Workshop Report[1]

Enhancing Due Process in UN Security Council Targeted Sanctions Regimes:

Ongoing Challenges, New Approaches

Overview

UN Security Council members, other UN Member States, senior UN officials, members of UN panels of experts, and leading international scholars gathered at a workshop convened at Greentree on 27 and 28 April 2022 to explore the utility of ideas outlined in a policy report prepared by the Graduate Institute, Geneva, *Enhancing Due Process in UN Security Council Targeted Sanctions Regimes* in 2021, and in a letter to the Security Council by the Group of Like-Minded States on Targeted Sanctions also in 2021. They were motivated by concerns about the fairness and clarity of the processes by which individuals and entities are listed as sanctions targets and about deficiencies in delisting processes which have threatened to disrupt the effective, universal implementation of UN sanctions regimes.

The primary purpose of the workshop was to provide a forum for assessing the existing risks, to identify ways in which existing arrangements could be improved to protect UN sanctions regimes from legal challenges, and to explore innovative, non-judicial review mechanisms that might help protect against future legal challenges – and thereby safeguard the legitimacy and effectiveness of these regimes.

The workshop was held under the Chatham House Rule and although this report is based on a detailed accounting of the discussion, there is no attribution to any of the participants. The workshop was structured around four topics:

(1) The problem

(2) Reflections on the option of creating context-sensitive review mechanisms

(3) Potential application of a context-sensitive review mechanism to sanctions regimes in situations of armed conflict

(4) Possible institutional models to strengthen due process in a context-sensitive manner

[1] Prepared by Thomas Biersteker, The Graduate Institute, Geneva and Larissa van den Herik, Leiden University, in consultation with the three co-organizers of the workshop: the governments of Switzerland, Ireland, and Norway.

(1) The problem

The move to targeted sanctions in the late 1990s stimulated the introduction of individual targeting. There was no consideration of due process at the outset, and as individual targeting expanded after the attacks of 11 September 2001, litigation ensued in European courts, most notably with the Kadi case. The Kadi judgements say that EU courts must ensure that due process protections, notably the right to be heard and the right to effective judicial review, are upheld when implementing UN sanctions. The UN responded with incremental steps to address the issue, beginning with a bilateral arrangement in 2002, the Focal Point in 2006, the establishment of the Office of the Ombudsperson for the 1267 ISIL (Da'esh) and Al Qaida sanctions committee in 2009, and the enhancement of the office with the introduction of reverse consensus in 2011.

Litigation against UN sanctions before EU and other courts declined following the creation of the Office of the Ombudsperson, but litigation concerning the other sanctions regimes that do not have access to the Ombudsperson increased. While initially most of the cases challenging UN sanctions focussed on counter-terrorism (CT) sanctions, fully half of the challenges over the past seven years have come from non-CT designation. The most notable case that was mentioned in the workshop is the Aisha Qadhafi case, where the ECJ appears ready to deny an appeal from the EU to maintain the listing. This case may thus come to pose the exact same problem for the other sanctions regimes, as Kadi did for the 1267-regime.

Today, after nearly two decades of fair process legal challenges, it was noted that the standards by which courts are evaluating UN sanctions processes are taking shape. There is a growing recognition that the protection afforded to sanctions targets should be functionally *equivalent* to those they would receive if analogous restrictive measures were imposed in a domestic context in accordance with international standards of due process. The *form* those protections may take may look quite different at the international level. What matters is the process through which an independent review is guaranteed and not necessarily the institutional form it takes.

The 2005 World Summit Outcome Document identified core elements of due process: (1) access, (2) fair hearing, (3) impartial, independent review, and (4) effective remedy. Participants noted that UN targeted sanctions are likely to be more legitimate and therefore more effective sanctions regimes if core due process is provided. Enhancing due process is also a way to keep sanctions regimes current and up to date.

Discussion ensued on recent case law before European courts regarding UN sanctions outside of the 1267-regime including the Mundes case in the DRC, Qadhafi in Libya, and Al-Dulimi in Iraq. These recent litigations have identified elements that need to be addressed. Some participants noted that it would be prudent to preempt new challenges, rather than simply react to them. Without further action at the UN level, states will determine that they need to take action at the national level. National courts will have to second-guess the UNSC in cases where they lack access to evidence. A participant raised the broader moral legitimacy question by having UN sanctions regimes in place that are not governed by proper procedures.

Discussions also revolved on the arrangement of the Ombudsperson. Even though there is widespread support for the Office of the Ombudsperson, problems with the current arrangement were highlighted: (1) failure to review the original decision to list; (2) the use of classified intelligence material and the vagueness of the charges like "meeting with an extremist" and (3) the lack of funding for representation (to pay for the costs of research, drafting petitions, drafting correspondence, and attending meetings for dialogue). A participant noted that we should learn from the limitations of the existing system and apply lessons learned to attempts to extend the discussion on review to other regimes.

(2) Reflections on the option of creating context-sensitive review mechanisms

The context-sensitive idea is based on the premise that there are structural differences between different types of UN sanctions regimes.[2] Therefore, the Graduate Institute report explores how to extend the functions, rather than the mandate, of the Ombudsperson.

There are three broad types of UN sanctions regimes: counter-terrorism (CT), non-proliferation, (NP) and armed conflicts (AC). The designations in non-proliferation regimes are more likely to be status-based, whereas armed conflict cases are a combination of status and conduct-based designations. There are also broadly two types of armed conflict situations: those with and without a major counter-terrorism aspect.

The political context of different types of sanctions regimes varies. In the case of CT sanctions, the goals are to constrain, to exclude, and to disrupt activities. In AC sanctions, the goals are often to resolve the conflict and to facilitate reconciliation. They are very fluid, with constant changes as conflict resolution goals morph from obtaining a ceasefire to negotiation of a settlement, peace enforcement, and ultimately to peacebuilding. The information environment also differs. When making designations, the CT domain is heavily influenced by information from intelligence sources, while the AC cases rely on information from panels of experts, UN field offices, SRSGs, and member states. There are also differences in the profile or background of the individuals who might be responsible for providing due process, the process of evaluation, and even potentially the location or place of alternative review mechanisms.

Three options for moving forward were discussed: (1) a context sensitive mechanism for one or more armed conflict situations, (2) extension of the mandate of the current Ombudsperson, or (3) some combination involving the Office of the Ombudsperson operating in a context-sensitive manner, perhaps with a Deputy Ombudsperson for AC regimes. The current institutional situation risks undermining the Office of the Ombudsperson, so these proposals may be a way of reforming and strengthening the office.

While there was global support for the equal application of law and for the strengthening of due process protections across regimes, there were a number of reservations expressed about the proposal to create context-sensitive mechanisms for different types of sanctions regimes.

First, there was concern that the draft UN Security Council resolution included in an annex to the Graduate Institute report might be watered down in negotiations over its adoption and that it could result in the creation of a two-tiered system for addressing due process concerns (with one standard for counter-terrorism, and a potentially weaker one for other sanctions regimes). One participant argued that it was important that if an alternative to the Ombudsperson were to be created, both the selection process be identical and the reverse consensus process at the Committee level (i.e. a de-listing proposal by a review mechanism can only be overturned in a Sanctions Committee by consensus of all its members) be included.

Second, there were concerns raised about the potential cost of creating alternative review mechanisms, with several participants arguing that an enhancement of the existing Office of the Ombudsperson might be more cost-effective than creating new institutional mechanisms for other sanctions regimes.

[2] Background is the United Nations University Study "Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures"

Third, drawing on a logic of pragmatism, several participants suggested that it would be easier for the UN to adapt an existing mechanism (the Office of the Ombudsperson) with a focus on basic elements of due process: hearing, review, and remedy, rather than create a new one.

Fourth, several participants argued that the proposed context-sensitive mechanisms were too complex and that someone with extensive judicial experience would be required to adjudicate and make the final assessments about delisting. A considerable number of participants articulated a preference for extending the mandate of the Office of the Ombudsperson to address petitions for delisting from other sanctions regimes.

(3) Potential application of a context-sensitive review mechanism to sanctions regimes in situations of armed conflict

Nearly three-quarters of the total individual designations not covered by the Office of the Ombudsperson are applied in situations of armed conflict → 419 out of a total of 584 designations in place in 2021 or 72%. This suggests that if a context-sensitive mechanism were to be introduced, it would make the most sense to introduce it in countries with sanctions related to armed conflict. They include CAR, DRC, Iraq, Libya, Mali, Somalia, South Sudan, Sudan, the Taliban in Afghanistan, and Yemen.

The Graduate Institute report focused on a potential application to a single country, the DRC. For the purposes of the workshop discussion, however, was expanded to include other armed conflict situations without a strong counter-terrorism presence: CAR, DRC, South Sudan, and Sudan. Each of the four is of course *sui generis* and has distinctive characteristics and complexities.

If the mandate of the Office of the Ombudsperson were to be extended to include DRC or any of the others, the workload would not necessarily be overwhelming, given the relatively small number of designations. But the office could be supplemented with the addition of seconded external experts familiar with the details of the conflict, perhaps working on a consultancy or pro bono basis.

The amount of information publicly available on the individuals and entities designated in the four non-CT armed conflict situations would appear to give a review mechanism (or the Ombudsperson) a substantial amount of information to investigate in cases of delisting requests. The kind of material to be researched, the methods of research, and the sources of information would appear to be largely the same. Thus, it would not be a major stretch to consider extending a context-sensitive review mechanism to these four cases (rather than restrict it to DRC).

The mere existence of an independent reviewer or panel of independent reviewers will likely increase the incentive for Panels/Groups of Experts to make better recommendations for listings. Finally, the idea was put forward that it might also be useful to consider whether panels should be mandated also to recommend delistings in an effort to improve the quality and currency of the existing sanctions list. This idea was challenged as it could inhibit their activities and the confidential nature of their research especially if they are asked to make delisting recommendations.

(4) Possible institutional models to strengthen due process in a context-sensitive manner

A number of participants recommended extending the mandate of the Ombudsperson not all at once, but step by step. This could be done with a time-limited mandate (probably of two years, given the time it takes for the review process to unfold), focusing on the low hanging fruit at the outset, with limited costs.

Extending the mandate of the Office of the Ombudsperson would not only address the due process deficit for designations made by other UN sanctions regimes, but it would also strengthen the office itself. A participant argued that the Office's independence was compromised by the conditions of service and the heavy workload faced by a very small staff. If properly funded, an extension of the mandate of the Office of the Ombudsperson would provide for a potential strengthening of both the analytical capacity of the office and address lingering concerns about the conditions of service.

To address the legitimate concerns of Security Council members that the introduction of an independent review of designations could complicate sensitive ongoing negotiations, the Council could reserve for itself the right to suspend the application of the office of the Ombudsperson for a specified period (renewable). This right could then be exercised on the basis of criteria that are similar to the Security Council's power to defer pursuant to Article 16 of the ICC Statute[3].

Conclusion

At the conclusion of the workshop, there appeared to be an aspiration to do better and to be pragmatic about how to proceed. A possible way forward that came across the discussions is to fix the problem in ways that are consistent with the UN system and to focus on ways to strengthen it. A context-sensitive mechanism can be established through different means. Therefore, adapting the existing mechanism (Ombudsperson) with a focus on the basic elements of due process: hearing, review, and remedy appeared a sensible way forward. Introducing a context-sensitive mechanism should not result in inconsistent standards across regimes.

Sanctions exist in a competitive market. The UN Security Council does not hold a monopoly on sanctions, and there is an increased tendency for national courts to exert their authority and exercise reviews of sanctions decisions. It is their right to assert their authority, and the EU has become the default solution for the restoration of due process protections. Doing nothing at the UN level at this point will yield to decisions of national and regional courts, threatening the uniform and universal implementation of UN Sanctions by Members States as well as the UN system for maintaining international peace and security. Further litigation is coming, and this will set the future agenda if no action is taken in the meantime.

[3] Article 16 ICC Statute Deferral of investigation or prosecution:
No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.