

The Office of the Ombudsperson; a Case for Fair Process

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While there is much discussion and academic writing about the Office of the Ombudsperson as a concept, today I want to address the actual practice of the Office and how it works “on the ground”. Consistent with the theme of the seminar, I will look at the Office in the context of the broad question as to whether it is assisting in bringing rule of law and fair process to a targeted sanctions regime. I will also touch on some of the challenges faced by the Office.

Meeting the Fair Process Fundamentals

One of the first issues that I faced as Ombudsperson, and I don’t think it is a question that the courts have addressed at all, is how to define fair process in the unique context of Security Council sanctions. As we all know, fair process is always contextual. The rights of individuals in a criminal case are very different from their rights in an administrative case, even domestically. And as between legal systems, the content and contours of fair process can vary significantly.

So in implementing the Security Council resolution on the Office of the Ombudsperson, I started by trying to define the fundamental elements of fair process which were applicable. I relied on what the Secretary-General had said about this issue¹ and drew on national system concepts of fair process. Through that I arrived at the following formulation of relevant precepts.

First, the Petitioners must know the case against them as far as possible. Secondly, they must have an opportunity to answer that case and to be heard by the decision-maker. Thirdly, there must be some form of independent review. I do not believe this must be in the form of traditional judicial review but am rather of the opinion that other forms of objective review are sufficient, provided they constitute an effective and independent assessment of the information. Fourthly, the decision to delist or not to delist must be a reasoned one. Finally, it must be an overall fair and timely process. Broadly speaking, those are the key principles I identified.

So the question becomes: are the procedures of the Office of the Ombudsperson, as developed in practice, in conformity with these fundamental principles?

Knowing the case

In terms of ‘knowing the case’, I seek to gather all the relevant material through the initial information gathering phase. And this is an issue on which resolution 1989 (2011), which last June renewed the Ombudsperson mandate (with innovations), has been critically important. From the beginning of my mandate under resolution 1904 (2009), I made it clear that I would not accept answers from States which pointed to “undisclosed information” as a basis for continued listing. I have emphasized all along that fairness dictates that the listing be assessed on the information gathered through the Ombudsperson process and disclosed to the Petitioner with the exception of

¹ See comments by the United Nations Legal Counsel on behalf of the Secretary-General, United Nations Security Council’s 5474th Meeting (22 June 2006), UN Doc S/PV.5474 (2006), p.5 (reading from a letter and annexed non-paper from the Secretary-General to the Security Council, setting out his views concerning the listing and delisting of individuals and entities on sanctions lists).

any confidential material. Simply put, it cannot be a fair process if the case against you is known only in part.

Resolution 1989 (2011) is important in this regard because it adds considerable weight to my requests for information. I now have a recommendation power which – in the case of delisting – will prevail in absence of a consensus position of the Committee to the contrary or a Security Council reference and vote. As a result, if a State decides not to provide full information in response to my request, the missing material will not form part of the case which is analysed by me nor will it be considered in the formulation of my recommendation. This aspect of resolution 1989(2011) serves as a powerful ‘motivator’ for the production of information by States. Further the failure to provide information does not then ultimately operate to the detriment of Petitioners. Subject to any confidential material submitted, the case made known to them will be the same case which forms the basis for the recommendation. And to date, the ultimate decision taken has been in conformity with that recommendation.

Answering the Case

The principle of knowing the case clearly intersects with the next precept – having an opportunity to answer the case presented. After the information gathering process, I move to the dialogue stage, where I engage with Petitioners. I provide them with a description of the information gathered and the parameters of the case, and offer an opportunity for them to exchange with me and convey their “answer” to the information. In most instances, this interaction is by way of a personal, face to face meeting, as I am encouraged to do so by the Security Council. This exchange also allows me to follow up on issues, ask specific questions and generally assess credibility. The dialogue not only fulfils the important principle of responding to the case, but it also adds to the overall fairness of the process and the perception of the same. It gives petitioners the occasion to express themselves on the situation they face.

Independent Review

The information gathered through the first two phases (from the States and from the Petitioner) is then compiled in the Comprehensive Report for the Al-Qaida Sanctions Committee. What is very important in this regard is that this “levels” the information field within the Committee. While previously only one or two states might have had information about the case, now all fifteen members have access to the same information. It is clearly information available to the Committee as a whole. On the basis of the Comprehensive Report and the information and analysis in the same, I then make a recommendation to the Committee. Through this process, the underlying information for the ultimate decision is subject to an independent and objective review, albeit one that is quite distinct from traditional judicial review.

Reasoned Decision/Timely Process

As indicated previously, if I recommend delisting, the person or entity will be removed either because there is no objection,² or in sixty days through the trigger mechanism, absent a consensus

² The Al-Qaida Sanctions Committee Guidelines, as amended on 30 November 2011, provide that “In cases where the Ombudsperson recommends delisting in his/her Comprehensive Report, and after the

overturn or a Security Council reference. If I recommend against delisting, the person will remain on the list.³

Thus, the resolution provides for various circumstances where a delisting petition might be rejected – on the basis of my recommendation, through a Committee consensus decision, or by a Security Council vote.

The resolution also states that where a delisting petition is rejected, the Committee shall provide reasons for that decision.⁴ This comports with the requirement for a reasoned decision and it also provides a means to assess the overall reasonableness of the process in any particular case.

However, when a decision is made to delist, the resolution does not require the provision of reasons. This is an unfortunate omission in terms of the fair process requirement for a reasoned decision. On a practical level, reasons also serve to promote consistency, fairness and transparency in the process as a whole. To its credit, even though not mandated, the Committee has developed a practice of giving reasons in instances where the decision is taken to delist. I forward those reasons on to Petitioners. This is important for the fairness of the process. However, there is still progress to be made: reasons should be available quicker and be more detailed. It would also assist if the requirement for reasons, in the case of a decision to delist, were included in the resolution itself.

Finally, the whole process is governed by strict timelines which have been consistently adhered to in each of the relevant cases. This contributes to an overall fair and timely process.

Cumulative Fair Process

Looking at all of this cumulatively, in my view there is an argument that the delisting mechanism introduced through the Office of the Ombudsperson is – at least in practice – fulfilling the fundamental requirements of a fair process. However only time and the views of those with the authority to decide, can ultimately determine if this will be sufficient in the specific context of targeted sanctions by the Security Council.

Challenges

Despite this apparent progress, important challenges remain.

Access to Information

First of all, access to information is a perennial issue. I am still facing significant hurdles in trying to get access to confidential or classified material. I have managed to enter into arrangements with

Committee has completed its consideration of the Comprehensive Report, the Chairperson will circulate the delisting request with a no-objection period of 10 working days.” (http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf, p.10, para. 7(gg)). If no objection is raised in this period, the listed name will be removed.

³ The only recourse for a State which disagrees with a recommendation to retain the listing is for that State to make a delisting request which will begin a separate process; no recourse is available through the Ombudsperson process.

⁴ See Paragraph 13 of Annex II to resolution 1989 (2011). As this obligation is tied to the Committee it does not appear to extend to a decision taken by the Security Council.

eleven states⁵ and Austria has opted for a formal agreement with the United Nations, as represented by the Office of the Ombudsperson, for the sharing of such information. However, I have still been unable to reach agreement with the United States, a frequent Designating State. This lack of accord is worrying in that I may be required to make recommendations on the basis of information which is not complete and thus does not tell 'the full story'.

Standard

A second challenge for the Office relates to the standard used to evaluate the case (sufficient information to provide a reasonable and credible basis for the listing presently). This standard was chosen because, while it does not come from any particular legal system, it contains concepts familiar in all systems. Also, it is intended to balance the individual rights to privacy, freedom of movement and property with the right to life and security and the obligation on the Security Council to protect, all of which are implicated in the system for targeted sanctions.

I remain satisfied that the standard, as formulated, is workable and appropriate to the specific international context. The problem, however, is one of application and the question as to what is "sufficient" and "reasonable and credible". I believe that a significant part of the difficulty lies in the fact that there are fundamental variations between legal systems, and even within them, as to what type and amount of information is sufficient to provide a reasonable and credible basis. The recent *Kadi* decision in the United States⁶ illustrates this problem in that the US judge, operating under the applicable law, took a vastly different approach to the assessment of information than that undertaken in the *Kadi* case when it was considered by the European Court of Justice (ECJ).⁷ Even taking into account that the US judge was party to information not available to the ECJ, it is still evident that there are different expectations as to sufficiency. This is but one illustration as to the challenges in applying an acceptable standard at the international level. Increasingly, I am of the view that the variation and difference in approach is of such a nature that it is never going to be overcome or solved, and can only be managed.

Fairness Concerns

Another challenge in terms of the fairness of the process is the possibility of a consensus overturn or a Security Council override of my recommendation. These potential actions built into the process are very concerning, particularly in the latter instance where it is unlikely that the decision would be accompanied by any reasons. Not only is that of general concern, but also in the absence of reasons there is no way to assess whether the decision was taken on the basis of the information before the Ombudsperson or whether it was influenced by other factors, including political factors.

The comfort in this regard however is that to date, those powers remain only theoretical in nature, since the Committee has not overturned any decision by consensus and there have been no

⁵ In order of adoption - Switzerland, Belgium, United Kingdom, Costa Rica, New Zealand, Germany, Australia, Portugal, Liechtenstein, France and the Netherlands.

⁶ U.S. District Court, D.C., Case 1:09-cv-00108 (19 March 2012).

⁷ *Kadi and al Barakaat International Foundation v. Council and Commission*, joined cases C-402/05 P and C-415/ P (Kadi I); *Kadi v. European Commission*, case T-85/09 (Kadi II) (pending).

references to the Security Council. Moreover, practice has indicated that it is very difficult to achieve the consensus required and there is, as well, an appropriate reluctance to utilize the Security Council reference power.

Relationship to Other Sanctions Regimes

One final challenge of note is the relationship between this sanctions regime and other sanctions regimes. On this issue, the question as to which regimes the Ombudsperson process should be attached to is evidently one for States and the Security Council to decide and not for me to comment upon. However, I would simply highlight the obvious fairness issues which arise from the fact that a remedy is made available to one set of sanctioned individuals but not to others. In this regard, the *Jim'ale* case is highly instructive. Mr. Jim'ale was listed by the Al-Qaida Sanctions Committee (then the Al-Qaida/Taliban Sanctions Committee) in 2001. On 17 February 2012, he was delisted after a recommendation by the Ombudsperson to the Committee to this effect. On the very same day, he was listed under the Somalia-Eritrea sanctions regime, with no recourse to the Ombudsperson mechanism. The fairness implications in this situation are obvious. In my view, it will not be long before challenges are brought with respect to other regimes on the same basis as that previously seen in the context of the Al-Qaida Sanctions regime.

Conclusion

In concluding, I think it only fit to emphasize the positive. The issue as to whether the Ombudsperson process is sufficient to address the fundamental fairness concerns surrounding the use of targeted sanctions in the Al-Qaida sanctions regime still remains to be decided. Furthermore, it is evident that several important challenges exist in terms of the practical work of the Office of the Ombudsperson. Nonetheless, one cannot help but note the tremendous gains made in terms of fair process over the past two years. There is now a clear recourse for listed persons and entities, which addresses the fundamental components of a fair process and provides for the intervention of an objective and independent third party in the overall assessment of the information in the case. In terms of protecting rights and enhancing the credibility and strength of the regime, the Office of the Ombudsperson cannot be categorized as other than a successful undertaking by the Security Council and its Committee.