

Remarks of Kimberly Prost, Ombudsperson, 1267 Al Qaida/Taliban Sanctions Committee delivered to the informal meeting of Legal Advisors 25 October 2010.

My thanks to the Chairman and to all of you for allowing me the opportunity to speak today about the developments with reference to the 1267 Committee and, in particular, regarding my new office.

I will provide a brief overview of the regime and some recent developments but would like to speak mostly about the work of my office, in particular the key challenges.

Obviously, with this audience, I need not go into any detail as to the nature of the work of the 1267 Committee. Suffice it to say that the regime involves targeted or so called “smart sanctions” aimed at individuals and entities determined by the Security Council 1267 Al Qaida/Taliban Sanctions Committee to meet the criteria for membership in, or association to, Al Qaida or the Taliban.

However, it is perhaps helpful to highlight the dichotomy of perspectives on these sanctions which is at the heart of the controversy that surrounds them.

From the perspective of the Security Council and its Committee and those who work in this context, the 1267 sanctions are the same as other Security Council sanctions, save for the target. Looking at the measures in that context, it is difficult to accept that this one variable somehow changes the fundamental nature of the sanction or the process surrounding it. It is understandable, therefore, from this perspective, that there is resistance to accepting that the 1267 sanctions should be subjected to any kind of special procedural constraints or review, especially those involving an external body, foreign to the contours of the UN Charter.

Equally understandable is the perspective of individuals and entities subject to these sanctions and the states which must implement them, who see, essentially, the results of the Security Council action - the sanction in operation - the effects of which appear identical to those of domestic court determinations. Thus, there is an expectation that

the procedural underpinnings and the due process accorded should be similar, if not identical, to a domestic proceeding.

It is difficult – if not impossible – to reconcile these two perspectives and it is this conflict which underpins the controversy of the regime and it is also within this context that my office operates.

From the beginning, or at least after the significant additions to the list – almost 200 names of individuals and entities- in 2001, the regime has attracted critical comment and political complaint to the Security Council focused on the lack of transparency as to the basis for identifying and listing individuals and entities and the absence of due process.

Increasingly, the sanctions as implemented in states have been at the root of judicial challenges in various domestic jurisdictions. While the actual findings have varied I think it is safe to say as a general principle, the courts have been uniform in their criticisms as to the lack of due process accorded to individuals and entities subject to these significant sanctions.

The Security Council has not been immune to, or dismissive of, the criticism. Over an 8 year period we have seen incremental changes to the 1267 process including humanitarian exemptions to the asset freeze, the development of guidelines for Committee process, the introduction of requirements for a statement of the case and narrative summaries to accompany the listings, the establishment of a focal point as a means by which affected individuals or entities could transmit requests for delisting and, most recently, a comprehensive review of the entire list which resulted in several delistings. While the result has been improved quality and transparency especially regarding new listings, fundamental concerns still remain, notably as to due process for those already listed.

In the context of this criticism emanating from many geographic corners, the tipping point, if you will, came with the decision of the European Court of Justice in the case of Kadi and Al Barakaat in September of 2008, in which the EU implementing

measures for the 1267 regime were struck down in relation to the applicants, on the basis of breaches of the rights of Mr. Kadi and Al Barakaat - with specific emphasis on the right to notification of the case and to be heard, as well as property rights.

While the court frames the decision as restricted to a review with respect to the EU implementing law, not the action of the Security Council itself, the practical effect is the same in so far as the enforceability of the Security Council regime is clearly directly in peril.

Parenthetically and out of chronological order in terms of this presentation, a few weeks ago the ECJ – the General Court (former Court of First Instance) - once again struck down the amended EU implementing regime, finding the information provided to Mr. Kadi pursuant to the revised measures to be inadequate in terms of a right to know and answer the case.

Going back now, in response to the various criticisms and challenges, in December of 2009 the Security Council adopted resolution 1904 which, *inter alia*, created the Office of the Ombudsperson. The intention was to provide an independent avenue through which requests for delisting could be presented to the Committee. Unlike the previous mechanism of the focal point – still applicable for other regimes – I have both a procedural and substantive role to play in the assessment of the delisting request.

Briefly, the process elaborated for consideration of the requests is in three stages. In the information gathering phase, I distribute the request to the Committee and to relevant states (designating state, state of nationality/residence) with a view to

gathering as much relevant information as possible about the request. The Monitoring Team which assists the Committee also provides the relevant information which they have and I can also look to other sources – other states or organizations, open sources – to obtain pertinent material.

Second is the dialogue phase where I put questions and generally engage, particularly with the Petitioner, as to the case and his answer to it. This can also involve putting questions which the states or the Monitoring Team have suggested and generally dialoguing about the case. During this same phase, I prepare a comprehensive report which, on the basis of my analysis and observations, will set out the main arguments related to the request, for the consideration of the Committee.

In the third phase the Committee will consider the report. This will include an appearance by me before the Committee, at which time I hope there will be an open discussion about the case. Subsequently, the Committee will make its decision on the request and I will then communicate that to the Petitioner, hopefully with reasons.

That is the theory and now for a description as to how it is going in practice, including the challenges. I have been in Office since mid July so it is still relatively early days. I have so far two cases, one which is about to enter dialogue phase and one which is in the information gathering stage. I believe shortly I will have a third.

Much of my time initially was spent on two key issues for the Office – independence and publication/accessibility. I have been working on establishing structures, such as my website, and procedures and relationships which properly reflect the independent

role I must play. And secondly, I have been striving to publicize the existence of my office generally and to those who might be interested in making an application. This remains a challenge and one on which I would appreciate thoughts and comments as to how to reach the relevant audience and encourage use of the office.

I have now turned my attention to the individual cases and in particular the role that I must play in those cases. I am of course well aware that some consider my office, as constituted, to be insufficient to deliver the necessary elements of effective due process. Those who criticize it point to the limitations of the position, i.e. I make no recommendations, the decision still rests with the Committee and there is no traditional “judicial review”. While I understand these criticisms, for my part, I prefer to concentrate on the positive – on what I can do, what has been provided for in the resolution. In my view, from the perspective of the individuals and entities facing the consequences of listing, the Office of the Ombudsperson is not an insignificant development. Therefore, my aim is to take the position as given to me and make it as effective as possible in practice. And I believe in doing so I can demonstrate that this position is ‘value added’ in terms of due process and the rights of the individual.

Specifically, to that end, I can use the post to draw out information- the contours of the case and underlying material - so that I can tell the Petitioner what the case is against him. In the dialogue phase, I can clarify his answer to that case. I can similarly draw him out as to the details of his response and present all of that before the Committee for its consideration. In essence, in this way, the Petitioner can be “heard” by the decision maker. These two steps alone – if achieved – will represent progress in terms of due process in the 1267 Sanctions Committee practice.

Second, what ever words were used in the Security Council resolution - observation as opposed to recommendation - I will provide the Committee with an analysis of the underlying information and my independent assessment as to the sufficiency of the case. Quite frankly, I am not known for keeping my opinions to myself. Again that will be a novel development in terms of the information provided to the decision maker in this process.

And finally, accepting that these are preventative, as opposed to punitive measures, I am not going to focus my attention on whether the original decision to list was reasonable or justifiable. Instead, I will provide my analysis and observations on this question - is there a sufficient basis today for this individual or entity to be on the list? In that way, in each individual case, the Committee will have to assess the sufficiency of the underlying basis in the context of the appropriateness of its continuation.

If I can accomplish these goals, I believe it will mark a significant step forward in terms of due process in the context of the 1267 procedure.

However, obviously I face many challenges – too many in fact to list for you today. I will therefore concentrate on two which are perhaps of particular interest to this gathering of Legal Advisors -Access to information and the broader question – is this all enough?

On access, while I am committed to doing my very best to draw out information, obviously the significant hurdle to overcome is in the nature of the information upon

which the listings are often based – namely intelligence and classified material - and the reticence of states to share that type of material. It is that particular challenge which is currently occupying a significant amount of my time. My aim is twofold in this regard. First, if possible, I want to limit or eliminate reliance on such material in particular cases. While that may seem an unrealistic statement, it is interesting already to see how much detail can be drawn out - non classified detail – just by probing and asking questions. So I will continue to pursue that. As a second important step however, for those cases where it is necessary to look at classified material, I am trying to find ways through which that can be achieved. Obviously, any access to confidential material would start and end with me. While this may not be optimal, if at least an independent third party has had an opportunity to view and assess the material, even *ex parte*, that would still represent progress and it is a process not dissimilar from that utilized in a domestic context in several countries. So we will see how matters evolve in the coming months on this important question of access to information.

The second challenge is the broader question which surrounds my work and that is whether, at the end of the day, my office as constructed is going to be considered a sufficient measure. It is interesting in this respect that two courts have already dismissed my office as being inadequate to render effective due process. I am trying not to take these comments personally. The European Court of Justice in its recent “Kadi 2” decision and the UK Supreme Court both have given an opinion as to the insufficiency of the office in this regard. With respect, I would note, they have done so, without rendering to me any form of due process in that the office was not yet

operational when considered nor have I ever been given an opportunity “to be heard “
on the subject

Ultimately, that conclusion – expressed only in *obiter* so far – may stand in some national jurisdictions. However, I think there are serious questions which should be addressed before we reach that point, which have not been considered to date.

For example, I believe strongly that there must be due process attached to a targeted sanctions regime. I would not be doing this job if I thought otherwise. But I am not yet convinced that the only mechanism for that is the traditional measures utilized in a domestic regime, in particular procedures generally associated to a criminal or punitive process. If we all accept that the Security Council is a unique body, exercising distinctive sanctions powers, is it not the case that the international due process regime for it can also be unique? And the follow up question is, if it is possible to have a special due process regime in this context, what are the contours of it and does my office meet them? These are fundamental questions and ones that need to be carefully considered before reaching conclusions which impact directly on this regime on a global basis. In the end, if this is not the case and we cannot otherwise resolve the dichotomy of perspectives, ultimately we will face the even more difficult question as to what states will do when they face conflicting decisions of the Security Council and a national court.

I have no answers and thankfully I am speaking in *obiter* now myself in terms of my mandate. It is ultimately for others – perhaps in the room – to resolve these questions. In the interim, however, while the broader issues are debated, my task is to be as aggressive as possible, in using the position of Ombudsperson as currently framed, to

provide as much due process for individuals and entities seeking delisting as I can.

Whatever the ultimate outcome on the wider questions, I think all the efforts in this regard are well worth it both in terms of the rights of the individuals and entities subjected to the sanctions and for the regime itself.

I will leave it there and I look forward to any questions and comments and thank you again for the opportunity to address you.