ In particular, the ECJ criticized that an applicant for delisting cannot assert his rights during the procedure before the Sanctions Committee or be represented for that purpose.¹⁰⁷ Moreover, the Sanctions Committee is not required “to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last[ly], if that Committee rejects the request for removal from the list, it is under no obligation to give reasons.”¹⁰⁸

The establishment of the OP¹⁰⁹ did not change the CFI’s view.¹¹⁰ Thus, the

100. Fromuth, *supra* note 54.

101. *Sayadi v. Belgium*, *supra* note 52 (dissenting in part in an individual opinion by Committee members Sir Nigel Rodley, Mr. Ivan Shearer, and Ms. Iulia Antoanella Motoc).

102. Thomas J. Biersteker & Sue E. Eckert, White Paper, *Strengthening Targeted Sanctions Through Clear and Fair Procedures*, Watson Institute Targeted Sanctions Project 1, 7 (Mar. 2006) [hereinafter Watson Report].

103. *Id.*

104. Although the CFI has been renamed “General Court” by the Lisbon Treaty, this Article will refer to this court as the CFI for reasons of consistency.

105. Case T-315/01, *Kadi v. Council & Comm’n*, 2008 E.C.R. II-3739.

106. *Kadi v. Council*, *supra* note 4, ¶ 323.

107. *Id.* ¶ 324.

108. *Id.* ¶ 325.

109. *Kadi v. Comm’n*, *supra* note 8, ¶ 128.

110. As of this writing, the ECJ has not yet rendered its *Kadi v. Comm’n* (Kadi II) decision.

CFI held in its 2010 *Kadi II* decision that:

In essence, the Security Council has still not deemed it appropriate to establish an independent and impartial body responsible for hearing and determining, as regards matters of law and fact, actions against individual decisions taken by the Sanctions Committee. Furthermore, neither the focal point mechanism nor the Office of the Ombudsperson affects the principle that removal of a person from the Sanctions Committee's list requires consensus within the committee. Moreover, the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee's list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (he need not even be informed of the identity of the State which has requested his inclusion on the Sanctions Committee's list). For those reasons at least, the creation of the focal point and the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee.¹¹¹

The U.K. Supreme Court similarly concluded, in a recent decision, that “[w]hile these improvements [referring to the establishment of the OP] are to be welcomed, the fact remains that there was not[,] when the designations were made, and still is not, any effective judicial remedy.”¹¹² Yet another potential concern that the Watson Report has pointed out is that, “in practice, such [delisting] requests can carry on indefinitely [and] States may either object without specifying a reason or demand a technical hold that places the request on indefinite hold.”¹¹³

To sum up these somewhat overlapping complaints, the seven issues that bothered national courts as well as academic commentators were thus: (1) the lack of a meaningful opportunity to challenge the allegations made before a neutral decision-maker—even after the establishment of the OP; (2) the listee's inability to access and review the evidence against him; (3) the listee's inability to contest the listing before the Committee; (4) the fact that the Committee in essence was still a political rather than a judicial body¹¹⁴ under no obligation to justify its decisions; (5) the Committee's closed-door approach; (6) the lack of legitimacy from which the Committee suffered; and (7) the control to which the Committee was subject.¹¹⁵

III. SECURITY COUNCIL RESOLUTION 1989: DUE PROCESS, *QUO VADIS*?

With these issues in mind, it is time to analyze the changes Resolution 1989 brought about in 2011. First, it specifically encouraged designating Member States to allow the Committee, upon submission of a proposal, to make known the

111. *Kadi v. Comm'n*, *supra* note 8, ¶ 128.

112. *A v. HM Treasury*, [2010] UKSC 2, [2010] 2 W.L.R. 378, 413–14 (U.K.).

113. Watson Report, *supra* note 102, at 37.

114. Baehr-Jones, *supra* note 13, at 453.

115. Watson Report, *supra* note 102 at 7.

Member State's status as a designating State.¹¹⁶ That way, the listee knew for certain which government to address when considering whether to issue and prepare a delisting request.

Second, and most importantly, Resolution 1989 authorized the OP to make a “triggering”¹¹⁷ recommendation upon each delisting request either to retain the listing or to consider delisting.¹¹⁸ Absent any specific guidance in Resolution 1989 as to which standard should apply, the OP decided to make these recommendations based on whether there is sufficient information to provide a reasonable and credible basis for the listing.¹¹⁹ If the OP finds there is enough information to provide such a basis for listing and therefore recommends rejecting the delisting request, then the listee remains listed.¹²⁰ However, if the OP recommends granting the request, then the person is delisted unless the Committee decides by consensus within a sixty-day period that the listee should remain on the list.¹²¹

Third, if a Committee member objects to a delisting request, the member must now provide reasons for its objections.¹²² Finally, Resolution 1989 establishes a second, expedited delisting procedure for cases in which the designating state itself submits a delisting request.¹²³ In these situations, the OP does not get involved at all. The sanctions are lifted after sixty days unless the Committee decides by consensus that the measures shall remain in place.¹²⁴

IV. AFTER SECURITY COUNCIL RESOLUTION 1989: DUE PROCESS STILL OVERDUE?

What part of the mentioned criticism, if any, did Resolution 1989 actually address? To what degree, if any, did Resolution 1989 change the procedural due process level to be afforded in the listing and/or delisting procedures? Was

116. S.C. Res. 1989, *supra* note 7, ¶ 14 (deciding that “Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaeda Sanctions List before the adoption of this resolution, shall specify whether the Committee, or the Ombudsperson, or the Secretariat or Monitoring Team on the Committee’s behalf, may make known the Member State’s status as a designating State; and *strongly encourages* designating States to respond positively to such a request”); *id.* ¶ 29 (“*Strongly urg[ing]* designating States to allow the Ombudsperson to reveal their identities as designating States, to those listed individuals and entities that have submitted delisting petitions to the Ombudsperson.”).

117. Rep. of the Office of the Ombudsperson Pursuant to S/RES/1989 (2011), ¶ 12, U.N. Doc. S/2012/49 (2012) [hereinafter S/2012/49].

118. Office of the Ombudsperson, *supra* note 43.

119. *Id.*

120. S.C. Res. 1989, *supra* note 7, ¶ 22.

121. *Id.* ¶ 23 (detailing that if no consensus on rejecting the OP’s delisting recommendation, Chair shall, on request of Committee Member, submit question of whether to delist that listee to Security Council for a decision within sixty days); *see also* U.N. Charter art. 27, ¶ 3 (showing that Security Council’s decision is made through normal decision procedure, by an affirmative vote of nine members including concurring votes of permanent members).

122. S.C. Res. 1989, *supra* note 7, ¶ 33.

123. *Id.* ¶¶ 27–28.

124. *Id.* *But see id.* ¶ 33 (detailing procedure when there is no consensus among Committee members).

Resolution 1989 a great step forward or a great disappointment? Is due process still overdue after Resolution 1989?

To begin with, given the number of amendments made to the sanctions framework in terms of transparency and procedural due process since its inception, one must respect what has been achieved within a rather short period of time. Admittedly, the new status quo is far from perfect. But in light of the international law context, which is fundamentally different from its domestic counterparts,¹²⁵ and the fact that the sanctions process is administrative—preventive in nature rather than punitive—the progress is remarkable.¹²⁶ Not only has the Security Council demanded that the Member States give listees a prompt and comprehensive notification of their designation—including the statement of case; a description of the effects of designation; the Committee’s delisting procedures; and the provisions regarding available exemptions¹²⁷—but it also authorized the OP to send a notification directly to a newly listed individual when there is a known address for the listee and the relevant states have been informed.¹²⁸ Apart from that, the Security Council even introduced a provision intended to ensure a speedy disposition.¹²⁹

In addition, and most notably, the Security Council established the Office of the OP,¹³⁰ an institution which cannot be overestimated. This change had a substantial positive impact on the procedural due process and fairness levels of the delisting and listing procedures. Of particular importance was the creation of a dialogue phase, during which the listee can present his side of the story.¹³¹ This is

125. See Prost, *supra* note 16, at 423 (stating that measuring procedural fairness under domestic standards is not an appropriate test in an international setting); see also Baehr-Jones, *supra* note 13, at 451 (suggesting the “creation of an international standard for due process involving secret intelligence evidence based on the jurisprudence of international criminal courts, specifically the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).”).

126. As can be seen from the recent decision of U.S. District Court for the District of Columbia in *Kadi v. Geithner*, No. 09-0108, 2012 WL 898778 (D.C. Cir. Mar. 19, 2012), the level of due process in U.S. administrative procedures, here *e.g.* for Kadi’s designation as a Special Designated Global Terrorist by the U.S. Office of Assets Control (“OFAC”), is similar to, if not even lower than, the one afforded under the Al-Qaida Sanctions regime. *Id.* at 3–4, 43–44 (describing the former); see also 31 C.F.R. § 501.807(c) (indicating that OFAC is not required to grant a hearing to a petitioner seeking delisting).

127. S.C. Res. 1822, *supra* note 74, ¶ 17; S.C. Res. 1735, *supra* note 68, ¶ 11.

128. S.C. Res. 1989, *supra* note 7, at Annex II ¶ 16(b). As of January 2012, the OP sent fifty-six notification letters; see S/2012/49, *supra* note 117, ¶ 32.

129. S.C. Res. 1904, *supra* note 5, ¶ 41 (directing the Committee to amend its guidelines to ensure that no matter is left pending for more than six months unless the Committee determines there are extraordinary circumstances that require additional time).

130. *Id.* ¶ 20.

131. Rep. of the Office of the Ombudsperson Pursuant to S/RES/1989 (2011), ¶ 42, U.N. Doc. S/2011/447 (2011) [hereinafter S/2011/447] (noting that “[w]ith cooperation from States and through the information-gathering process, the dialogue phase and the comprehensive report, key components of fairness (‘knowing the case against you’ and ‘having an opportunity to respond and be heard’) are being met.”).

all the more true since Resolution 1989 has turned the previously only “observing”¹³² OP into a “quasi-decision-making OP.”¹³³ As a consequence, the dialogue phase is not just an exchange between the listee and some organ somewhat participating in the delisting process, but a hearing before a neutral de facto decision-maker. Not only has this expansion of the OP’s mandate to issue triggering recommendations increased the significance of the dialogue phase, but it has also had a positive impact on the degree of state cooperation,¹³⁴ since “[t]he consequences of a failure to [cooperate by providing requested information to the OP] will have a more direct impact on the decision to be taken in each case.”¹³⁵

The OP’s interpretation of the new delisting provisions can further increase the due process level. In an effort to create yet another impetus for states to provide as much information as possible during a delisting request’s information-gathering period, the OP has recently stated that any lack of detail does not prejudice the petitioner.¹³⁶ This is similar to the “default judgment” approach applied by the Human Rights Committee.¹³⁷ At any rate, the OP’s approach effectively shifts the delisting procedure’s burden of proof to the states.

Similarly, Resolution 1989 now requires Member States objecting to a delisting request to provide reasons for their objections to the Committee members.¹³⁸ Not only does this adopt an entirely different tone than before, but it essentially shifts the burden of proof to the Member States.¹³⁹ Now the Committee must present its case, and not just the listee.

Lastly, to enable petitioners to inquire into the allegations against them more effectively, Resolution 1989 also tries to ensure that the listee knows which State designated him.¹⁴⁰ Even though this is not fully equivalent to the United States’ Sixth Amendment right to be confronted with the witnesses against oneself, it does come close. It has already brought about some positive effects; since its adoption, in each case the designating states have given their consent to disclose their status.¹⁴¹

132. S.C. Res. 1989, *supra* note 7, at Annex II ¶ 6(c).

133. As noted earlier, unlike the observations under the S.C. Res. 1904 regime, the OP’s recommendation can only be overturned if the Sanctions Committee rejects her conclusions by consensus or by decision of the Security Council. *See* S.C. Res. 1989, *supra* note 7, ¶ 23.

134. S/2012/49, *supra* note 117, ¶ 45.

135. *Id.* ¶ 41.

136. *Id.* ¶ 42.

137. *Bleier v. Uruguay*, Commc’n No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) ¶ 13.3 (1982) (holding that “[i]n cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party”).

138. S.C. Res. 1989, *supra* note 7, ¶ 33.

139. In the OP’s view, this change has led “to enhanced fairness and transparency.” *See* S/2012/49, *supra* note 117, ¶ 47.

140. S.C. Res. 1989, *supra* note 7, ¶ 14.

141. S/2012/49, *supra* note 117, ¶ 48.

Resolution 1989, therefore, did address at least some of the voiced criticism, especially with respect to a meaningful hearing before a neutral quasi-decision-maker, the degree of petitioner participation allowed under the delisting procedure, and the Committee's duty to give reason for rejecting a delisting request.

V. *DESIDERATA*: WHAT REMAINS TO BE DONE

A. *Legal Issues*

1. Too few hard law guarantees

Although some progress towards due process has been made, most of these procedural due process elements are not guaranteed, as the Member States are not obliged to afford them. The language the Security Council uses with respect to these safeguards is more often recommending,¹⁴² requesting,¹⁴³ and encouraging,¹⁴⁴ rather than compelling and directing in nature. This is why the due process “guarantees” are in fact not guaranteed. Accordingly, the CFI is somewhat correct in stating that there is still no hard law obligation on the part of the designating Member States to inform a listee of his designation and of the state's status as his designator, let alone to disclose the evidence supporting the designation.¹⁴⁵ Furthermore, states are still not formally required to provide either the Committee or the OP with all relevant information in their possession.¹⁴⁶ Their sometimes resulting reluctance to cooperate may prevent the Committee as well as the OP

142. S.C. Res. 1526, *supra* note 30, ¶ 18.

143. S.C. Res. 1735, *supra* note 68, ¶ 6.

144. S.C. Res. 1989, *supra* note 7, ¶ 14.

145. *Kadi v. Comm'n*, *supra* note 8, ¶ 128.

146. This is despite the OP's information request as mandated in a Chapter VII resolution. See S.C. Res. 1989, *supra* note 7, ¶ 15 (stating that the Security Council “[d]ecides that Member States, when proposing names to the Committee for inclusion on the Al-Qaeda Sanctions List shall . . . provide the Committee with as much relevant information as possible on the proposed name”). Although “decisions” of the Security Council technically are legally binding on the Member States, the limiting phrase “as possible” serves as a justification for not submitting information available. Cf. Diaz, *supra* note 80, at 339. The language, used in S.C. Res. 1989, *supra* note 7, ¶ 18, is even weaker in that it “[c]alls upon all members of the Committee and the Monitoring Team to share with the Committee any information they may have available regarding a listing request from a Member State so that this information may help inform the Committee's decision on designation;” see also *id.* ¶ 25 (containing language that “[s]trongly urges Member States to provide all relevant information to the Ombudsperson, including providing any relevant confidential information, where appropriate, and confirms that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it”); Baehr-Jones, *supra* note 13, at 453 (claiming that “[a] state, therefore, is not mandated to submit classified intelligence evidence should the state decide it cannot release the information, and in practice, the amount of information provided can vary greatly—from one conclusory paragraph to over a page of information. As a result, the UN receives heavily redacted information with vague details.”). And yet, according to the OP, state cooperation continues to be strong. See S/2012/49, *supra* note 117, at ¶ 13.

from taking into account all information available.¹⁴⁷ This is especially true, and to some extent understandable, in regards to confidential material.¹⁴⁸ The price of this, however, is that the Consolidated List is possibly not as accurate as it could and should be; in other words, there might be names on this list which do not belong there. Therefore, if the Security Council is genuinely serious about increasing the procedural due process level, then it must harden these soft law safeguards into legally binding due process guarantees.

2. Further strengthening and legalizing the mandate of the OP

It would be extremely beneficial to elevate the status of the OP from a quasi-decision-maker to a de jure-decision-maker in an effort to establish a truly independent review. This would require abolishing both the Sanctions Committee's and the Security Council's present power to overrule the OP's delisting judgment, thus effectively diminishing their influence on the delisting procedure. However, the argument that the Committee acts as the check on its own judgments could no longer be made. Hence, such a strict functional separation between the Committee and the OP would significantly improve the procedural due process record of the sanctions regime.

Furthermore, formally legalizing the standard the OP applies in considering the delisting requests, such as in an annex to a Security Council resolution, would be a constructive step towards greater due process. This is by no means to be understood as a criticism of the OP's work. Quite the contrary, this is rather to ensure that the "reasonable basis" standard developed by the current OP, Judge Kimberly Prost, is guaranteed to be applied consistently in all future delisting procedures—regardless of who serves as the OP.

B. Practical Issues

Aside from these legal issues, there remains one practical matter that reduces the efficacy of the OP and thus overshadows due process efforts: staff shortages. The OP should have its own staff and should not be required to draw on the services of the Monitoring Team, which works for the Sanctions Committee as well,¹⁴⁹ for the same reasons a functional separation between the Committee and the OP is advisable—to avoid possible conflicts of interest.

Until very recently, the OP was basically functioning individually. Currently, apart from interns, there is only one assistant to the OP. Fortunately, an additional temporary senior legal professional post, recently approved by the General

147. The OP concedes that lack of access to confidential information has been a concern in at least four recent cases. See S/2012/49, *supra* note 117, ¶18. As a result, developing arrangements or agreements for access to classified information has been made a priority. *Id.* ¶ 36.

148. However, very recently, bilateral arrangements for access to classified information have been agreed upon with a small, albeit growing, number of states. See S/2012/49, *supra* note 117, ¶ 17. The United States, probably the most active state (see VAN GINKEL, *supra* note 42, at 240), is unfortunately not one of them.

149. S.C. Res. 1904, *supra* note 5, ¶ 47.

Assembly, has just been filled.¹⁵⁰ However, given the number of delisting requests pending at a time¹⁵¹ and the amount of information to gather and to review for each case, this is still insufficient to ensure proper due process.

C. Outlook

In light of these obstacles, the OP's office should not be considered ineffective. To the contrary, considering the very "limited resources"¹⁵² and the imperfect legal framework in which it must operate, its record is quite impressive.¹⁵³ Since its inception in 2010, the OP has completed the delisting procedure in sixteen cases,¹⁵⁴ which amounts to slightly less than one case per month. Nevertheless, as demonstrated, there remains a great deal that can and should be done, from a legal as well as a resources-oriented perspective. The path the Security Council has taken so far is the right one, and the speed at which it has progressed has been astonishing. Yet, despite this remarkable progress, there is, of course, room for further improvement, and the Security Council would be well-advised to continue making every effort to improve the fairness and transparency of this unique, yet necessary, framework. Just as the Security Council was among the first actors in 1999 to address the evolving phenomenon of 21st century terrorism, it should also try to become a forerunner with respect to due process mechanisms in this distinct international context, for due process is essentially not only what distinguishes us from terrorists, but also what ensures that we win the war on terror.

150. See S/2012/49, *supra* note 117, ¶ 58, in response to S/2011/447, *supra* note 131, ¶ 51.

151. As of March 12, 2012, sixteen delisting requests were pending; see Office of the Ombudperson, Status of Cases, available at <http://www.un.org/en/sc/ombudsperson/status.shtml> (last visited Mar. 17, 2012).

152. S/2012/49, *supra* note 117, ¶¶ 20, 27 (pointing to "limited resources" and "given resource constraints").

153. See S.C. Res. 1989, *supra* note 7, pmbl. ("Welcoming the establishment of the Office of the Ombudperson pursuant to resolution 1904 (2009) and the role it has performed since its establishment, noting the Ombudperson's important role in improving fairness and transparency.").

154. In all but two cases (one request was denied, one request was withdrawn by the petitioner), the delisting requests were granted; see Status of Cases, *supra* note 151.