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International Law Summary

UN Sanctions, Human Rights and the Ombudsperson

Judge Kimberly Prost

United Nations Security Council Ombudsperson for the Al-Qaeda Sanctions Committee

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INTRODUCTION

This is a summary[1] of an International Law Discussion Group meeting on 17 May 2013 with Judge Kimberly Prost, ombudsperson for Al-Qaeda Sanctions.[2] The discussion focused on the process by which the ombudsperson determines whether a petitioner should remain on the Al-Qaeda sanctions list. Also discussed were the ways in which the role of the ombudsperson has been strengthened and improved since its inception in 2009, and areas of the process that could still benefit from improvements aimed at ensuring greater overall fairness.

Judge Prost was appointed as the first ombudsperson for Al-Qaeda sanctions by the United Nations Security Council (UNSC) in 2010. Prior to this, she spent time at the Commonwealth Secretariat, the UN Office on Drugs and Crime and the International Criminal Tribunal for the Former Yugoslavia, where she sat as a judge.

This meeting was held on the record.

1 This summary was compiled by Annie O'Reilly.
2 For further information on the Office of the Ombudsperson, see http://www.un.org/en/sc/ombudsperson/accessinfo.shtml.

SANCTIONS

The world of sanctions regimes has become increasingly complex, with states like the United States and regional bodies like the European Union maintaining their own sanctions systems in addition to the sanctions promulgated by the UNSC. The UN's so-called smart sanctions raise very specific issues flowing from the binding nature of the UNSC's decisions, its highly political nature, and the direct impact on the rights of individuals.

At issue with the UN sanctions regime is a clash of rights: on the one hand, the rights to life and security, and the obligation of states and, by analogy, the Security Council to protect those rights; and on the other hand, individual rights, like the right to property, freedom of movement and fair process for those who find themselves on the sanctions list.

The only regime so far to have the ombudsperson process is the Al-Qaeda sanctions regime, commonly known as the 1267 regime, resolution 1267 being the originating resolution. Targeted sanctions are those that the UNSC decides to employ as an alternative to state-wide sanctions, which have been known to have dire effects on a population. Targeted sanctions are aimed at factions or individuals.

The original resolution, passed in 1999, targeted the members of the Taliban, with the purpose of forcing the Taliban to cease its support and harbouring of Osama Bin Laden. The measures that were imposed are the same measures in essence imposed today: an arms embargo, a travel ban and an international asset freeze. An amendment in 2000 extended the sanctions to cover Osama Bin Laden and members of Al-Qaeda. Through this amendment, for the first time targeted sanctions were aimed at non-state actors, given that the membership of Al-Qaida is not limited to any particular state. This added to the complexity of the fairness issue in the context of targeted sanctions. In 2000, the number of individuals on the list of people targeted by the sanctions was very small, but the tragic events of 9/11 changed that and soon there were hundreds of names of individuals and entities on what was then the Taliban and Al-Qaeda sanctions list (the two were subsequently severed). The main issues with the list were that there was no notice given, no reasons and no recourse. It did not meet the fundamentals of a fair process.

Kadi

In 2008, in a case called *Kadi*[3] the European Court of Justice (ECJ) effectively struck down the implementing legislation for resolution 1267 within the European Union. There can be little doubt that this sent shockwaves down the hallways of the UN headquarters and led ultimately to the establishment in 2009 of the Office of the Ombudsperson.

In 2010, the judgment in *Kadi II* was handed down by the ECJ, which helped to drive home the point that the Office of the Ombudsperson would need substantial powers if it was going to provide a meaningful response to the litigation that was ongoing in Europe. The appeal from that judgment is still pending. The advocate general recently issued an opinion in the Kadi appeal, which recognized the role that the Office of the Ombudsperson has played in improving the listing process:

> This process [of improving the listing and delisting process] reflects a realisation within the United Nations that, despite confidentiality requirements, the listing and delisting procedures must now be implemented on the basis of a sufficient level of information, that the communication of that information to the person concerned must be encouraged, and that the statement of reasons must be adequately substantiated. The Ombudsperson, who performs her functions in complete independence and impartiality, plays a significant role in this regard. She gathers the information needed for her assessment from the states concerned, she initiates a dialogue with the petitioner on that basis, and she then makes her proposals to the Sanctions Committee as to whether or not it is necessary to keep a person or an entity on the list […] The rigorous examination carried out by the

3 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, 3 September 2008. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML.

> Ombudsperson requires that there be a strong justification for keeping a name on the list, that is to say, that there must be sufficient information to form a 'reasonable and credible' basis for listing. In view of the important role played by the Ombudsperson in the decisions taken by the Sanctions Committee, I consider that the procedure before it can no longer be regarded as purely diplomatic and intergovernmental.[4]

Interestingly, as a side note, in March 2012, a US judgment came out relating to Mr Kadi's domestic listing by the United States distinct from his listing by the Security Council. The US court upheld that listing 'across the board' and it is an interesting decision in that it represents a contrasting approach to that taken by the European courts.

In October 2012, Mr Kadi was delisted from the UN sanctions list through the ombudsperson process.

PROCESS

The petition

The ombudsperson usually receives the petitions from individuals directly, normally by email; sometimes by combination of phone call and email. About half of the petitioners are represented and half are not, but she takes extremely seriously the duty to ensure that those who are not represented are not in any way disadvantaged by their lack of representation; she can draw out information as she needs to ensure that the process can proceed. The threshold to start the process is very low. Once an individual has set out for her why they do not believe they should be on the list, in accordance with the resolution, she can start the process, although she sometimes has to seek further clarification from the petitioner as it is not always clear from the original contact.

The ombudsperson does not have *proprio motu* powers to bring cases herself, but the petition can be brought by a person other than the listed person, such as a family member. This is particularly pertinent in the case of deceased persons. In general, if there is a reason why the petitioner cannot bring the petition himself, and representation is proper, the petition would be accepted. However this has to be carefully considered on a case by case basis as it would not be appropriate, for example, to accept applications brought by organizations that might have an alternative agenda.

The standard of review

One of the first issues the ombudsperson was required to address upon taking up office was the standard of review that would be used. The UNSC made clear that the standard should not be a criminal one but little other guidance was provided. Borrowing from civil and common law, she formulated the standard that she now uses, which is whether there is sufficient information to provide a reasonable and credible basis for the listing. It draws on the common-law standard of 'reasonable grounds' and the European civil-law test of 'serious and credible evidence.' This standard seems to have worked, although Ben Emmerson, the UN Special Rapporteur on Counter-terrorism (SRCT) disagrees with its use and has argued for a different standard.

The original listing

In order to be placed on the list, a determination must be made that the person or entity is 'associated to' Al-Qaeda, association having a very specific meaning under the governing resolution, which includes providing support to, and participating in the activities of, Al-Qaeda. States can nominate a person independently, or together. It is the Sanctions Committee, which is

4 Opinion of Advocate General in European Commission, Council of the European Union, United Kingdom of Great Britain and Northern Ireland v. Yassin Abdullah Kadi, 19 March 2013, para. 82, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=135223&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=205611.

comprised of the 15 members of the UNSC, that makes the decision on whether to make a designation.

The ombudsperson is only allowed to know the identity of original designating state in the cases she takes for review. Originally, she was only able to inform the petitioner about which state had designated him if the designating state gave permission but the last UNSC resolution reversed the onus so that she can now disclose that information unless the state has specifically objected to her doing so.

The ombudsperson has no formal role in the original listing process; however, a petitioner can apply for delisting the day that the listing occurs, so even though the ombudsperson is not part of that process she is in a position to affect the decision almost immediately. The timeline for the ombudsperson's process is strict, so relief need not be unduly delayed. Four months are assigned to information-gathering, subject to a two-month extension that only the ombudsperson can grant if she finds it necessary to complete the information-gathering process. Two months are assigned to the dialogue stage, which can be extended once for a further two months again by decision of the ombudsperson.

Consensus among all 15 members is required for a listing to be approved. The listing process has improved in recent years. More detailed reasons accompany the committee's decisions. Also the ombudsperson process appears to have had an influence on the listing process because possible delisting applications must be taken into account in considering the basis for the listing and the reasons for it.

It is important to note that the ombudsperson does not engage in any sort of judicial review of the original listing decision. The only question she asks is, looking at the information gathered during the ombudsperson process, is it sufficient to justify the listing presently? This approach has several advantages. Unlike judicial review, the petitioner can present new information and explanations. Also there is no issue of deference to the original decision maker or a test that is limited to a consideration of the reasonableness of a previous decision. The matter is considered presently and in essence *de novo*. The ombudsperson must, of course, consider the original conduct involved based on the information gathered, to determine the inferences that can be drawn from it in terms of possible present association. But the ombudsperson does *not* assess the sufficiency of the original decision, and her consideration is not in any way limited to the original material upon which the decision was made.

Phase 1: Information-gathering

It is a three-stage process, the first of which is the information-gathering phase. This phase is far more intense than the governing resolution might suggest. While the resolution speaks of contacting the relevant states, the ombudsperson also carries out extensive follow up through emails, phone calls and in-person visits in addition to the initial formal letters sent. Another source of information is the UNSC Sanctions Committee Monitoring Team, which is required to provide her with information, and with whom she engages regularly to attempt to draw out as much information as possible. She also conducts independent research and gathers considerable material from public sources.

Her sheer persistence with the information gathering process has proved a useful tool, in the absence of subpoena powers, for obtaining information. She has been very impressed by the level of cooperation of states. For example even when there are significant competing priorities for states – such as in the case of states directly affected by the Arab Spring – responses were still being received to her requests for information.

Confidential information

The biggest problem she has faced in the information-gathering process is the lack of specificity of the information she is provided due to confidentiality concerns. If the ombudsperson's review is to have any substance, there must be access to the raw material. So far, she has been successful in reaching agreements with various states, including the United Kingdom, Germany and France,

over access to confidential material and in some instances she has received confidential material. The full list of states that have entered into such agreements is listed on her website.[5] These agreements are not personal to her but are personal to the ombudsperson and any information provided to her is not shared with the Sanctions Committee or with the petitioner. This has the potential to create a problem in the dialogue phase, where she is required to put the case to the petitioner; the case may arise where she is not able to explain the case to the petitioner because it is based substantially on confidential information. However to date, she is satisfied that in the completed cases, the petitioner fully knew the case against him even where confidential information had been received. In her assessment, it was not so central in these cases such that it prevented her from putting the case to the petitioner. Nonetheless the possibility for that problem in future cases remains.

An agreement with the United States, which is the designating state in many of the cases, has not been forthcoming. This is a serious, continuing problem, but it does not act to the detriment of the petitioners. The rule is that the decision is based solely on the information gathered in the ombudsperson process, which means that if the information is too vague, it will not support continued listing. The absence of particularity does not prejudice the petitioner but it is very worrying in terms of the ombudsperson being able to properly and fully assess the case.

Phase 2: Dialogue

The dialogue phase is the critical part of the process in terms of fairness. The ombudsperson travels to meet with the petitioners in most cases as they are subject to travel bans. These face-to-face meetings are very important to a proper assessment of the case. In some instances, it has not been possible to visit the petitioner because of the security situation in the country. However in the last resolution, the UNSC gave her the power to ask for an exemption to the travel ban to allow the petitioner to travel to another location for the interview. This will be of assistance in ensuring that the interview can take place in all the necessary cases.

The purpose of the dialogue phase is to engage with the individuals or representatives of an entity, as far as possible in person, to put the case directly to them. In some cases she will send information about the case to the petitioner in advance of the meeting but in other instances the case will be put through the questions posed at the interview. The meeting with the petitioner, or in some cases written exchanges, provide the petitioner with the opportunity to respond to the case and to submit any relevant to the ombudsperson and the committee. This can include important documentation. In fact in some instances the petitioner produced highly relevant documents not obtained from any other source.

The petitioners may have counsel present during this meeting. However, as indicated, there is no requirement for or right to legal representation in the process. The SRCT has recommended that counsel be provided to each petitioner and in some complex cases the ombudsperson would agree that having counsel would be of assistance. However, funding is so difficult to come by already that she believes that it would be impossible to provide counsel for each petitioner in practice. Also, as indicated, the ombudsperson pays special attention to ensure that no petitioner is prejudiced by the absence of counsel and so far, there has been no case where such prejudice has resulted. .

The ombudsperson noted that it was very striking how much this meeting means for the petitioners. On several occasions she has been told by petitioners that it is the first time, after many years of being on the list that anyone has listened to their side of the story. To her, this is a significant step forward for fair process – regardless of whether ultimately the process is determined to be overall sufficient.

Evidence obtained through torture

The SRCT has raised the issue of what ought to be done if the ombudsperson finds that evidence underwriting the original listing decision was obtained through torture. The policy that the ombudsperson follows is that she will investigate any suggestion by a petitioner that information in

5 Website of the Office of the Ombudsperson of the Security Council's 1267 Committee, 'Access to Confidential/Classified Information,' available at http://www.un.org/en/sc/ombudsperson/accessinfo.shtml.

support of the listing was obtained through torture. She can do this by putting specific questions to states. It would certainly help to have subpoena powers in these situations but were a state to be uncooperative in providing answers to these questions this would be taken into account in her assessment of the material. And if she finds to the same sufficiency standard that evidence was obtained under torture, she would not give it any weight nor rely on it in any way in her analysis of the case

It is always possible that information obtained through torture could enter the process without her knowing, but to the extent that the same could occur in a court context this cannot be said to be a failing that is peculiar to the ombudsperson process. To date, no information that she has received seems suspicious to her as being obtained under torture but she nonetheless remains vigilant.

Phase 3: Decision-making

Based on the information she receives from states, individuals and other entities, the ombudsperson drafts a comprehensive report that is submitted to the Sanctions Committee. When she first took up the position of ombudsperson she only had the power to make 'observations' in her reports and she could not make 'recommendations.' A delisting decision required consensus. She has subsequently been given a 'recommendation' power, and more significantly, 60 days after making a recommendation to delist, the person comes off the list unless there is a consensus decision by the 15 members to the contrary, or the matter is referred to the council itself for a vote. This has been a very important step forward for fair process. The designating state can also ask for the person to be delisted, in which case the same trigger mechanism kicks in and the person or entity will be delisted after 60 days unless there is similarly a consensus decision to the contrary or a referral to the Council.

One other important step in the resolution is the requirement for reasons. Originally the resolution mandated only that the committee give reasons in cases where an individual's listing was retained, although the practice was that reasons were given in every case in order to demonstrate that the decision was a reasoned one – a hallmark of fair process. Now, the provision of reasons is required by the governing resolution in all cases and the committee complies with this, though sometimes the production of those reasons is delayed.

Facts and figures

Forty-six cases have been submitted to the ombudsperson since she took office, and 27 of these cases have been concluded. As a result, 23 individuals and 24 entities have been delisted. One entity was removed as an alias for another listing. One individual, whose request for delisting was initially denied, brought a subsequent application – which is permissible if the petitioner can produce new information – that resulted in his delisting. There has been one case in which the listing was retained, and one withdrawal before the case concluded. In two cases, the committee delisted the individual by a separate decision before the conclusion of the ombudsperson process making it moot. This occurred recently in the case of Osama Bin Laden.

In terms of the sufficiency of the fairness of the process, the ombudsperson respects the SRCT's comments that because the council retains the power to overturn the ombudsperson's decisions, more needs to be done at a structural level to ensure the overall fairness of the process. However, she emphasizes that it is not her role to comment on this broader question of overall sufficiency. From the ombudsperson's perspective what is relevant is that she is satisfied that in each of the individual cases completed to date the individuals or entities have received a fair process.

The ombudsperson acknowledges that some who are concerned about the fair process issues have advocated for the elimination of the use of targeted sanctions. However, in her personal view, these sanctions are an important tool for the Security Council in counter-terrorism and in cases of violations of international humanitarian law. As a result she believes the solution lies not in eliminating targeted sanctions but in ensuring that the sanctions are used accurately and credibly.