

## **Improving fair and clear procedures for a more effective UN sanctions system**

### **I. Introduction**

Targeted sanctions constitute an important tool for the UN Security Council in exercising its primary responsibility for the maintenance of international peace and security under Chapter VII of the UN Charter. Further developing fair and clear procedures would strengthen the effectiveness of the sanctions system and thereby contribute to counter terrorism.

The UN Security Council has already made considerable efforts to improve the procedures of one particular body within the sanctions regime, namely the Al-Qaida and Taliban Sanctions Committee established pursuant to resolution 1267 (1999) (the 1267 Committee). Those procedures were brought a great step forward by resolutions 1822 (2008) and 1904 (2009), which introduced periodic reviews of the Consolidated List, improved the system of notifications and established the Office of the Ombudsperson. More generally, measures have been taken to avoid inappropriate delays in decision making, enhance the quality of listings and make the narrative summaries of reasons for listing publicly available.

Concerns still remain as to the right of listed individuals and entities to an effective remedy to challenge their designation before an independent and impartial authority. Some parliaments continue to perceive the UN sanctions system as failing to conform to due process standards, while national and regional courts tend to scrutinize the regime critically. Examples of recent challenges to the implementation of UN sanctions decisions include the *Ahmed and others* judgment of the UK Supreme Court of January 2010 and the second *Kadi* decision of the General Court of the EU of September 2010 now under appeal. In addition, the Grand Chamber of the European Court of Human Rights is due to render a judgment in *Nada v. Switzerland* soon. Various cases are also pending before courts in Canada and the United States, including in the matters *Abdelrazik et altera v. Attorney General of Canada* and *Kadi v. US treasury*.

Some of these cases review human rights guarantees at the level of measures implementing the Security Council decisions and call into question the decisions' binding character (article 25 combined with article 103 UN Charter), as well as their uniform application worldwide. Further improvements to the 1267 sanctions regime are indispensable for the UN to stay true to its founding objectives. Of particular importance in the pursuit of these goals is the respect for human rights and fundamental freedoms (enshrined notably in article 1 (3) and article 55 (c) UN Charter) and the observance of the rule of law in situations where the UN actions directly affect individual rights. By further improving fair and clear procedures, the Security Council would render the work of the 1267 Committee more effective and legitimate and thus considerably strengthen it as a counter-terrorism instrument. This would at the same time contribute to strengthening the rule of law within the United Nations.

During the coming months, consultations and negotiations will take place in preparation for the adoption, by June 2011, of a follow up resolution to 1904 (2009). The Security Council should take this opportunity to build on existing mechanisms and aim for further progress towards fair and clear procedures. In particular, the mandate of the Office of the Ombudsperson, which has only started operating recently and will display its full potential in times ahead, should be strengthened, giving due attention to the observations and recommendations made in its report of 21 January 2011 (S/2011/29).

The Group of Like-Minded States encourages the Security Council to continue its efforts towards establishing an independent and effective sanctions review mechanism that would, as a minimum, satisfy the basic elements of rule of law and due process. In this regard, we invite the Security Council to take into consideration the following common suggestions by the Group of Like-Minded States. These suggestions have been structured within three sections, focusing on listing (section A), de-listing (section B), and on the Ombudsperson (section C). Whereas all these suggestions serve to strengthen the 1267 sanctions regime, the suggestions relating to access to information (nos. 2 and 8) and to decision-making on de-listing (no. 6) would particularly address due process concerns as reflected in numerous judicial decisions by national and regional courts.

## **II. Suggestions**

### **A. Listing**

#### **1) Time limit for all listings**

All listings should have time limits (so called “sunset clause”) and expire after 36 months, unless the Committee decides to maintain the entries on the list.

*The 1267 Committee reviews periodically all names on the Consolidated List that have not been reviewed in three or more years (OP 32 of resolution 1904 (2009)). It reviews the names of individuals reportedly deceased every six months, and the list of those lacking identifiers every year (OP 26 and 31 of resolution 1904 (2009)). The Security Council should require that after the periodic triennial review each listing must be actively confirmed by the Committee in order to remain on the list. Introducing such a sunset clause to all listings would underline the preventive and temporary nature of the sanctions measures. This idea has been voiced numerous times by the Monitoring Team, as well as by the former Chairman of the 1267 Committee, Ambassador Mayr-Harting.*

#### **2) Access to information**

Listed persons or entities should have access to sufficient information regarding the grounds for listing, so they can challenge the decision to list them and present an effective defense. Upon request, the Committee should after consultation with the designating State inform the petitioner through the Ombudsperson about the identity of the designating State.

*The right to an effective remedy requires that the listed individual or entity is given access to sufficient information to present an effective defense. This presupposes that States have provided the Committee with such information.*

*The non-disclosure of the identity of the designating States is a potential impediment to the delivery of effective due process, because the petitioner may face a significant disadvantage in answering a case without knowing the identity of the State or States that proposed the listing. It may also be necessary that other States involved in a particular case be advised as to the designating State in aid of drawing out all the relevant information in the case (see paras. 51-52 of first report of Ombudsperson of 21 January 2011).*

### **3) Narrative summaries of reasons for listing**

Designating States should make every effort to provide substantial information and a detailed statement of case to the Committee as to why they propose or support the listing of an individual or entity. Such information should include all information requested in the relevant resolutions and the Committee's Guidelines (sections 6 and 9). In its decision to maintain an entry on the list, the Committee should take into due account whether Member States or the Monitoring Team have discovered any information about the activities of a listed person or entity over one review period).

*In formulating the narrative summaries, the Committee should be in a position to give the fullest and clearest possible narrative of the statement of case with due regard to the role which the narrative summary plays as information to the general public and the basis for requests for review or complaints to courts.*

### **4) Lacking identifiers**

In order to conduct the review of entries lacking identifiers in a timely manner, the Committee should expeditiously establish a list of identifiers necessary for the effective implementation of the sanctions measures. In cases where the Committee is unable to add further identifying information for entries lacking identifiers in the course of the annual review pursuant to paragraph 31 of resolution 1904 (2009), the Committee should temporarily remove the listings which continue to lack identifiers necessary for effective implementation until sufficient identifiers have been provided.

*Listings should rest on sufficient identifiers to allow effective implementation of the measures. For an individual, this should include the full name, date of birth, place of birth and nationality. For a legal entity, this should include full registered name and the location of all offices, branches or subsidiaries that are subject to sanctions (see para. 91 of the Report of the Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822 (2008) (S/2010/497)).*

### **5) Humanitarian Exemptions**

As requested in OP 7 of resolution 1904, the Security Council should review the system of humanitarian exemptions pursuant to resolution 1452, as amended by resolution 1735 (2006), in order to facilitate their implementation, accessibility for individuals and more frequent use. Possible measures include permitting Member States to submit a general notification of their intention to authorize unfreezing of assets of listed individuals for basic expenses pursuant to OP 1 (a) of resolution 1452 up to a certain nominal sum. In addition, individuals should themselves be entitled to submit applications for humanitarian exemptions to the Committee through the Ombudsperson, who should notify the decision of the Committee to the petitioner and the State(s) concerned.

*Under the current system, the responsibility of advancing an individual's request lies with the Member States, which may not wish to present exemption requests to the Committee or may lack the resources to do so. However, in order to guarantee full respect for fundamental rights, individuals and entities themselves should have the right to petition for an exemption.*

## **B. De-listing**

### **6) Decision-making Procedure**

(a) The Committee should take its de-listing decisions by majority vote of at least any nine of its members.

*Already under the current procedures, if consensus cannot be reached on a particular case, de-listing requests may be submitted to the Security Council for decision by majority rule pursuant to Article 27 of the Charter. The majority rule should be applied for de-listing decisions of the Committee without the privileges of the permanent members, following the precedent created by the Security Council for another of its subsidiary bodies, the Governing Council of the UN Compensation Commission for Iraq established pursuant to Resolution 692 (1991).*

(b) In cases where the retention of list entries is no longer founded, the Ombudsperson should be competent to recommend de-listing. Absent the Committee's reasoned decision within 30 days to confirm the entry on the list, the listing would automatically expire.

*The main criticism voiced by national and regional courts concerns the lack of an effective remedy against the Security Council's sanctions decisions. A fundamental condition for the remedy to be qualified as "effective" is that the reviewing body be competent to grant appropriate relief. The Ombudsperson should be vested with greater competence in that sense.*

(c) In cases where a delisting request has been rejected, the Committee should, without exception, provide reasons for its decision to be transmitted to the petitioner through the Ombudsperson and to the States concerned.

(d) The written report of the Ombudsperson to the Committee should be transmitted to the petitioner. The report or at least its observations should be made public, while protecting the petitioner's personal data.

*It would be an important element of due process and transparency to make public the Ombudsperson's report, which forms the basis for the Committee's decision.*

### **7) Reasons for de-listing**

The 1267 Committee should provide its reasons for de-listing.

*As underlined by the Ombudsperson, information as to the basis for a de-listing in one case may be important in assessing other cases. These reasons would also be helpful to the Ombudsperson in developing relevant observations for the Committee and in ensuring consistency in analysis (see para. 50 of first report of Ombudsperson of 21 January 2011).*

### **C. Ombudsperson**

#### **8) Access to information**

The Ombudsperson needs enhanced cooperation from States. He/she should benefit from additional powers to seek and receive information, so as to have access to all relevant information regarding the listing. Legal and practical ways should be found to allow for access to such information, including relevant information contained in confidential and classified documents. The Ombudsperson should consider any question related to lacks of best efforts by States in the biannual reports pursuant to paragraph 15 (c) of Annex II of resolution 1904 (2009). In addition, the Ombudsperson should bring a case of persistent non-cooperation of a State to the attention of the Sanctions Committee and ask for its assistance.

*The effectiveness of the Ombudsperson's work and its ability to provide detailed information and thorough analysis and observations to assist the Committee is heavily dependent on the cooperation of States (see para. 47 first report of Ombudsperson of 21 January 2011). Still, one of the main challenges of the Ombudsperson is to access information on listings, in particular classified or confidential information (see paras. 33-35 first report of Ombudsperson of 21 January 2011).*

#### **9) Extension of the term of office and renewal of the mandate of the Ombudsperson**

The Ombudsperson should be appointed for a 3 year period. His/her mandate should be reviewed every 18 months.

*A prolongation of the term of office to 3 years instead of 18 months would give more weight and credibility to the Ombudsperson's work, enhance his/her independence and solve important administrative hurdles such as the funding of the office. At the same time, it is useful to review the mandate more often (every time a new resolution is adopted) in order to adjust it if needed.*

#### **10) Competence of the Ombudsperson for persons or entities who face unintended problems due to the list**

The Ombudsperson should, when such cases are brought to her attention, be empowered to monitor and follow-up on cases of persons who face unintended problems due to the list, such as delisted persons and persons with the same names as listed entries (see para. 48 first report of Ombudsperson of 21 January 2011). In particular, the Ombudsperson should have the competence to submit to the consideration of the Committee proposals for documents of negative identification and documents certifying a de-listing. Those documents, after approval by the Committee, could then be used by the concerned persons as evidence for not being subject to Security Council sanctions.

#### **11) Notification of petitioner in case of de-listing**

The Ombudsperson should be mandated to send separate notifications in all cases of de-listing.

*Given the general intent to ensure that individuals and entities receive notifications of Committee decisions affecting them, the Ombudsperson should be mandated to send an independent notification to individuals or entities also in cases where the Committee decides on a de-listing without the Ombudsperson having been involved.*

## **12) Resources**

The office of the Ombudsperson should be timely provided with all resources necessary to fulfill her mandate.

*The Office of the Ombudsperson requires qualified support, including an administrative assistant and a senior-level legal professional to assist with legal research and analysis. It further needs a reasonable travel budget independently administered by the Ombudsperson, as well as funds for translation. Appropriate resources will consolidate the mandate of the Ombudsperson's Office and its independence.*