

**Briefing of the Ombudsperson at the Security Council's Open Debate
on "Working Methods of the Security Council" (S/2014/725):
"Enhancing Due Process in Sanctions Regimes"**

Madam President, Members of the Council, Excellencies,

I thank you Madam President for the opportunity to address the Security Council at this open debate on the topic of enhancing due process in sanctions regimes. I hope that reflections based on my experience as Ombudsperson will help to inform the discussion today.

I will touch on three issues arising from the concept paper beginning with the question of extension of the mandate of the Ombudsperson to other sanction regimes.

Extension

Requirement of international law

While international law in this area continues to evolve, from experience one point is clear. A review of the relevant jurisprudence, as well as interaction with human rights officials, courts and bodies conveys a clear and consistent message. The imposition of targeted sanctions which directly affect the rights of individuals and entities, without the availability of an independent review mechanism which can deliver an effective remedy, is a practice inconsistent with fundamental human rights obligations. In this context, the Ombudsperson mechanism has been criticized in principle for not going far enough, in particular as the decisions of the Ombudsperson are not fully binding. However, it has not been disputed that in practice, if the recommendations of the Ombudsperson are followed, as they have been, the mechanism provides a fair process and can and does deliver an effective remedy. However, it remains a procedure applicable only in the context of one targeted sanctions regime. The ramifications of this given the requirements of Article 1 of the UN Charter in terms of international law and human rights obligations is evidently a matter for the consideration of States and the Security Council.

No rationale for distinction

A second and related point on the same issue is that on a principled basis, there is no evident rationale as to why an independent review mechanism is made available to one set of individuals facing targeted sanctions but not to others. This is particularly the case when the matter is considered from the perspective of those subject to the sanctions. I have been exposed to this perception on several occasions when I have been contacted by individuals listed through other regimes and must advise them that the mandate of the Ombudsperson is not applicable. The inequality of this was made clear in a case a few years back where an individual was delisted from the Al-Qaida list and immediately relisted on another sanction regime. In one context he had access to a review mechanism and in the other he did not. Of course the other regimes benefit from the Focal Point mechanism which is obviously helpful to affected individuals. However what is clear at

law is that even with improvements, the Focal Point mechanism by its very nature and structure does not have the fundamental characteristics necessary to serve as an independent review mechanism which can deliver an effective remedy.

The point is made that the justification for the distinction arises from the differing nature and distinct criteria of the other regimes and the need for flexibility in order to employ the sanctions effectively against the threat. For the consideration of this point I simply wish to emphasize the limited role of the Ombudsperson. Responsibility to decide upon and interpret the criteria for listing rests exclusively with the Security Council and its Committees. The role of the Ombudsperson is solely to analyse the facts in individual cases to determine whether it supports to the standard that the person or entity meets the criteria which has been set.

Fair process is good for implementation

The final point on this issue is one which in my view rarely gets sufficient attention but it is continually made clear to me in my practice as Ombudsperson. Fair Process is supportive of, essential to effective implementation of the sanction measures. Repeatedly I have heard from government officials, legislators, judges about the challenges which they face in implementing these significant measures against their citizens, their residents without access to the underlying information as to the basis for the measure and –most importantly – without the availability of independent recourse. And these are not just legal challenges in the courts. There are difficulties politically and in terms of policy in developing, adopting and applying the necessary legislation and related measures for implementation.

These challenges are not new of course but now however – in the context of the Al-Qaida regime – there is a response. Reference can be made to the existence of a mechanism at the international level which can consistently address these fundamental concerns. That this is helpful to implementation is not just an abstract proposition. Recently I have seen an example where the information communicated to a State about the Ombudsperson process during one of my outreach activities was instrumental in helping the officials of that State overcome practical obstacles to implementation.

As to the legal challenges, there are no measures at the international level or otherwise which can eliminate the potential for judicial intervention and appropriately so. However, if experience with the Al-Qaida regime is any indication the introduction of the fair process mechanism at the international level can significantly reduce the number of domestic and regional court challenges, thereby decreasing the opportunity for potential conflict between obligations. It appears clear that cases are filtered off to the Ombudsperson process and as well, the fundamental unfairness – which proved such a fertile ground for the legal challenges – is no longer present.

In sum, the Al-Qaida experience demonstrates that fair process is good for effective implementation of sanctions.

Operation of the Office of the Ombudsperson

I turn to the second point I wish to address briefly which is the operation of the Office of the Ombudsperson within the Al-Qaida regime. As stated here today and repeatedly in my written reports to the Security Council, it continues to be a robust mechanism which in practice meets the fundamental requirements for fair process. However there remain several challenges, which – save for one – I will leave to my written reports to the Council.

The one issue is that raised in the concept paper – the provision of reasons with respect to the decisions taken on delisting requests. I emphasize that this problem does not in any way relate to questions of confidential or classified information which would never be disclosed in the reasons.

While many improvements have been made, the reality remains that the Ombudsperson process is not a transparent one. While the Petitioner receives much needed information about the case against him through the dialogue phase, the only view into the actual decision making process is through these reasons. The necessity for reasons in both retention and delisting cases has been recognized by the Council in that successive resolutions have mandated that they be provided. This is clearly in recognition of the fact that a reasoned decision is what distinguishes a fair process from an arbitrary one.

But despite the requirements of the resolution there remains a reluctance to provide the factual detail in the reasons which is essential to make them meaningful. The problem is less acute for retention cases though even in that context there can be significant resistance to the disclosure of the full reasoning which is so critical to defend the decisions.

For delisting cases the view is expressed that the petitioner has received his “fair process” in that the remedy he sought has been granted. With respect, fair/due process can never be assessed based on results or outcome. In fact it is the contrary, fair process means that regardless of the result, fair and reasonable steps were followed in reaching the decision. And in this particular case a reasoned decision is what distinguishes a fair process from an arbitrary one. It follows that substantive reasons with factual information – as a part of fair process – should be provided regardless of result as mandated by this Council.

It also merits noting that given the confidential nature of the process otherwise, these reasons provide a rare opportunity for the Security Council and its Committee to demonstrate to the Petitioner and beyond what is factually the case: That decisions within the targeted sanctions process are reasoned and fair and based on underlying information. That can only serve to enhance the credibility and strength of the regime. Once again it is an example where improved fair process by way of more detailed and substantive reasons would aid the effectiveness of sanctions.

My final point relates to the implementation of the Ombudsperson regime as established by the Security Council and I can be brief. While the Office of the Ombudsperson continues to deliver on its

mandate and to operate independently as envisaged by the Security Council it does so based on the good will and efforts of the individuals within the Office of the Ombudsperson and within the Secretariat. Structurally the Office of Ombudsperson does not exist and the administrative and contractual arrangements supporting it in practice do not provide institutional safeguards for independence. Given the extraordinary steps which the Council has taken to introduce an independent review mechanism into a targeted sanctions regime in aid of fair process, it seems imperative that it be implemented by the Secretariat in a manner which ensures its sustainability as such.

Madam President, recently it was said that I am obsessed with fair process. Upon reflection I accept that categorization and I think it is a characteristic which this Council would expect from the Ombudsperson for the Al-Qaida Sanctions regime. More importantly for the discussion today, it is a focus motivated by the fact that improved due process has a dual effect in the context of targeted sanctions. It evidently enhances the protections for individual rights. At the same time, it strengthens the credibility of the regime and contributes to improved implementation of the sanctions measures, measures the ultimate aim of which is to safeguard our collective rights to life and security. Cumulatively I believe these protections are well worth obsessing about.

Again I thank you for the opportunity to contribute to this discussion today.