



Security Council

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Letter dated 7 December 2018 from the representatives of Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

We, the undersigned representatives of Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland (the Group of Like-Minded States on Targeted Sanctions), are writing to you on the issue of Security Council sanctions. Our group is strongly committed to the effective implementation of the Security Council's sanctions regimes. The respect for international due process standards is key in this regard. However, as long as national and regional courts consider United Nations sanctions to fall short of the minimum standards of due process, national authorities may find themselves legally unable to implement them fully at the national level.

In the light of that, we would like to submit to the Security Council proposals for improving due process with regard to the Office of the Ombudsperson to the Security Council Committee pursuant to resolutions [1267 \(1999\)](#), [1989 \(2011\)](#) and [2253 \(2015\)](#) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities (see annex). We would also like to recall the letter of the Group of Like-Minded States on Targeted Sanctions to the Security Council of 12 November 2015 ([S/2015/867](#)) concerning the Committee, which also encompassed due process proposals relating to sanctions regimes other than that of the Committee. The mandate of the Ombudsperson should thus ultimately be expanded to other appropriate sanctions regimes. These proposals remain valid to the extent that they have not yet been implemented by Security Council sanctions resolutions.

We hope that Security Council members will find our proposals of interest, in particular in view of the preparation of a follow-up resolution to Council resolution [2368 \(2017\)](#). We look forward to continuing and deepening the dialogue on this important matter with all stakeholders.

We should be grateful if you would have the present letter and its annex circulated as a document of the Security Council.

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Ambassador

Permanent Representative of Austria to the United Nations



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(Signed) Jürg **Lauber**
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Annex to the letter dated 7 December 2018 from the representatives of Austria, Belgium, Chile, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

Proposal by the Group of Like-Minded States on Targeted Sanctions for fair and clear procedures for a more effective United Nations sanctions system

1. The Group of Like-Minded States on Targeted Sanctions reiterates that, as long as national and regional courts consider that United Nations sanctions imposed on individuals fall short of minimum standards of due process, national authorities may find themselves legally unable to implement those sanctions fully at the national level. In the light of that, the Group would like to recall its letter to the Security Council of 12 November 2015 (S/2015/867), whose propositions remain valid to the extent that they have not yet been integrated in the Security Council sanctions regimes. In addition, the Group herewith submits the following proposals to further improve the independence and effectiveness of the Office of the Ombudsperson to the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities.

I. Ensure the independence of the Office of the Ombudsperson

A. Appointment of the Ombudsperson and continuity of the work of the Office

2. There was a de-facto vacancy of the position of the Ombudsperson for 11 months, from 8 August 2017 to 17 July 2018. While the former Ombudsperson had left detailed instructions for the staff members supporting the Office of the Ombudsperson, the Office continued to operate informally until the current Ombudsperson took office on 18 July 2018.

3. An “informal” operation of the Office of the Ombudsperson cannot mitigate formal actions by the Ombudsperson, and it has a negative impact on due process in the following ways:

(a) The delay hinders the right of a petitioner to an independent and impartial review within the time frame prescribed by resolution 2368 (2017);

(b) An informal gathering of information during the absence of an Ombudsperson necessarily delays the information-gathering period until the formal acceptance of a case by the Ombudsperson. Extensions of the information-gathering period by three months serve the purpose of achieving a comprehensive analysis by the Ombudsperson of the case before submitting recommendations to the Committee and not to delay cases owing to the absence of an Ombudsperson.

4. The Security Council or its Committee should thus create an optional acting Ombudsperson mechanism, which could be activated temporarily in the case of unforeseen absence of an Ombudsperson.

5. The Security Council should set a time frame for the selection process of an Ombudsperson. Thus, upon announcement of a vacancy (in the event that the Ombudsperson has to leave before the end of his or her term), one week should be

dedicated to issuing the call for applications, three weeks to the submission of applications, one month to their review and interviews and one month to the appointment and taking up of office. A three-month selection procedure corresponds to the two weeks' notice that applies to an Ombudsperson leaving office.

B. Independence of the Ombudsperson and access to petitioners

6. While the Security Council in its resolution [2368 \(2017\)](#) requested the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, and to make the necessary arrangements to ensure its continued ability to carry out its mandate in an independent, effective and timely manner, the current contractual arrangements as a consultant and the institutional links with the Department of Political Affairs fail to fully implement the Security Council resolutions and significantly impair the ability of the Ombudsperson to fulfil the mandate, in particular in terms of independence.

7. The Ombudsperson should be able to decide independently on his or her travel needs to meet with petitioners and other relevant persons and State authorities in order to fulfil his or her mandate and should be able to organize his or her work independently without reporting to the Department of Political Affairs.

C. Ensure the independence of the Office of the Ombudsperson and make it a permanent structure

8. The Office of the Ombudsperson should be made permanent and the contractual arrangements for the position of the Ombudsperson should be modified and improved.

9. This could be done in several ways:

(a) The Security Council could enable the transformation of the Office of the Ombudsperson into a permanent office within the Secretariat, but independent in the exercise of its mandate, and call upon the Secretary-General and Member States to undertake the necessary steps in that regard;

(b) Alternatively, the Security Council could enable the transformation of the Office of the Ombudsperson into a special political mission within the Secretariat, but independent in the exercise of its mandate, and call upon the Secretary-General and Member States to undertake the necessary steps to that end;

(c) Alternatively, the Security Council could consider appointing the Ombudsperson as an "official other than Secretariat official", which corresponds to the type of appointment that United Nations judges have.

10. In all cases, the Office should be provided with all resources necessary to fulfil the mandate of the Ombudsperson, while maintaining at least the operational strength of the Office. Institutional safeguards should be incorporated and implemented to ensure the independence and autonomy of the Office.

II. Enhance the transparency of the Ombudsperson process: reasoning of decisions

11. Reasoning of decisions is a key due process instrument to exclude arbitrariness in decision-making.

12. The Security Council, in annex II, paragraph 16, of its resolution 2368 (2017), provided for an improved process regarding the reasoning of decisions to delist or to maintain a listing. In that paragraph, the Council recognized that the summary must accurately describe the principal reasons for the recommendation of the Ombudsperson, as reflected in his or her analysis, and specified that the summary, in cases of delisting, must include key points of the analysis of the Ombudsperson.
13. While it was reported that some progress had been made (S/2018/120, paras. 25 and 26), it was also noted that a summary had been transmitted to a petitioner that no longer reflected the principal reasons for the recommendation of the Ombudsperson. Given that, pursuant to resolution 2368 (2017), an accurate description of the principal reasons for the recommendation of the Ombudsperson is required, and that the Committee's review serves the purpose of addressing the disclosure of confidential information, the reasons underlying the listing or delisting must be clear, understandable and substantiated.
14. Where the recommendation of the Ombudsperson is followed, both in delisting and retention cases, the Ombudsperson is in the most advantageous position to prepare and provide the reasons to the petitioner. Therefore, the Ombudsperson should be empowered to provide the reasons based on the comprehensive report directly to the petitioner. That would enhance transparency and credibility, as well as ensure coherence between the comprehensive report and the reasons.
15. Where the recommendation of the Ombudsperson is not followed, the Ombudsperson — in addition to the petitioner — should be made aware of the actual and specific reasons for a decision by the Committee, since those reasons may have bearing in the assessment of other cases. Otherwise, there is a risk of inconsistency in the practices of the Ombudsperson.
16. Since the petitioner is provided with the reasons for a delisting or the maintaining of a listing and is free to pass those reasons on, they may as well be made publicly available. Doing so would further enhance the transparency and credibility of the Ombudsperson process.
17. All decisions, regardless of whether they maintain a listing or delist an individual or entity, should contain adequate and substantial factual reasons.
18. Where a listing is maintained or a petitioner is delisted on the basis of the recommendation by the Ombudsperson, the Ombudsperson should be granted the responsibility to provide the reasons for that determination to the petitioner, without undue delay and in compliance with any confidentiality restrictions that are placed on confidential or classified information by Member States.
19. The Security Council should instruct the Committee to provide the actual and specific reasons to the petitioner through the Ombudsperson without undue delay and with appropriate safeguards regarding confidential material in case it decides not to follow the recommendation of the Ombudsperson. The Ombudsperson should also be made aware of those reasons by the Committee.
20. Lastly, provisions should be foreseen for the Ombudsperson to make the reasons publicly available or to disseminate them to interested individuals, States or other bodies, with appropriate safeguards regarding confidential material.
21. In all communications with the petitioner, interested individuals, States or other bodies, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.

III. Improve information-sharing by Member States with the Ombudsperson

22. The Security Council should further encourage Member States to provide to the Ombudsperson all the information that is available and to enter into confidentiality agreements or arrangements with the Office of the Ombudsperson.

23. The standard developed by the Ombudsperson for her or his analysis, observations and conclusions is to make an assessment of whether there is sufficient information to provide a reasonable and credible basis for the listing at the time of the review. On the basis of all the information available at such time, the Ombudsperson determines whether a continued listing is justified. Cooperation by Member States with the Ombudsperson in terms of information-sharing and provision of confidential or classified material is critical to the effective operation of the Office and must be further improved. The level of detail and supporting information should be enhanced. Further progress should be made with regard to access to confidential information. In its resolution [2368 \(2017\)](#), the Security Council explicitly encouraged Member States to cooperate with the Office of the Ombudsperson and specified that the cooperation should include the conclusion of arrangements with the Office of the Ombudsperson for the sharing of confidential information.

24. Member States that have not yet done so shall be encouraged to enter into agreements or arrangements on the sharing of confidential or classified information with the Office of the Ombudsperson in advance of a specific case. Concluding such agreements or arrangements would evidence support on the part of the Member States in question for the work of the Office and the implementation of the sanctions regime adopted by the Security Council.
