

**Remarks by Kimberly Prost,
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to the 49th meeting of the Committee of Legal Advisors on Public International
Law (CAHDI) of the Council of Europe
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Introduction

It is a great pleasure for me to be here today on the occasion of the 49th meeting of CADHI and to have the opportunity to share some thoughts on the Office of the Ombudsperson - now almost five years on. The world of the Ombudsperson can be a lonely and narrow one, so I always look forward to the opportunity to exchange on broader issues, especially with such an impressive array of legal authorities/experts.

I spoke here in March of 2011 when the Office of the Ombudsperson was still very much a new initiative. Interestingly, when I went back to look at the remarks I delivered on that occasion, it struck me that despite the challenges and set-backs, we have come a long way in terms of fair process and targeted sanctions in the Al-Qaida regime.

Drawing from the points I discussed back then, I thought it most appropriate to prompt our discussions today with an update on the work of the Ombudsperson - the successes, the set-backs and the key challenges that remain.

Purpose/Process

First, let me provide a brief description of the Ombudsperson purpose and process.

The Office of the Ombudsperson was established by resolution 1904(2009) and became operational in July 2010. It resulted from the fair process problems related to the use of targeted sanctions, particularly with respect to the Al-Qaida regime and was driven in no small part by litigation here in Europe.

As Ombudsperson, I receive requests directly from listed entities and individuals. Once satisfied that the request addresses the reasons for listing, I begin a three-phase process by circulating the request to the Committee. The first phase is a four-month period for information gathering, which I can extend once for two additional months. This is followed by a two-month period of engagement with the Petitioner (extendable for two additional months if I consider it necessary) which generally involves a 'face-to-face' interview. Within this same period, I prepare a report to the Security Council Committee setting out the gathered information, analysis and a recommendation, and this Report ultimately leads to a decision on the petition in each case.

Successes

Let me start my update with the successes.

Mechanism has been used

One of my key preoccupations back in 2011 was whether the office would be used. It is all well and good to have a mechanism, but if it is not used it does little to address the fair process problem.

The key questions were: Would its existence be known? Would listed persons and entities use it?

To these questions, I can answer with a resounding yes.

Four years on, 63 petitions have been submitted by or on behalf of individuals or entities or a combination of both. 48 cases have concluded through the Ombudsperson process. 42 petitions have been granted resulting in the delisting of 37 individuals and 28 entities. In six cases, the petition was denied. Three cases have been concluded by a separate Committee decision to delist while an Ombudsperson case was active. There are currently 11 active cases.

Reflecting back to 2011, this is one of the successes of the Ombudsperson process which tends to be forgotten or overlooked. It was not in any way a given -back then- that petitioners would know about the Office or sufficiently trust it and bring an application.

Work was undertaken to 'spread the word' about the Office- through the website, notice letters to any possible addresses for listed persons and through general outreach activities. Also, the efforts of States have been instrumental in informing citizens and residents about the existence of the Office and encouraging applications to be brought.

The fact that the process is 'user-friendly', I think, has also contributed to its use. The process has been made as simple as possible. While petitioners can use lawyers, it is not a requirement. The petition can be presented in the Petitioner's language of choice. Also, when individuals contact the Office, we will do direct outreach - usually by phone - to assist them if the initial communication is not sufficient to start the process.

But what has also clearly been important is the credibility of the person occupying the post. I do not mean that arrogantly. There are many individuals with the experience and skills to do the job credibly and effectively. I simply wish to emphasize how important it is that the Ombudsperson is viewed as sufficiently qualified and experienced to carry out the particular functions of the position. As well, the Office has acquired the reputation of being fair and independent. Trust is central to the success of this mechanism in terms of the relationships with relevant States, the Al-Qaida Sanctions Committee and the Security Council. But it is also essential that the Petitioners and counsel who act for them trust it to be a fair and truly independent mechanism, and

credibility is central to that perception. Going forward, I cannot stress strongly enough how important it will be to ensure that this credibility and trust is sustained and that will depend, in no small part, on the reputation, qualifications and experience of the Ombudsperson.

Mechanism delivers a fair process

The second achievement I would note relates to another set of questions I discussed on the last occasion– can and will the Office of the Ombudsperson provide a fair process.

I was very ‘Canadian’ when answering this question four years ago – “Nice day eh?” (as the temperature drops below – 35). I put on a brave face back then. Truth was - in March (2012), I was deeply troubled because of the limitations of resolution 1904, primarily in that it did not allow me to make a recommendation. Even though I did so in practice, there also remained the potential for one State to block delisting whatever the report might indicate about the sufficiency of the underlying information. I had, at that time, my first case pending and those issues looming.

Remembering that only serves to highlight the remarkable progress made and the significance of the two critical steps taken by the Security Council with the adoption of resolution 1989 in June of 2011 when the mandate was renewed.

First, they gave the Ombudsperson a recommendation power.

Even more importantly, the resolution provided that if the Ombudsperson recommends retention, that will end the process and the listing will be retained without prejudice to a State’s ability to bring a separate request and have it considered under the Committee procedures.

If the Ombudsperson recommends delisting, the person or entity will come off the list in 60 days, unless there is a ‘reverse consensus’ against the recommendation. That is - the 15 Committee members oppose the delisting. It is also possible for the matter to be referred to the Security Council for a vote. Neither of those eventualities has occurred, such that over the almost five-year period of operation and in all the completed cases post resolution 1989(2011), the decision of an independent and impartial mechanism has prevailed in terms of the assessment of the delisting requests.

And with those changes, the combined measures meet the fundamental requirements of fairness in practice. Through the information gathering and dialogue phases, the Petitioner knows the case and has a chance to answer it and be heard by the decision-maker. Resolution (1989) (2011) strengthened the procedure in this regard by encouraging the Ombudsperson to meet with Petitioners, face to face, for the exchange with them, which I do in most cases. All of the information, including that from the Petitioner, is then captured in the Comprehensive Report which forms the basis for the recommendation and ultimate decision. And the combined process gives the Petitioner the possibility of an effective remedy, if appropriate, by way of delisting.

So today, in practice, I can state, as I do in my reports to the Security Council: yes the Ombudsperson process can and does deliver a fair process, with an effective remedy.

Setbacks – Legal Challenges

At the same time, as with most initiatives, there have been disappointments and set-backs.

The most significant will be well known to many of you. There was much hope that the establishment of an international fair process mechanism for this targeted sanctions regime would eliminate the need for national and regional courts to intervene to assess the sufficiency of the listings which originate with the Security Council. Such intervention causes a number of significant problems in terms of the effectiveness of the sanctions and creates the potential for a conflict of obligations for States. But the hope of some form of deferral or at least recognition has not materialized so far.

Of particular note in this regard was the decision in Kadi II where the European Court of Justice held that only a full review of the sufficiency of the information underlying the listing, by that Court, in accordance with its standards, would suffice when the measures were being implemented by the European Union bodies. In Kadi I in 2008, the Court had made reference to the absence of any international fair process mechanism as a reason for its intervention and ultimate conclusion to strike down the implementing regime. This was a major impetus to the development of the Ombudsperson mechanism. Yet, despite that key finding previously, in Kadi II the Court did not in its analysis mention the Office of the Ombudsperson. This absence of recognition by the Court of the steps taken at the international level is unfortunate. Evidently, the Court will independently decide on what is necessary in terms of fair process according to its analysis and law. However, given its previous justification for intervention, it would have been helpful if some consideration had been given to the Office of the Ombudsperson, even if it considered the mechanism did not go far enough.

There are of course other legal issues pending, including *Al –Dulimi and Montana Mangement Inc. v Switzerland* before the ECHR, but I leave that to others in this room more qualified to comment on.

Overcoming Set-backs

In assessing where we are on this issue, it is clear that the approach of the Court in its analysis in Kadi II has had a damaging effect in terms of the motivation at the political level to maintain and to expand the Ombudsperson position.

At the same time, what was sought to be achieved through legal decision is actually, to a great extent, being achieved in practice. The Ombudsperson has significant advantages over court process – it is a simple procedure, it can be started through an email, the Petitioner can communicate in a language of choice, no lawyer is required, there are no costs, and it has strict deadlines which make it quite fast relatively speaking. For these

reasons and others, we have seen a significant diversion of cases away from national/regional courts.

While potential for a conflict of obligations remains, the numbers of situations for it to be realized, at least with respect to the Al-Qaida sanctions regime, have been diminished.

Moreover, the international mechanism provides a remedy, to the same standard, for all listed individuals/entities, not just for a particular category. This is contrary to the European Court of Justice judicial review which does not address situations where the circumstances have changed since the original listing. I have had several cases of that nature. Because my test is whether there is sufficient information to provide a reasonable and credible basis for the listing presently, those cases can be assessed and decided upon on the merits. As judicial review focuses on the basis for the original listing, it can provide no remedy in these cases of changed circumstance.

Lastly, we have to focus on the real purpose for the establishment of the Office of the Ombudsperson which was never about trying to satisfy any individual Court or body. Rather, the goal was and must remain to ensure that the use of the Security Council powers is in conformity with Article 1 of the Charter, which includes respecting international law and human rights principles. Here lies perhaps the most important value of the Ombudsperson mechanism – it brings fair process and the rule of law to the work of the United Nations Security Council.

Key Challenges

Going forward there remain key challenges as detailed in my biannual reports to the Security Council.

Lack of Transparency

The process is still very secretive and lacks transparency. The Comprehensive Reports are not disclosed beyond the Committee and, on a discretionary basis, to some interested States upon request. Further, despite clear requirements to provide reasons for the decision in both delisting and retention cases, there remain challenges – particularly in delisting cases – to the provision of substantive, factual reasons.

Access to Confidential/Classified Information

In 2011, I was speaking about the need to access confidential information and I am still speaking about that today. It is amongst the most significant challenges to the effectiveness of the Ombudsperson process. While considerable progress has been made with the adoption of 16 agreements/arrangements, including with some key States, there are significant gaps which present problems in practice. Efforts continue in earnest, particularly with U.S. authorities, but it remains a difficult and challenging issue.

Lack of Institutionalization

In my view though, the greatest threat at this stage to the Ombudsperson mechanism is the lack of institutionalization of it. The remarkable steps taken by the Security Council with the support of States have not been accompanied by parallel movement within the Secretariat to bring the terms and conditions and administrative arrangements for the Office into conformity with the nature of its role and responsibility.

In short, while resolution 1904 (2009) called for the establishment of an Office of the Ombudsperson, none has ever been established. The contractual arrangements in place present significant problems for the management of the Office as an independent mechanism and they also fail to accord appropriate recognition to the importance of the mechanism within the overall structure of the organization. Finally, while I can state without reservation that, in practice, there is an Office which operates in a fiercely independent manner, that is attributable solely to the personalities involved. There are no institutional protections for the independence of the Office of the Ombudsperson, which leaves it very vulnerable, especially when going through the upcoming period of transition.

Extension

The final point I will raise for discussion is that, while there are 16 Security Council targeted sanctions regimes at this point, the Ombudsperson mandate remains applicable only to the Al-Qaida regime. While this is a matter for the Security Council and States, it does raise significant fair process issues, particularly when viewed from the perspective of those who are listed.

Conclusion

I leave off there, noting that great progress has been made in the past five years due to the strong support of many States. I am hopeful that will continue in the years to come. I want to thank the organizers for giving me the opportunity to be here today and to exchange with this important body.