

Remarks by the Ombudsperson at the High-level Panel Discussion on the occasion of the 10th Anniversary of the Office of the Ombudsperson. The event was organized by the Permanent Mission of Switzerland, on behalf of the Group of Like-Minded States on Targeted Sanctions, at United Nations Headquarters, New York, 17 December 2019

Excellencies, dear colleagues, ladies and gentlemen,

It is a great pleasure and an honor to be invited here as the current Ombudsperson to participate in this event and to celebrate together with you the Office of the Ombudsperson's tenth anniversary.

At the outset, I would like to recall my predecessors, Kim Prost and Catharine Marchi-Uhel, and to express my deep gratitude and appreciation for their important work, their contributions to the establishment of the Office of the Ombudsperson and their creation and evolution of consistent "judicial" practice.

First, I was invited for the second panel about further improvements of the function, then I was invited to the first panel to speak about achievements. So, I will do both.

I would like to start with an aperçu from my field of expertise, the philosophy of law: When I was appointed for the function in May 2018, I received some official letters of congratulation and read posts on official social media accounts. All of them mentioned that my appointment was a long-expected and important decision in the interest of the sanctions regime's effectiveness and legitimacy. Legitimacy? - Of course! But effectiveness? That made me think about why effectiveness was mentioned in the context of an institution responsible for due process and fairness.

As far as legitimacy in a broad sense is required for the implementation of sanctions in national legal systems— yes, in this respect, the Ombudsperson also plays a role the effectiveness of the sanctions measures. And maybe, it is also a good political argument for promoting due process to the sceptics: due process and legitimacy as instruments for power.

However, on the very basic level of principles it is important to emphasize that legitimacy is more than a functional aspect of effectiveness – it is an irreducible value in itself without any function for effectiveness, for the “power of power”. Or in other words: Acts of power are morally or ethically acceptable only if they are legitimate. Legitimacy does not serve power but sets its basis and its limits. In this regard it is enough to recall first, that the Security Council claims a kind of executive power by imposing targeted sanctions on individuals, which under normal circumstances is reserved for Member States; and second, to emphasize that the Universal Declaration of Human Rights is addressed to Member States.

The Security Council has adopted targeted sanctions since 1999, initially in the context of the Taliban sanctions regime. As you know, targeted sanctions claim to be smarter than comprehensive sanctions or embargos against whole countries. But criticism soon materialized because targeted sanctions were imposed on individuals, infringing their legal status, without the individuals having had the opportunity to appear before a court. As we have already heard, three impulses have been important to motivate the Council to further steps after the creation of targeted sanctions: (1.) It was Kofi Annan, who urged implementation of the right to be heard for persons against whom measures have been taken, and the right to a review of the sanctions measure by an effective review mechanism. (2.) Kofi Annan was strongly supported by the “Group of Like-Minded States on Targeted Sanctions for fair and clear procedures for a more effective UN sanctions system”. (3.) And finally, it was the European Court of Justice which, with its decision in the Kadi case, gave the decisive impulse for the creation of the Ombudsperson’s function; stating that the European Union regulations should be annulled, insofar as they concerned Mr. Kadi [...], and that Mr. Kadi’s claims of infringement of his right to be heard, right to property, and right to an effective legal remedy had been well-founded. The United Nations Security Council adopted resolution 1904 on 17 December 2009, by which the Office of the Ombudsperson to the Committee established pursuant to resolution 1267 was created. The Security Council was reaffirming in resolution 1904 *“the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts...”* And the Council decided that *“When considering*

delisting requests, the Committee shall be assisted by an Office of the Ombudsperson, to be established for an initial period of 18 months from the date of adoption of this resolution, ...”

Or in other words: The result was the creation of a review mechanism by an independent and impartial Ombudsperson, who reviews requests from individuals and groups seeking to be removed from the Committee’s Sanctions List. The Ombudsperson shall assist the Committee to improve and strengthen fairness, rule of law, due process and transparency in listing and especially delisting procedures.

How did this work out? Since that crucial moment in late 2009 when the resolution was adopted, the Office of the Ombudsperson has advanced tremendously. My predecessor, Judge Kimberly Prost, set up the office in a dynamic and complex environment which hadn’t previously focused a great deal on issues of human rights while implementing targeted sanctions measures. And my second predecessor, Judge Catherine Marchi-Uhel, moved forward on the same path. Currently, we continue to build on the strong foundations that my predecessors were able to create and build upon back then. One of them, being the actual mandate of the Ombudsperson.

The Ombudsperson’s mandate is stronger today than some States may have anticipated on that December day in 2009 when they adopted the Security Council resolution. How does it work in practice? The Ombudsperson’s recommendation to the Council’s ISIL (Da’esh) and Al-Qaida Sanctions Committee to retain a name on the list is basically a decision – if the Ombudsperson recommends retention, then the listing continues. The Ombudsperson’s recommendation to take a name off the list can prove decisive as well. A delisting recommendation is subject to Committee consideration. However, uniquely, there is a reversed veto system which means that the support of only one member of the Committee is necessary for the Ombudsperson’s recommendation to stand. As you can understand, this makes it difficult to reject a delisting recommendation, because all 15 Sanctions Committee members would have to actively object to the Ombudsperson’s recommendation.

In short: The Committee may overturn the recommendation of the Ombudsperson and it may refer a case to the Security Council. Neither has happened thus far.

This system of decision-making in delisting cases through the Ombudsperson makes the mandate very strong; which was necessary to meet the requirement for an effective review mechanism; effective in the sense of Kofi Annan's requirement. About 70% of the delisting requests have been granted over the last ten years.

The strong position of the Ombudsperson in delisting proceedings was, in my opinion, the basis for the further development and strengthening of the Ombudsperson's position.

Which are the most important aspects and achievements regarding due process, fairness and transparency?

Fairness and due process

- Recommendations and decisions about delisting requests are based on procedural rules (Resolution 2368 (2017), Annex II, and the approach to analysis, assessment and use of information is published on our website).
- The Office of the Ombudsperson has established a rule based consistent practice.
- Independence and impartiality of the review guarantees the equal application of the rules.
- Petitioners have the right to receive a decision within a reasonable time.
- Petitioners have the right to be heard, specifically:
 - to know the case against them;
 - to answer the allegations;
 - to submit evidence;
 - to know the reasons for the outcome.
- Pro-bono legal assistance is available for petitioners who wish to be assisted.

Transparency

- The procedural rules are published, as is the approach to analysis, assessment and use of information.
- Status of cases and statistics are published.

- Accountability: The biannual reports of the Ombudsperson to the Security Council are published, which detail the weaknesses and challenges faced in fulfilling the mandate, among other things.

As I said, the review by the Ombudsperson is a transparent, impartial, factually independent and effective review with which very important requirements for the rule of law and fairness are realized.

However: The Ombudsperson's procedure does not meet the requirement of full judicial review. The most important issues regarding the standards for judicial review are set out by the European Courts, especially the European Union Court of Justice in Luxembourg, are the following:

1. The Ombudsperson does not formally decide, but only recommends a decision to the Committee.
2. The Ombudsperson does not consider an appeal against the initial listing decision but rather a delisting request. The petitioner can not ask for a review of the lawfulness of the initial listing decision; so, it is not possible for a petitioner to receive a decision about the eventual unlawfulness of the initial listing. This also prevents the petitioner from being able to claim damages.
3. There have been no attempts to interfere with the independence of the Ombudsperson. The factual independence of the Ombudsperson can be affirmed. But on an institutional level, and also regarding the appearance of the Ombudsperson, it is not independent.

That is to say: improvements would be possible, particularly on an institutional level.

With the experience of one and half year in office, I propose possible improvements on a practical basis within the Resolution.

First, I would very much welcome it if the Secretariat, the Security Council or the Committee would consider changing the contractual status of the Ombudsperson; as a first step towards not only a personal but also an institutionally independent office.

Second, I would welcome an improvement of the procedure through a stronger and an also slightly different commitment from Member States. Let me explain. I was informed several times about the political nature of the sanction decisions. Yes, that's true, but if Member States want a review under the conditions of a minimal standard of fairness, rule of law and due process, then they have to admit that legal rules based on general principles are applicable.

The Ombudsperson has a quasi-judicial function but is embedded and carried out in the context and under the rules of a multilateral political decision-making process. Member States are used to functioning within the rules of multilateral political decision-making processes. But, in my opinion, these rules are not completely appropriate to proceedings and decisions in single cases about the legal status of individuals. These rules are primarily designed for guaranteeing participation and the protection of Member States' interests. They are not designed for taking decisions about the legal status of individuals and therefore not fully appropriate to decisions of this kind. At least two problems are associated with these conditions, making it difficult to establish a culture of learning and sustainable competence, experience and expertise.

Lack of continuity: Since the Ombudsperson was appointed one and half years ago, 14 of the 15 representatives of Member States in the Committee have left. Under those conditions, it is difficult for the Ombudsperson to establish a shared basis of experience and expertise.

Lack of rational discourse about legal grounds: The rules of multilateral diplomacy are not primarily focused on the exchange of reasons and arguments in a rational discourse under rule of law, as it is obviously the case for judicial proceedings. It happens quite often that Member States communicate their position on a petition to the Ombudsperson without mentioning any reasons for it. In Committee meetings, where the Ombudsperson presents his comprehensive reports orally, pre-prepared statements are read by representatives of Member States. It is apparent that representatives present in the Committee meetings do not normally have the power to answer questions or respond to statements of the Ombudsperson beyond their explicit instructions.

These examples demonstrate the difficulties for the Ombudsperson to engage the stakeholders in a quasi-judicial form of a rational discourse regarding the specific challenges of every single case and the issues of the function and the procedure in general.

In conclusion, I am of the view that there are significant difficulties under the given structural conditions to establish a rational and coherent discourse about single cases, as well as the procedure and function in general. Significant difficulties also challenge to the establishment of a culture of learning, sustainable competence and institutional experience and expertise.

Improvements are possible - within the current framework through a stronger and also slightly different commitment from Member States: They should not participate in the Ombudsperson's proceedings as if it was a political game, but as parties in a judicial proceeding, even if it isn't, strictly spoken, a judicial proceeding; for example by submitting information relevant to the case, or by submitting reasons for motions and positions. It is not enough to communicate "We do not have updated information, therefore the grounds for the listing remain" or "We are opposed" without communication of any rationale.

I am very optimistic that further improvements of the practice will be possible within the current framework as well as steps toward a more appropriate culture of discussion.

Finally, I would like to recall how the institutional development of the mechanism has been realized over the last ten years: by a policy of incremental steps. How did that work specifically?

This evolution was possible based on a dialogue between the Ombudsperson and the Security Council. As you know, the Ombudsperson is accountable to the Council via the biannual reports. These reports have been used to discuss issues and challenges related to the proceedings and the function of the Office. Considering these reports, the Council has taken various steps in evolving the function. So, for example it was possible for the Council to consider the Ombudsperson's concerns in with each new resolution: we have seen this happen with regard to informing petitioners about the identity of designating states, and the content of the so-called reasons letter.

The mechanism is already robust and very effective; it can be still be improved – if only through a series of small steps. In this sense I am very optimistic and grateful for your support.

Thank you for your attention.

Daniel Kipfer