

THE UN SECURITY COUNCIL OMBUDSPERSON: AN ORIGINAL INSTITUTION STILL UNDER CONSTRUCTION*

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Abstract

The United Nations Security Council has set up an Ombudsman's Office to deal with complaints from individuals or entities subject to sanctions imposed within the framework of the fight against international terrorism. This article examines the reasons that have led the UN to create such a mechanism and whether, given its configuration and functions, this body meets the requirements traditionally expected of an ombudsman. We conclude that, despite some institutional shortcomings, the Security Council Ombudsman has shown a high degree of effectiveness, and that this is a figure with the potential to strengthen the due process in this field of international relations.

Keywords: Ombudsman; Ombudsman; Security Council; human rights; United Nations.

L'OMBUDSMAN DEL CONSELL DE SEGURETAT DE L'ONU: UNA INSTITUCIÓ ORIGINAL ENCARA EN CONSTRUCCIÓ

Resum

El Consell de Seguretat de les Nacions Unides ha establert una Oficina de l'Ombudsman per atendre les reclamacions de persones o entitats sotmeses a sancions imposades en el marc de la lluita contra el terrorisme internacional. L'article examina les raons que han conduït l'ONU a crear aital mecanisme i si, per la seva configuració i funcions, aquest òrgan reuneix els requisits que tradicionalment s'espera d'una institució de l'Ombudsman. Conclourem que, malgrat alguns defectes institucionals, l'Ombudsman del Consell de Seguretat ha mostrat una alta taxa d'efectivitat, i que és una figura amb potencialitat per enfortir el procés just en aquest àmbit de les relacions internacionals.

Paraules clau: Ombudsman; Consell de Seguretat; drets humans; Nacions Unides.

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Summary

1 Introduction

2 Targeted or smart Security Council sanctions and the need for an oversight mechanism

2.1 Evolution of the Security Council's sanctions regimes

2.2 Challenges posed by smart sanctions

3 The Security Council Ombudsperson from an ombudsman perspective

3.1 Basic profile of an ombudsman on an international level

3.2 The Security Council Ombudsperson: configuration, functions and how the office operates

4 Final considerations

Bibliography

1 Introduction

Since the middle of 2010, the UN Security Council has had an Ombudsperson who is responsible for supervising, upon request, the sanctions this body imposes on natural and legal persons as part of its remit for maintaining international peace and security. The figure of an ombudsman, which originated in Sweden in 1809, has spread all over the world, especially in the final third of the 20th century, and varies greatly both from a competence perspective (general and specialised institutions) and a territorial perspective (state and sub-state institutions). There are even international ones, such as the European Ombudsman. The UN itself has an Ombudsman and Mediation Services Office for United Nations employees.¹

Despite the widespread emergence of this institution, it is nonetheless surprising that a body as singular as the Security Council, which was set up and traditionally operated in the logic of traditional international relations (between states or, at best, subjects of international law), should have equipped itself with a figure conceived to defend the rights of individuals. Admittedly it has done so in a particular sphere (a specific sanctions regime) and with clearly defined powers (removing a petitioner from a sanctions list) but that does not detract from the institution's innovative character. On the contrary.

The aim of our contribution, therefore, is to analyse this innovative figure on an international level: its origins and design, its functions and how it functions and, in short, whether its institutional characteristics allow it to be compared to a real ombudsman, as this figure is understood in international practice. We will divide the article into two large parts. Firstly, we will explain the reasons that led the Security Council to create this figure, which are none other than the changes in the sanctions model that have gradually been introduced within this body and their effect on individuals. Secondly, we will analyse the institutional characteristics of the Security Council Ombudsperson and how this particular figure has operated in the last six years, and study to what extent it is comparable to ombudsmen on a national level. In our final considerations we will point out the shortcomings that the Security Council Ombudsperson needs to overcome and the potential this institution has for defending the rights of people subject to sanctions by the Council itself.

2 Targeted or smart Security Council sanctions and the need for an oversight mechanism

In this first part we shall see how the Security Council sanctions regime has gone from targeting sovereign states to targeting individuals, and how that has raised serious doubts from the point of view of democratic principles and the rule of law, particularly from the perspective of the right of people sanctioned by states at the request of the Security Council to due process.

2.1 Evolution of the Security Council's sanctions regimes

The Security Council is the main body responsible for achieving the United Nations' primary aim, namely the maintenance of international peace and security.² To do that it is empowered by the member states to issue legally binding resolutions, particularly when there is a threat to peace, a breach of the peace or an act of aggression, under the terms of Chapter VII of its Charter.³ It is well known that in this and other spheres of action, the permanent members of the Security Council may veto any decisions, even if these have obtained the affirmative majority of nine votes set out in the Charter (Article 27(3)). When its resolutions within the framework of this chapter are not respected by the state they address, the Security Council may impose diplomatic, economic, military or other sanctions, which have to be applied in practice by other UN member states.

Following decades of virtual inactivity, the Security Council has made extensive use of its powers under Chapter VII of the Charter since the 1990s. In particular, it has frequently imposed diplomatic and economic

1 Its rules of procedure are published in the Secretary-General's Bulletin "Terms of Reference for the Office of the United Nations Ombudsman and Mediation Services". Document ST/SGB/2016/7, of 23 June 2016. These terms of reference replace those originally adopted in 2002, when the Office was set up.

2 See Article 24(1) of the Charter regarding its Article 1(1).

3 Article 25 of the Charter states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

sanctions and, on many occasions, authorised the use of force against states that resist its resolutions. A broad interpretation of its mandate in this area has even allowed it to set up international criminal tribunals,⁴ take action against non-state actors⁵ and adopt international quasi-legislation against terrorism following the attacks of 11 September 2001.⁶ In that regard, it is worth mentioning that this expansion of the instruments that the Security Council has at its disposal for maintaining international peace and security has been accompanied by a broader concept of the terms “peace” and “security”, which are no longer limited to the relations between states but also include new threats such as international terrorism and organised crime. All this means that the Security Council’s resolutions are increasingly having a greater effect on private individuals, even if that is through the member states.

At the same time, the traditional economic sanctions that the Security Council used against sovereign states, in the form of more or less extensive international trade embargoes,⁷ have received strong criticism from legal opinion and humanitarian organisations for their devastating effect on the civilian population.⁸ The United Nations Charter is certainly very sparing in its treatment of the secondary effects of this type of sanction and only in Article 50 does it envisage the possibility that a state adversely affected by the preventive or enforcement measures adopted by the Security Council towards a third party might “consult the Security Council with regard to a solution to those problems”. There is not a single word on the adverse effects that the civilian population might suffer, as happened during the long decade of sanctions in Iraq following the Gulf War (1991). The hundreds of thousands of deaths attributed to these sanctions which, in turn, had no effect on the government or its leader, Saddam Hussein, forced the international community to reconsider the scope and opportunity for sanctions that do “not involve the use of force”, in the words of the Charter (Article 41) In his year 2000 report, *We the Peoples*, the UN Secretary-General had harsh words to say about economic sanctions:

“When robust and comprehensive economic sanctions are directed against authoritarian regimes [...] it is usually the people who suffer, not the political elites whose behaviour triggered the sanctions in the first place. Indeed, those in power, perversely, often benefit from such sanctions by their ability to control and profit from black market activity, and by exploiting them as a pretext for eliminating domestic sources of political opposition”.⁹

And he concluded that economic sanctions had proved to be a “blunt and even counterproductive instrument”, which is why he called on the Security Council to bear that in mind when designing and applying future sanctions regimes.¹⁰

In reality, the Security Council had already begun to do that the previous year with Resolution 1267 (1999) on Afghanistan, and the link between the Taliban regime and the terrorist organisation Al-Qaida and the attacks on the American embassies in Nairobi and Dar es Salaam.¹¹ This approach was based on the twin concept that international terrorism should be characterised as a threat to international peace and security and that individuals, rather than states, should be the target of sanctions.¹²

4 The tribunals for the former Yugoslavia and Rwanda, respectively, in Security Council Resolutions 827 (1993), of 25 May, and 955 (1994), of 8 November.

5 In the case of piracy off the coasts of the Horn of Africa, based on Security Council Resolution 1816 (2008), of 2 June. In fact, sanctions against non-state actors may date back to 1997, against members of UNITA, in Angola [Res. 1127 (1997)]. What distinguishes the sanctions against piracy is the fact that this was the first time sanctions were not based on the sovereign territory of a state.

6 Security Council Resolution 1373 (2001), of 28 September.

7 As Reinisch says, the “theory” of economic sanctions is that economic pressure on civilians will be translated into pressure on governments, who in turn will be forced to behave differently. See Reinisch (2001: p. 851)

8 See, for example, Segall (1999).

9 See UN (2000: para. 231).

10 *Ibid*, paras. 232 and 233.

11 See *Sixteenth report of the Analytical Support and Sanctions Monitoring Team, submitted pursuant to Resolution 2161 (2014), concerning Al-Qaida and associated individuals and entities*. Document S/2014/770, of 29 October, para. 38.

12 See Willis (2011: p. 679)

Essentially, the sanctions system established by Resolution 1267 (1999) consisted of imposing a series of sanctions (flight bans, financial assets freeze, etc.) on members of the Taliban movement and Al-Qaida personally, as well as individuals or entities “associated” with one or the other. Given the need to gradually identify who these “individuals and entities” were, aside from their leaders, a “committee” comprising the Security Council members themselves was set up as a subsidiary body¹³ and tasked with drawing up a “consolidated list” of the individuals and entities that the sanctions would target according to the criteria of the main body, as well as monitoring the measures adopted by member states for implementing, and eventually lifting, these sanctions, as will be seen in more detail in the next section.

Since then this technique has become the general approach and there are currently a dozen sanctions committees dealing with conflicts in Somalia-Eritrea, the Democratic Republic of Congo, North Korea, Sudan, Guinea-Bissau, Yemen, the Central African Republic and other states,¹⁴ although the committee set up by Resolution 1267 is by far the one that has targeted the most individuals and entities with their sanctions. So much so that, in a very controversial decision taken in 2011,¹⁵ the mandate was split to separate the sanctions aimed at the Taliban and contextualised in Afghanistan (the new *1988 Committee*), from those aimed at Al-Qaida (the mandate and name of which has changed as ISIS has replaced Al-Qaida as the focus of international attention).¹⁶ On 19 December 2016, the latter committee alone identified a total of 256 individuals and 75 entities as the subject of sanctions.¹⁷

2.2 Challenges posed by smart sanctions

At this point, the solution to an old problem poses a new one. The lists of individuals and entities subject to sanctions are approved by a body, the Security Council, which, although it is not above international law¹⁸ is, de facto, not answerable for anything to anyone.¹⁹ They are often based on requests from states that are hardly, or not at all, democratic (although formally the decision is the committee’s) and based on classified information, which is therefore confidential.²⁰ The powerlessness of individuals and entities included in the *Consolidated List* has been notorious right from the start, as the Sanctions Monitoring Team, a body of experts that has advised the 1267 Committee since 2004, has acknowledged.²¹ For example, it was not until 2002 (three years after this sanctions regime was adopted) that the first “guide” was approved with criteria

13 That meant there would be a committee of 15 members, the five permanent members of the Security Council (with no right of veto) and ten others on rotating two-year terms.

14 See the [list of UN sanctions committees](#) [Consulted: December 2016].

15 It was highly controversial only because segregating alleged members of the Taliban in a new sanctions committee meant those individuals on the list or subsequently added to it no longer had access to the Ombudsperson. The argument for excluding the Ombudsperson from this committee is that it focuses on a single country during a specific period, while the struggle against Al-Qaida (and now ISIS) is not limited by time or space. See Mirshahi (2012: p. 9)

16 After various changes its official name has been the *ISIL (Da’esh) & Al-Qaida Sanctions Committee 1267/1989/2253* since December 2015. See Security Council Resolution 2253 (2015), of 18 December, para. 1.

17 Up-to-date information on the list of individuals and entities sanctioned by Committee 1267/1989/2235 can be found [here](#). For its part, [the 1988 Committee sanctions list](#) contains the names of 136 individuals and 5 entities (figures updated on 19 December 2016) [Consulted: December 2016].

18 See Reinisch, *op. cit.*, p. 855-858.

19 The International Court of Justice has established that the Security Council, despite being a political body, is subject to general international law and the functional limits imposed by the United Nations Charter (Lockerbie case). The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has ruled likewise (Tadic case). But these formal constraints have so far not been translated into effective, legal or jurisdictional control of their conduct which, moreover, is subsumed in their lack of any international legal personality, so that any international responsibility that might derive from any breach of international law would be attributable to the United Nations as such.

20 According to Ben Emmerson, the Special Rapporteur on human rights and counter-terrorism, any state may propose listing with minimal data to back it up. In practice the committee follows a “no-objection” procedure whereby, if no member opposes the listing, this becomes effective within a period of 10 working days. In fact, the committee as a whole does not examine the evidence that supports a designation, so the risks of undue use of the procedure are high. See UN (2012: paras. 25-27).

21 In drawing up a balance of the sanctions regime’s 15 years, the Team recognises that “*some commentary has been critical, arguing that the Security Council introduced a global targeted sanctions regime without providing sufficient safeguards to ensure that the underpinning evidence was robust or enabling those listed to challenge the basis for their listing*”. See document S/2014/770, *op. cit.*, para. 43.

for identifying a person as suspicious and, more particularly, interpreting what it means to be “associated” with Al-Qaida, the Taliban or Osama bin Laden²² (as the regime initially formulated it). And until 2006, there was no obligation to notify those sanctioned that they were included in the list.²³

This powerlessness was accentuated first by the impossibility, then the difficulties, of challenging inclusion in the List. Until 2002, no procedure was envisaged whereby the interested party or their representative could ask the government of their state of residence or nationality to petition the committee for a review of their case. Since this government was frequently the one that proposed the person be listed in the first place, a requirement was established in 2006 for states to create a single Focal Point for submitting the review requests to all Security Council sanctions committees. However, this is merely an administrative body, which ensures requests go to the right place and the pertinent notifications are made. It does not carry out an independent review of the case, nor does it have any decision-making power.²⁴ Furthermore, while the criteria for adding a name to the List had been approved in 2002, those for removing a name were only approved in 2006.²⁵

As the decisions of the Security Council and its subsidiary bodies cannot be subjected to judicial review (directly), the conflict over the sanctions regime’s legitimacy is transferred to the member states. In fact, responsibility for implementing international sanctions lies with the member states, especially those where the sanctioned person is domiciled, has their current accounts, and so on. They are the ones that have to take legal and regulatory measures to enforce “the freezing of financial deposits, suspension of credits and economic aid, the denial and restriction of access to foreign financial markets, trade embargoes on arms and luxury goods, bans on flights and the denial of international displacements, visas and studies abroad”, etc.²⁶ The Council has been at pains to reiterate the administrative and non-criminal character of these measures,²⁷ an appraisal with which, for example, the European Court of First Instance concurred in the Kadi case.²⁸ With this thesis, the Security Council is trying to side-step the minimum demands of due process by situating the sanctions in a pre-trial stage, with an administrative profile and temporary character. However, the consequences of the sanctions are sufficiently serious and ongoing to cast doubt on this definition, at least from the point of view of their practical effects.²⁹

In fact, one of the main obstacles the Security Council has come up against in applying this and other sanctions regimes has been the attempts on a national and international level to challenge them before the courts, while questioning the state laws and procedures that gave effect to the Security Council resolutions.³⁰ International case law initially avoided entering into the substantive issues, shielding itself behind the binding nature of Security Council resolutions on member states and the principle of presumed conformity with human rights standards.³¹ However, for a number of years now, a trickle of national and international judgements have gradually been overruling the national procedures in some states due to the lack of effective judicial guarantees regarding listing and delisting.³² This is the context in which the Security Council has been trying

22 Security Council Resolution 1390 (2002), para. 2. See Kirschner (2010: p. 589)

23 Security Council Resolution 1735 (2006), para. 5.

24 See Kirschner, *op. cit.*, p. 590-591.

25 Resolution 1735 (2006), *op. cit.*, para. 14.

26 See Gordillo (2012: p. 211)

27 See, for example, Resolution 2253 (2015), *op. cit.*, paras. 44 and 58: “Reiterates that the measures referred to in paragraph 2 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law”.

28 Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005.

Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities. Case T-315/01.

29 See Kirschner, *op. cit.*, p. 33.

30 See Reinisch, *op. cit.*, p. 855-858.

31 See the report of the special rapporteur, doc. A/67/396, *op. cit.*, para. 17.

32 Some of the most emblematic cases on a European level are *Nothing against Switzerland*, ECHR judgement of 13 September 2012, and *Kadi*, CJEU (Grand Chamber) judgement of 18 July 2013, both prior to the creation of the Ombudsman figure. As a more recent example, we may cite the ECHR Grand Chamber judgement in the case of *Al-Dulimi and Montana Management Inc. against Switzerland*, of 21 June 2016 (the Second Chamber judgement dates from 2013). It should be pointed out that the committee

to strengthen the due process guarantees on an international level and establish, since 2010 and exclusively within the framework of the 1267 Committee, an Office of the Ombudsperson,³³ with the scarcely veiled aim of ensuring its decisions gain legitimacy and may not be questioned by national jurisdiction for violation of the basic rights of sanctioned individuals.

3 The Security Council Ombudsperson from an ombudsman perspective

In this second section we will examine the Security Council Ombudsperson's role and work, and the configuration of the office, in order to decide whether this figure has the characteristic features of an ombudsman, as they have gradually been established in international practice, as well as the potential this new institution has for defending human rights within the framework of the Security Council sanctions regime.

3.1 Basic profile of an ombudsman on an international level

It is generally maintained that the figure of the ombudsman originated in Sweden in 1809 and gradually spread to the rest of the world from there.³⁴ In reality though, the old Swedish *justitieombudsman* is merely a forerunner to today's Ombudsman that could not only supervise the public administration but also the judicial power and whose decisions were binding. Both these features are completely alien to the contemporary Ombudsman institution. Moreover, until the Second World War, it was an institution that had only spread to the Scandinavian countries. Its unstoppable expansion to every continent only came about in the final third of the 20th century.³⁵

The current proliferation of this figure, to the United Nations as well, begs the question of what characteristics this institution requires for it to be considered a genuine public defence mechanism. Doctrinal sources,³⁶ resolutions issued by international organisations³⁷ and other reports³⁸ have shed some light on this question. By schematically following the study promoted by the Ombudsman of Catalonia, we can point to the following features:

a. From the point of view of the *configuration* of the institution, the international texts cited point to the necessity, and not just the opportunity, of having an independent body responsible for the public defence of human rights, as a requirement of a democratic state and the rule of law. As a general characteristic it is recommended that the essential features of the institution be regulated at the highest level, the constitution, so that they are not left to changing parliamentary majorities.³⁹ The purpose of the institution is, above all,

questioned in this case is the Committee established pursuant to Resolution 1518 (2003) concerning Iraq, which has no ombudsman's office. Summaries of the judgements dictated on national and international levels regarding listed individuals and entities may be found in the half-yearly reports issued by the 1267 Committee Monitoring Team. On this question, see also Sena (2009: p. 193-228).

33 It appears Denmark first proposed setting up an independent review mechanism in the form of an ombudsperson, when it joined the Security Council in 2005 as a non-permanent member. See Kirschner, *op. cit.*, p. 597.

34 Today the main international Ombudsman institution on a global scale, [the International Ombudsman Institute](#), brings together 170 institutions from more than 90 different countries [Consulted: December 2016].

35 See Reif (2011: p. 269-271).

36 Apart from Reif (*op. cit.*), mention must be made of the work by Ribó [et al], online [here](#) [Consulted: December 2016]. As regards the differences and similarities between the Ombudsman and the so-called "national human rights institutions", consult Steinerte and Murray (2009: p. 54-72).

37 Among the most significant on a universal scale we may cite: "The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights", UN General Assembly Resolution 69/168, of 18 December 2014. On a European scale: "Strengthening the institution of Ombudsman in Europe", Parliamentary Assembly Resolution 1959 (2013), of 4 October. There have also been pronouncements in the African ("OR Tambo Minimum Standards for Effective Ombudsman Institution and Cooperation", of 26 February 2014) and Latin American spheres ("Strengthening of the National Human Rights Systems of the Member States and Support for the Work of Defenders of the People, Defenders of the Population, and Human Rights Attorneys or Commissioners (Ombudsmen)", OAS GA Resolution, of 6 June 2006).

38 For example, the Council of Europe Venice Commission report: *Compilation on the Ombudsman institution*. CDL (2011) 079, 1 December. Or the *Wellington Declaration*, adopted unanimously at the 10th IOI World Conference (See [The International Ombudsman Institute website](#), *op. cit.*).

39 These sub-state ombudsmen should be regulated at a statutory or equivalent level.

the protection and promotion of human rights. Naturally, the traditional monitoring of “maladministration” is maintained but for decades now the focus of the Ombudsman’s work has been in the area of human rights recognised on a national and international scale. Moreover, the Ombudsman is seen as a magistrate of persuasion whose resolutions have the value of a recommendation, with a strength based not on any legally binding character but on the authority that the rigour and prestige of the office gives them.⁴⁰ Finally, one of the reasons for the spread of the institution lies in the fact that they have been established on a regional and local level as well as with various specialisations (for example, the energy ombudsmen or mediators in the United Kingdom, France and Belgium), a trend that is generally applauded by international bodies but not without criticism.⁴¹

b. A second basic trait defining the Ombudsman figure is *independence*, from the point of view of the institution as well as the person with the mandate. This requirement means high personal qualifications are demanded of the post holder and they should not be a member of any political party. The Ombudsman’s appointment must be accompanied by guarantees that can only be provided by the representative institution of popular sovereignty (legislative assembly or similar) and qualified majorities that ensure it is not an imposition by the government or just the parties that support the appointment. It is also important, from the point of view of guaranteeing the institution’s independence, that it has sufficient human and budgetary resources as well as full organisational autonomy, since formal independence often clashes with the effective lack of real possibilities for taking action.⁴²

c. Thirdly, with regard to *competences and areas of activity*, we have already pointed out that the core of the Ombudsman’s activities lie in monitoring public administration in general and whatever affects citizen rights in particular, clearly excluding those matters that may be subject to legal scrutiny. Nevertheless, it is increasingly common to see Ombudsman offices with competences in relation to private companies that provide services of public or general interest. Either way, the Ombudsman can act on his or her own initiative, or at the request of another party and, while their resolutions may not be legally binding, there has to be a legal duty for all administrations under their supervision to collaborate with them. A legal duty that means an obligation to respond to their requests for information, provide access to all kinds of documents and take into account the good faith of their recommendations.

3.2 The Security Council Ombudsperson: configuration, functions and how the office operates

As a result of the criticisms received regarding the shortcomings, in terms of due process and transparency, in including or removing names from the Consolidated List, the Security Council has gradually introduced improvements within the framework of Resolution 1297 (1999) which, in due course, led to the establishment of the Office of the Ombudsperson under Resolution 1904 (2009), of 17 December.⁴³ Its functions and the way it works have been revised on several occasions, notably by resolutions 1989 (2011) and, more recently, 2253 (2015). To date the Office has had two incumbents: Kimberley Prost (2010-15) and Catherine Marchi-Uhel (from 27 July 2015).⁴⁴

Configuration and independence

Resolution 1904 (2009), established the Office of Ombudsperson for a period of 18 months. Since then, its mandate has been renewed for several similar periods, up to Resolution 2253 (2015). At that time (December

40 See Ribó [*et al.*], *op. cit.*, p. 10.

41 The European Congress of Local and Regional Authorities, in its Resolution CPLRCE 80 (1999), pointed to the dangers without rejecting specialisation: “The appointment of ombudsmen whose competence is limited to a specific field (health, telecommunications, etc.) or to a specific group of persons requiring protection (persons with disabilities, immigrants, minorities, etc.) is no alternative to the Ombudsman with general competence. There is no objection in principle to the appointment of these specialized ombudsmen in addition to other ombudsmen. However, there is a need to avoid excessive proliferation which might interfere with the functioning of a general system for the protection of human rights.” (Principle 15, quoted in Ribó [*et al.*], p. 14)

42 See *Wellington Declaration*, *op. cit.*, para. 10.

43 See in particular paragraphs 20 to 27 and Annex II.

44 See *Report of the Office of the Ombudsperson, submitted pursuant to UN Security Council resolution 2253 (2015)*. Document S/2016/96, of 2 February, para. 2.

2015), its existence was “assured” until 2017 and the resolution extends that for a further 24 months, until December 2019. The purpose of this measure was to give the Office a degree of stability and legal security, although the Ombudsperson’s temporary character in the Security Council framework still leaves it open to criticism.

This lack of stability is linked to the new institution’s legal rank. In contrast to recommended international practice, the Security Council Ombudsperson does not have a “constitutional” rank (United Nations Charter) but an “organic” one (Security Council resolution). Given that reforming the Charter is, in reality, an illusion, there is probably no alternative to an appointment by means of a resolution. However, it seems reasonable to demand the Office is at least given the permanent character that so many other UN subsidiary bodies have, and at least while the 1267 Committee remains in existence (or the sanctions committees in general if, as we shall propose, the Ombudsperson’s powers are extended to the whole UN sanctions regime). This way, it would not be possible for the Office to lapse merely due to the passage of time. Its termination would need a new resolution, with the enhanced majority required by Security Council decisions.⁴⁵

The fact that the UN Secretary-General appoints the Ombudsperson does not help to ensure the latter’s independence either. Admittedly, there are no obvious alternatives and the situation whereby the Security Council itself nominated the holder of an office set up to monitor it has wisely been avoided. Once the Security Council had been discarded, the obvious candidate for designating the Ombudsperson was the General Assembly, where all the UN member states are represented on an equal footing and which is the closest to a “parliament of man” that the international community has.⁴⁶ Alternatively, and due to the subject matter, the Human Rights Council could have been given the task. This is also an intergovernmental body, albeit with a restricted membership. Instead it is the Secretary-General who nominates the Ombudsperson, merely after listening to the sanctions committee established by Resolution 1267.⁴⁷ In that regard, and without casting any doubt on the capacity or integrity of the two people who have occupied the post until now, it is significant that both should come from first-world countries and that the second is even a national of a permanent member of the Security Council.⁴⁸ The General Assembly’s participation could drag out and politicise the appointment process but it should not be forgotten that it is the most representative body of the international community and the Charter also gives it a role in maintaining international peace and security (Article 11)

The fact that it is the Secretary-General who appoints the Ombudsperson is evidence of the latter’s dependence on the administrative head of the United Nations. This dependence is increased if we take into account the Ombudsperson is taken on as a “consultant” and their work is monitored and evaluated by the Secretariat. The incumbent has no authority with regard to the Office staff or budget, or managing its resources, which are “assigned”, and therefore controlled by the Secretariat.⁴⁹ In fact, in her last report and letter on leaving the post, the first Ombudsperson made clear her concern that there were still shortcomings in the “contractual, administrative and organisational” arrangements, which posed a threat to “the independence and sustainability of the mechanism”.⁵⁰ The budgetary shortfalls which beset the UN in general have reached such a point that

45 In the current situation, any permanent member could veto the extension of the Ombudsperson’s mandate. If, on the other hand, a resolution gives the Office a permanent character, it would take a new resolution to replace it and, if one permanent member did not agree (and vetoed the proposal), that would be enough to prevent it.

46 Title of the work by Paul Kennedy *The Parliament of Man. The Past, Present and Future of the United Nations*, 2007.

47 See *Letter dated 13 July 2015 from the Secretary-General addressed to the President of the Security Council*. Document S/2015/534, where literally it says: «*I wish to inform you that, after consulting the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, I have appointed Catherine Marchi-Uhel (France) as Ombudsperson.*»

48 The bibliography of the current office-holder, who is French, can be found [here](#) [Consulted: December 2016]. The previous office-holder, a Canadian, was also a judge in her own country.

49 See the working document *Fair and clear procedures for a more effective UN sanctions system. Proposal to the UN Security Council by the Group of Like-Minded States on targeted sanctions*, 12 November 2015 [Consulted: December 2016]. The document’s author states are Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, Netherlands, Norway, Sweden and Switzerland.

50 See document S/2015/533 and the letter dated 13 July 2015 on [the Office of the Ombudsperson to the ISIL \(Da’esh\) and Al-Qaida Sanctions Committee’s website](#) [Consulted: December 2016].

it is difficult to obtain quickly full translations of the information provided by states and petitioners, or which has to be sent to them.⁵¹ The new Ombudsman also stressed the institutional deficiencies of her Office in the report she submitted in August 2016.⁵²

From an institutional set-up point of view, therefore, the figure of the Security Council Ombudsman has some very notable deficiencies, with a clear impact on the formal independence of this mechanism. It appears these shortcomings have not prevented the institution from functioning reasonably effectively in its first years but the fact that its prestige and way of working could be called into question at any time still poses a threat.

Functions and how the office operates

In the context of the Security Council's system of smart sanctions, the task of the Ombudsman and their Office may be regarded as relatively modest. It is *only* concerned with the stage of delisting an individual or entity that has been included on the Sanctions List by the 1267 Committee (and *only* by that committee). As we have seen above, until the position of Ombudsman was created in 2009, delisting requests were sent to a national Focal Point which then processed them, without studying them or making any recommendation to the Committee. This continues to be the practice for the other sanctions committees, including the Taliban 1988 Committee, while any individual or entity included in the 1267 Committee List has the option of submitting a petition via the Ombudsman.

Once the request to be removed from the Consolidated List has been received, a procedure that essentially consists of three stages gets under way.⁵³ First, the Ombudsman has to ask for official information from all the relevant actors, i.e. from “the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant United Nations bodies, and any other States deemed relevant by the Ombudsman”.⁵⁴ As happens with national ombudsmen, the “administration” (the UN and the member states in particular) have a duty to collaborate with the Ombudsman and provide them with all the information requested, even if it is of a confidential nature.⁵⁵ This is a key moment in the process from the point of view of securing fair and equitable treatment for the petitioner. But numerous commentators and the Ombudsmen themselves have made it very clear they have faced difficulties with some states in gaining access to relevant information, especially intelligence.⁵⁶ In an effort to make states comply with this duty to collaborate, the Office of the Ombudsman has reached bilateral agreements with 17 countries, all but one of them in the Western orbit, while it works with the rest on an ad hoc basis when necessary.⁵⁷

Either way, full access to complete and reliable information is one of the clearest proofs that an ombudsman institution is working correctly and on this point, as on others, the Security Council Ombudsman still has significant shortcomings.

51 See Eckert and Biersteker (2012: p. 22)

52 See *Report of the Office of the Ombudsman, submitted pursuant to Security Council resolution 2253 (2015)*, document S/2016/671, 1 August 2016, especially paragraphs 36-45.

53 These stages are defined in Security Resolution 2083 (2012). They are also explained in [the Procedure section](#) of the Office of the Ombudsman website [Consulted: December 2016].

54 See Resolution 2253 (2015), *op. cit.*, Annex II, para. 2.

55 However, the terms used by the Security Council resolutions could be stronger. For now, the Security Council only “*strongly urges Member States to provide all relevant information to the Ombudsman, including any relevant confidential information, where appropriate, encourages Member States to provide relevant information, including any detailed and specific information, when available and in a timely manner*” [Resolution 2253 (2015), para. 60; highlighted in the original].

56 See Eckert and Biersteker (2012: p. 22 and 24. See also the report by the Special Rapporteur Ben Emmerson at A/67/396, para. 38. This has been challenged more recently by Hovell, who thinks that the states are collaborating with the Ombudsman in a normal way (and have incentives to do so, since the lack of information on a case can lead the Ombudsman recommend delisting). See Hovell (2016: p. 28-29).

57 They are Austria, Australia, Belgium, Costa Rica, Denmark, Finland, France, Germany, Ireland, Liechtenstein, Luxemburg, New Zealand, Netherlands, Portugal, Switzerland, United Kingdom and United States. See document S/2016/96, 2 February, *op. cit.*, para. 16.

In the second stage of the procedure, called “dialogue”, the Ombudsperson has to transmit the essence of the information obtained to the petitioner and give them the opportunity to be heard. This Ombudsperson function is a bonus compared to the traditional judicial process. It makes for a more versatile and proactive figure who can travel to the country of residence, or at least communicate by telephone or other means, with no formalities or costs for the petitioner and with greater speed and diligence than any judicial procedure.⁵⁸ It is also a stage where a lack of material means at the Office of the Ombudsperson (travel and means of communication; translation of documents and interpreters for personal interviews) could frustrate the expectations generated by this institution.

To conclude this stage, the Ombudsperson draws up a comprehensive report with a recommendation for removing an individual or entity from the List or not. Surprisingly, the petitioner has no access to this document, something that the mandate holders themselves and the states that support it have criticised.⁵⁹ This lack of transparency is particularly serious when the Ombudsperson recommends maintaining a listing, because that prevents the petitioner or their representatives from knowing the reasons so they might prepare a better defence in the future. Increasing the transparency of the regime in general, but above all that of the Ombudsperson in particular, is a widespread demand among analysts.⁶⁰

In the final stage, the Ombudsperson has to submit their report to the Committee in writing and present it in person at an official session. If the Ombudsperson recommends retaining the person or entity on the List, this decision is taken by default, although theoretically it would be enough for one member of the Committee to dissent to force a formal decision for or against.

If the Ombudsperson recommends removing an individual or entity from the List, the petitioner is automatically removed, unless the Committee decides by consensus within a period of 60 days that they should stay on it. This practical unanimity seems very unlikely but there is an alternative scenario: if just one member opposes removing the name, the committee chairperson has to submit the question to the Security Council, which has a period of 60 days to take a decision. At this stage, the consensus of all the members would not be necessary, only the usual majority of nine votes in favour, including the affirmative votes of the five permanent members.

The Office of the Ombudsperson publishes its six-monthly reports to the Security Council, which include information on the Office, its procedures and the cases studied, online on its own website.⁶¹ On 1 December 2016, the Ombudsperson had concluded 65 cases, after drawing up and presenting the corresponding comprehensive reports. In most cases (52) the recommendation was to delist the petitioning person or entity. In all these cases (as when retention on the list was recommended) the 1267 Committee accepted the Ombudsperson’s recommendation.⁶²

Therefore, despite some predictions that it would have little effect,⁶³ the Office of the Ombudsperson has allowed the system to become more accessible and provide more safeguards. More than the institution as such, it is the sanctions system that continues to receive criticism from those authors who decry the fact that, despite the improvements it implies in comparison with the previous situation, the Office’s intervention does not provide petitioners with any legal protection, nor does it equip the procedure with the essential elements

58 See Hovell, *op. cit.*, p. 24.

59 See *Fair and clear procedures for a more effective UN sanctions System...*, *op. cit.*, p. 7. Apart from the legal insecurity, the failure to publish the comprehensive reports that have been drawn up makes it difficult to know what the Office’s doctrine is and, as a consequence, to submit viable cases to the Ombudsperson. See document S/2016/96, 2 February, *op. cit.*, para. 36.

60 See *Fair and clear procedures for a more effective UN sanctions System...*, *op. cit.*, p. 7. Also Eckert and Biersteker, *op. cit.*, p. 21-22.

61 See [The Office of the Ombudsperson to the ISIL \(Da’esh\) and Al-Qaida Sanctions Committee’s website](#) [Consulted: December 2016]. The list of Security Council reports can be found [here](#) [Consulted: December 2016].

62 The fact that the recommendations were 100% effective does not mean there have not been controversial cases, when some committee members disagreed with the Ombudsperson’s recommendation. See Eckert and Biersteker, *op. cit.*, p. 18 and 20. The existence of these disagreements, and the fact there is no case where a member state has taken the question to the Security Council, are proof that the Ombudsperson’s recommendations have quickly acquired legitimacy and authority.

63 See Kirschner, *op. cit.*, p. 602.

for making it a *fair trial*.⁶⁴ These criticisms, including those that refer to the non-binding character of the recommendations,⁶⁵ show a clear lack of understanding of what an ombudsman is, that under no circumstances can this figure replace the need for an independent judiciary in democratic systems. Furthermore, as some authors point out, even though from a formal point of view the Ombudsperson process is not the equivalent of a judicial recourse, it “offers equivalent elements that go a long way to address the due process concerns and, in essence, constitutes a *de facto* judicial review”.⁶⁶ Not only that, for some the Ombudsperson process is “superior to internationalized judicial frameworks in its capacity to achieve the goals” of a public interest justice model.⁶⁷

Rather than deciding whether the Ombudsperson is the equivalent or not of a guarantee that meets due process demands, we believe the challenge lies in exploiting the potential this institution offers. In our opinion, the Ombudsperson’s mandate should be gradually extended to the other Security Council sanctions regimes, with the consequent increase in human and budgetary resources.⁶⁸ And the Office functions could be expanded to evaluating requests for humanitarian exemption from sanctions and providing assistance to people or entities that have been delisted but, due to a lack of diligence, continue to be subject to sanctions in one or more states.⁶⁹ The 1267 Committee currently has these powers via the respective Focal Points but it seems clear that the Ombudsperson’s intervention would make the decisions that need to be taken one way or the other more neutral. At the same time, the possibility of the Ombudsperson acting on their own initiative, and not just at the request of a third party, could be explored as part of these enhanced powers. It is not an accident that the most vulnerable people are often the ones that are unaware there are mechanisms to protect their rights or have no material access to them.

4 Final considerations

The establishment of the Office of the Ombudsperson within the framework of the *1267/1989/2253 Committee* sanctions regime has significantly improved the safeguards of the people and entities affected, although the system as a whole still has deficiencies from the point of view of a fair process.

Focusing on the figure of the Ombudsperson, it has to be admitted it has worked well in practice during these first few years. All the Ombudsperson’s recommendations have been accepted and the cases under way advance without unjustifiable delays, a balance sheet that national ombudsmen would in general like to have. Despite all that, various aspects relating to the configuration and functions of this mechanism need improving to shield it from spurious political interests and ensure it works well beyond the good will of the various states.

These improvements should focus on enhancing the Ombudsperson’s functional and material independence. First, the institution should be turned into a permanent body with a more democratic method of electing the mandate holder. Second, it is essential to equip the office with sufficient, stable resources so it can carry out its role. No less important is the need to have access to all the documents required for the cases to be processed correctly and, within the necessary confidentiality limits regarding intelligence information, the whole procedure needs to be more transparent.

Finally, it would be necessary to expand the Ombudsperson’s functions and mandate to exploit their potential to the full. On the one hand, to give them a greater presence in safeguarding the rights of people and entities subject to sanctions, i.e. enable them to act on their own initiative and do so in other stages and for other

64 Ibid, p. 599. Also, Willis, *op. cit.*, p. 736; Mirshahi, *op. cit.*, p. 28.

65 It would be difficult to create a body with the capacity to issue resolutions that are binding on the Security Council within the framework of the United Nations Charter. For that reason, Special Rapporteur Emmerson proposed that the Security Council should approve a resolution whereby it voluntarily committed itself to abide by the conclusions of an “independent arbiter” (which could be the Ombudsperson). See document A767/396, *op. cit.*, para. 23.

66 See Eckert and Biersteker, *op. cit.*, p. 24.

67 See Hovell, *op. cit.*, p. 23.

68 See *Fair and clear procedures for a more effective UN sanctions System...*, *op. cit.*, p. 13; Eckert and Biersteker, *op. cit.*, p. 25.

69 See *Fair and clear procedures for a more effective UN sanctions System...*, *op. cit.*, p. 8-9.

duties, not just the procedure of removing names from the Consolidated List. On the other hand, to bring the level of safeguards sanctioned people have in line with other Security Council sanctions regimes. The unique nature of the *1267/1989/2253 Committee* regime, which is not limited to a specific state, is not a sufficient argument for other people suffering similar sanctions imposed by other committees not having an international safeguard such as the Security Council Ombudsperson.

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