

**Speaking Notes¹ for Presentation by Kimberly Prost, Ombudsperson, 1267 Al Qaida/Taliban Sanctions Committee delivered to the 41st meeting of the Council of Europe Committee of Legal Advisors on Public International Law (CAHDI)
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Let me thank you for inviting me to join with you today, at this CADHI meeting, for a discussion of my work to date in the role of Ombudsperson for the Security Council Al Qaida/Taliban Sanctions Committee (1267 Committee). It provides me with an opportunity to share some thoughts on developments to date and, with an impressive group such as this, to obtain views and comments on the issues which present in the context of this unique position.

My comments today will centre on the key challenges. I would frame them as follows:

- a) Will the Office of the Ombudsperson be used?
- b) Does the Office of the Ombudsperson have the potential to provide fair process?
- c) Will the Office of the Ombudsperson provide fair process?

Use of the Office

To begin with, it is evident that to be effective, the Office of the Ombudsperson must be known and it must be accessible. From the start, this has been a key concern and efforts to publicize the Office are ongoing.

I have tried a variety of methods to ‘advertise’ the Office which have included the creation of my website, briefings to governments – bilaterally and multilaterally - and various presentations in different fora. I am in the process of sending letters to those on the Consolidated List with addresses and I am aware that individuals, who write to governments and regional bodies, about their listings, are receiving information about my office in any response. I have also attempted to reach out to listed persons and entities who have no access to technology and communication facilities, by asking those who work in the field – the Monitoring Team, CTED, UNODC for example - to distribute flyers about my work.

There have been successes. I know that some of the current cases have reached me because of the website and because of government letters. But the challenge remains and I am open, as always, to any suggestions as to how to better publicize the office, especially to those who might wish to make a delisting request.

Fair Process and the Potential of the Office of the Ombudsperson

It is no secret that the birth of the Office of the Ombudsperson was a difficult one. It was the product of a compromise forged between two very different perspectives on this use of the Security Council sanctions powers. For the members of the Security Council and those who work in this context, the suggestion of some form of review or involvement of an outside body in the decisions of the Security Council was seen as

¹ These Speaking Notes have not been checked against actual delivery.

contrary to the fundamental nature and clear powers of the Council. From this perspective the fact that the sanctions have a direct application on individuals did not justify altering the process or allowing for intervention into the prerogatives of the Security Council.

From the opposite perspective, particularly for those individuals and entities subject to the sanctions, it in essence “feels like” a measure which was the product of a judicial or administrative process. This raises expectations that there will be the types of protections and recourse which normally surrounds such proceedings whatever the origin of the sanction.

The creation of the Office of the Ombudsperson – designed to bring elements of that procedural fairness without affecting the decision making power of the Council – was the compromise forged to bridge that gap. As a good compromise it meant that no one on either side, or in between, was happy. For some, it was seen as an encroachment “too far” into the Security Council process and for those of the other view – too little too late - in terms of due process.

Coming into a position which has this particular background, I have chosen not to delve into that debate but rather to focus on the powers which have been accorded to me in this post. It is my aim to use them as robustly as possible to provide fair process, while still remaining operationally within the confines of my mandate.

In this regard, I believe there is clear consensus on one point which is that there must be appropriate fair process in relation to Security Council sanctions imposed on individuals and entities. What is much less clear, and an issue which ultimately will have to be addressed in other fora, is, what is fair process in this unique context?

For my part, I focus on the core elements - some of the fundamental principles of fairness - and whether those can be addressed through the Ombudsperson process.

Right to Know the Case

First, the right to know the case against you. In addressing this requirement I look to use the information gathering phase of the process to draw out information, particularly from the relevant states. Now, clearly I have not been accorded any compulsory powers in this respect. However, I do find that the combined effect of the process having been established by the Security Council, with the mandate to report to the Committee and the Council, to be very “persuasive”. And I stress I do not approach this task passively such that I write letters and await replies. I follow up by email, by letter, by phone or by appointment. I ask questions about the information I receive and seek more details where those are lacking. Generally, I make myself an irritant to many in pursuit of information.

Right to be Heard

If I am successful in this first stage in obtaining information, I then use the dialogue phase to put that information to the Petitioner and, importantly, to draw out an answer to that case. Ultimately, it is that response which can be incorporated as part of my report thereby addressing a second fundamental concept – the right to be ‘heard’ by the decision maker.

Review

Finally, I move to perhaps the most challenging component of fairness – review. It is clear that I have not been accorded any form of review mandate in terms of the decisions of the Security Council, for very obvious reasons. Nor in fact has there been any shift in the decision making power through the creation of this Office. The power to set and interpret the criteria and to decide on listing and delisting in accordance with it rests solely with the Security Council and its Committee.

Nonetheless, it is within my mandate to gather and review relevant information in the case, to analyze it and to provide my ‘observations’ to the Committee. In this way, I bring an independent, third party ‘eye’ to the underlying information related to the listing. In my view, this is a form of review not with respect to decisions, of course, but in relation to the information. To this end, I have from the start indicated that while I have not been accorded a right to make recommendations, I do consider that it is within my mandate to ‘observe’ or comment on the underlying information. In fact, I have always said I will tell the Committee what I think about the sufficiency of the information, as it stands today, with reference to the listing. In my view, though it is not a conventional approach to review, I believe that it may be adequate to meet this aspect of due process.

It is on this basis that I venture the opinion that the Office of the Ombudsperson can bring sufficient fair process, even if it is in this unusual way. It is arguably a distinct form of fair process suitable to this unique context.

3) Will the Office of the Ombudsperson accord fair process?

While the potential is there, many challenges exist to the fulfilment of that potential. Obviously, it is too early to make any definitive pronouncements. At best, at this stage, I can only identify some of the challenges.

Access to information

First and foremost is the question of access to information. When I mention this issue, immediately, thinking turns to the issue of classified information and whether states are prepared to share that with me. Of course, that remains a critical question. However, it is not just protected information which is problematic.

States may be reluctant to provide answers or face impediments to the release of information even where classification is not the issue. Further, even where the hurdle of providing the information is overcome, it may not occur on a timely basis, thereby impeding the effectiveness of the process overall. There are many reasons for these difficulties, ranging from resources and priorities to a natural reluctance on the part of operational agencies to discuss their cases generally.

As indicated in my Security Council report submitted in January, at least in the early stages cooperation has been good in that states are providing responses. However, as the cases increase I expect there will be issues and challenges in this respect.

Classified/Confidential Information

I return then to the topic of classified information. While there are some cases where resort to such material may be unnecessary, ultimately the cases will arrive where access to classified information is essential. Reflecting on the fundamentals of due

process again, even if the information is shared only with me, there is still much value added in having an independent party review it and, to the extent possible, comment as to whether it is sufficient to support a particular point or not. This would be similar to domestic processes which deal with sensitive or national security information, particularly in the context of administrative proceedings.

There are, however, legal and policy obstacles which make the sharing of this information with the Office, a challenge for many states. For this initial period, I have looked for interim and 'case by case' solutions which might allow me access. However, in the long term, arrangements or agreements which are institutional are needed to support the practice of sharing such information with the Office of the Ombudsperson. To date, I have secured an arrangement with Switzerland which has allowed for the sharing of information. I continue to appeal to other states to explore the possibility of entering into such agreements or arrangements. In my view, it is of the utmost importance that states support the Office in this way.

Allowing for the Petitioner to be "heard"

As for the use of the dialogue phase and the report, to allow the Petitioner to be "heard", the first case has certainly demonstrated that these combined mechanisms do work. Thus, it simply remains to be seen whether that pattern will continue in future cases.

Consideration of the Report and the Decision

While one comprehensive report has been submitted to the Committee, no case has been through the full process elaborated by the Council as of yet. Thus, it is premature to comment on the particular challenges of the final aspect of the process which involves consideration of the report by the Committee and decision making. Obviously, it is only once some cases have proceeded through to the end of the process that we will be in a position to fully assess the effectiveness of the Office of the Ombudsperson. In my view, however, that assessment should not focus solely on outcome but rather the process leading to the outcome. In particular, I think it is critical that the Committee gives careful consideration to the comprehensive reports submitted and ultimately provides a reasoned decision. Those elements, combined with the earlier features of the process as discussed, are, in my view, the means by which fair process can best be measured.

Conclusion

I will leave off there to allow time for discussion. I remain optimistic about the role that this Office can play in bringing enhanced fair process to the 1267 regime. I do so bearing in mind that what is being asked of governments and their agencies is very much a 'sea change' and this of course will take time. However, the stakes in terms of this important counter terrorism regime and the fundamental rights of individuals are very high, so I will continue to strive to do my best to meet the challenges that arise.

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