LECTURE AT THE INSTITUTE OF LEGAL RESEARCH ON THE INVITATION OF THE MINISTRY OF FOREIGN AFFAIRS AND THE NATIONAL AUTONOMOUS UNIVERSITY OF MEXICO, 24 JUNE 2011

It is an honour and pleasure to be here today and to be in Mexico City, as this is my first visit. I am thankful to the Government of Mexico, in particular the Foreign Ministry, for the invitation and hospitality already accorded to me.

One reality has become clear to me in my first year as Ombudsperson for the Security Council Al-Qaida/Taliban Sanctions Committee. The efforts to strengthen this "targeted" sanctions regime by safeguarding the rule of law and due process in this context, will be effective only with the support of countries which prioritize these concepts. Mexico is a key state in that respect and we see every day the efforts made to protect these fundamental precepts, in principle and in practice, within this country and on the international level. So it is particularly apt that I should be here today to discuss my work so far. It is also fitting given the important strategic role which Mexico played in the establishment of my office, during its term in the Security Council.

OVERVIEW OF REMARKS

By way of preview to my remarks, I am pleased to say that this is a world premiere in a way, as it is the first occasion I have had to speak about the renewed and enhanced mandate accorded to me by the Security Council, one week ago, under Security Council resolution 1989 (2011).

My remarks today will cover, briefly, the background to my office – in essence how we have arrived at this point – but will focus mostly on the practice so far and, in particular, how the Office is functioning in terms of the delivery of the fundamental components of due process. I will also, of course, touch on the modifications brought about by the new resolution and give some thoughts on their potential impact.

By way of context, two important points need to be highlighted at the start. First, it is essential to understand that the Al Qaida/Taliban sanctions regime – commonly referred to as the 1267 regime – arose from efforts on the part of the Security Council

to minimize the unwanted effects on innocent civilian populations brought about by the imposition of state wide sanctions. In the particular case, in 1999, rather than imposing sanctions on the entire country of Afghanistan, the Council directed the sanctions to the Taliban, a political faction in control of parts of Afghanistan at that time. Thus, as a starting point the motivation for these sanctions - in this and other instances - is laudable.

Secondly, there are certainly those who argue that the solution to the due process issues I will discuss shortly is to eliminate the use of these types of sanctions by the Security Council and to revert to the days of state regimes only. What this argument overlooks, however, is the important role that these sanctions can play in protecting human rights and responding to situations of gross violations of international humanitarian law. Having spent four years of my life at the ICTY, hearing, as a judge, the horrifying details of the massacre at Srebrenica, I believe that the international community and the Security Council must have at its disposal every possible available mechanism to prevent such events from ever occurring again. And a targeted sanction is one of those weapons, as we are seeing so clearly today.

As a result, in my view, the aim must be to improve the system for the targeted sanctions by infusing it with due process, which is why I undertook this job.

PATH TO DUE PROCESS CHALLENGES

With those thoughts in mind, lets begin with a brief description of how we have arrived at this point.

As mentioned, the regime – adopted originally in 1999 – was aimed at compelling the Taliban to cease supporting terrorist activities and, in particular, to turn over Usama bin Laden who was at that time being sheltered in Afghanistan by the Taliban. The sanctions imposed included travel restrictions, weapons prohibition and an asset freeze upon the membership. At the same time, the Council established a Committee responsible, in essence, to identify the Taliban membership for sanctions. Until last week those basic elements remained at the core of the 1267 regime, with an important amendment in 2000 which extended these sanctions to individuals “associated to” Usama bin Laden and Al Qaida in addition to the Taliban. That term “association”

was subsequently defined by the Council to cover broadly any person or entity providing support to this individual or these groups.

Despite its unique nature, the regime was not the focus of particular attention until the tragic events of 9/11, after which, a number of names were added to the list – something like 200 within the first few months after those events.

Within a year or so – by 2002/3 - the problems with this regime in terms of due process began to evidence themselves. They arose from the fact that the Security Council approached the matter in a manner consistent with its normal process but the effects, which were direct on individuals and entities, as opposed to states, were anything but usual.

FAIR PROCESS CHALLENGES AND SECURITY COUNCIL RESPONSE

Individuals were not notified of their listing and there were many instances where they found out because they attempted to carry out a financial transaction. Once they did learn of the sanctions, there was little available information as to why they were on the list. Aside from asking a state to pursue the matter with the Security Council, there was little by way of recourse available to question or challenge the listing. And of course there was no mechanism in place to provide for any form of independent review given that the decision making power rests exclusively with the Security Council.

Criticism grew - from many corners – and, gradually, the Security Council began to respond, adopting measures such as notification processes, public narrative summaries of the reasons for listing, periodic reviews and the establishment of a "focal point" through which an individual could pursue a request for delisting. The focal point, however, was not a substantive mechanism for review but rather a transmission point which allowed individuals and entities to communicate with the Al Qaida/Taliban Security Council Sanctions Committee.

These measures, though bringing about a vast improvement, still failed to address sufficiently the fundamentals of due process including – the right to know the case against you, the right to answer that case and be heard and the right to some form of

independent review. Inevitably, national courts began to play a role and there is currently litigation pending in several states including Canada, the United States, Pakistan and, famously, the European Union, related to this listing process or more precisely to the implementing regimes within states for it.

For the purpose of this presentation, I do not intend to dwell on the details of the pending litigation or decided cases. Suffice it to say that in September 2008 the European Court of Justice (ECJ), in the case of *Kadi and Al Barakaat International Foundation* held that the European Union regulation freezing Mr. Kadi's assets - where he had no ability to know the information making the case for his listing - breached his fundamental rights, including his right to be heard, the right to effective review, and his property rights. The Court annulled the regulation as it related to Mr Kadi and Al Barakaat, staying enforcement of the decision for 90 days to allow for action to be taken to cure the defect. Under a new regulation subsequently adopted, Mr. Kadi was given the information the Community held in support of his listing (which was the Narrative Summary prepared by the 1267 Committee), and a chance to respond. Mr. Kadi made submissions in writing. The Community determined that he should remain on the list. Consequently, in February 2009, Mr. Kadi challenged this process and his continued listing. In September 2010, the General Court upheld his claim, finding that the new process was not sufficient to protect Mr. Kadi's fundamental rights. That decision is now under appeal and pending before the Grand Chamber of the ECJ.

The decision of the ECJ, coming at the culmination of ongoing criticism – academically, politically and otherwise – as to the lack of a fair and transparent process, led directly to the adoption of resolution 1904 (2009) and the establishment of the Office of the Ombudsperson.

OFFICE OF THE OMBUDSPERSON

I move then to a discussion of the Office and the process for the consideration of delisting petitions. I was appointed to the position in June of 2010 and took up office in July of that year.

My primary role is to assist the Security Council Committee in its consideration of delisting petitions. To this end, individuals and entities come to me and I follow a

process whereby I gather information from relevant states, then dialogue, particularly with the Petitioner, and prepare a Comprehensive Report in which, until recently, I would summarize information gathered, analyze, make "observations" and set out the arguments in the case. It was then for the Committee to take a decision on delisting.

Within this framework I have endeavoured over the past 12 months to use this mandate as aggressively as possible to deliver the fundamentals of due process. While I am well aware of the criticisms of the process and the lament that the position does not go far enough, I have chosen to focus not on what I don't have but on the powers which I have been accorded and I think that was the right approach to take. What follows is a description of some of the key activities I have undertaken.

PUBLICIZE/ACCESS

On a general note, I have strived to use every available method to publicize and make the office accessible. While I believe I am succeeding on the latter point, I remain concerned about reaching all of those who might wish to take advantage of the new system. I remain open to any thoughts as to how that might be accomplished.

INFORMATION GATHERING PROCESS – RIGHT TO KNOW THE CASE

Moving to the delisting process itself, in practical terms, I use the information gathering phase to try and obtain as much relevant material as possible, with the aim of being able to tell the Petitioner what the case is against him. Parenthetically, I use only male references here reflecting the fact that there are no listed females. While I start the process by sending a letter and distributing the petition to relevant States, such as the States of nationality, residence and of course the Designating State- I certainly do not rely solely on that measure. I follow up – by phone, by email, by fax; I just generally make a nuisance of myself so that I am difficult to ignore. And I have had some considerable success in getting States to respond. While I have no subpoena power, the combination of a Security Council mandate and persistence, is proving effective. Almost without exception States do respond to my queries.

CONFIDENTIAL INFORMATION

However, the content of those responses often requires 'prodding' for detail and obviously the biggest challenge I have is the question of confidential/classified

information and access to it. That is a point on which I continue to vigorously engage with States. In the short term and for the first few cases, we have managed to find practical ways to address the issue – summaries of underlying information, declassification or, in some instances, analyzing the case without resort to classified material. But in the long run, the only solution is to have in place agreements and arrangements with States which will allow for the sharing of information with the Office. So far, I have achieved two such arrangements with Switzerland and Belgium but it is an ongoing project.

DIALOGUE PHASE – RIGHT TO KNOW THE CASE AND BE HEARD

Once I have gathered information in the two month period set for this purpose (which can be extended once for an additional two months) I then proceed to the dialogue phase. During this period, to the greatest extent possible, I share with the Petitioner the information gathered with a view to ensuring that he knows the parameters of the case against him and as much of the detail as possible. I believe I have been able to do so in the cases I have handled to date.

The dialogue phase has proved to be of great importance in these cases in many respects. It allows me to draw out the full answer of the Petitioner and it also gives the Petitioner a real and tangible means by which to communicate his "side of the story". What has been very striking is the Petitioners who, almost without exception, tell me that after several years on the list, this is the first time someone has asked them questions, listened to their side of the story. It is a powerful testament to the need for the Office of the Ombudsperson and the importance of this measure in terms of due process.

Through the Comprehensive Report, I am able to ensure that the Petitioner's case, as established through dialogue, is presented fully to the Committee thus allowing him to "be heard" by the decision maker; another fundamental aspect of due process.

DIALOGUE PHASE/INDEPENDENT REVIEW

During this phase and in the preparation of the Comprehensive Report, I also have the opportunity to "review" the information which underlies the listing. Even in the case of confidential information, while I am unable to share that material with the

Petitioner, if I am given access it will mean that an independent third party has viewed it and can provide an assessment as to whether it is sufficient to support the listing or a part thereof or not.

OBSERVATIONS/RECOMMENDATIONS

On this point, while the prior resolution restricted me to making "observations" on the information as opposed to "recommendations" I have said very publicly – from the start – that I don't care what it is called, I intend to tell the Committee what I think about the sufficiency of the information in each case. And that is exactly what I have done. I did so because in my view this was the only way that the Ombudsperson process could possibly be characterized as delivering a form of fair process. And as we will see, this has now been recognized in the most recent resolution, which accords the Ombudsperson the right to make recommendations.

In my opinion, the dialogue process and the preparation of the report, as they are operating in practice, bring a form of "independent review" to the 1267 regime. It is, of course, not a review of any Security Council or Committee decision as such action would conflict directly with the UN Charter. Rather it is a review of underlying information for the purpose of a decision yet to be made by the Committee. It may not be the concept of traditional judicial review as it is known, but it is a form of review. An independent third party is looking at the underlying information and providing views on it to the decision maker. In this respect, resolution 1989 (2011) has made some important changes which serve to even more clearly recognize this review role on the part of the Ombudsperson.

DELIBERATIONS AND DECISION

The third and final phase of the process involves the presentation of the report to the Committee and deliberations and decision. My role in this part of the process is obviously a limited one. I present the report - first in writing and then orally - and engage in a discussion with the Committee members about it, as appropriate. It then falls to the Committee to take its decision.

Unquestionably any assessment of the fairness of the process overall will take into account the decision making procedure as well. Paramount in my view is whether the Committee – whatever decision it takes and especially where it declines delisting – gives reasons. It is my opinion – one which I have stressed repeatedly to the Committee and beyond - that only with a reasoned decision can the process be sufficiently transparent and fair.

THE REGIME IN PRACTICE

There, in broad terms, is what I am striving for in this process, so the question becomes how is it working out?

So far, I have had 11 cases which are now at various stages.

I can say that my experience to date is, overall, positive. I have been receiving information from States and, for the cases in which I have prepared reports – 5 in total – I am satisfied that I was able to tell the Petitioner the case against him and to present the Petitioner's response to that case to the Committee. Fortunately, none of the cases have involved instances where classified information presented a particular obstacle, though as indicated that is only a matter of time.

I am also satisfied that the Committee members are giving serious consideration to each of the reports presented and that my "observations" are being accorded weight.

As to the decision making phase, it is really too early to assess it, particularly now with the changes brought about by the most recent resolution. These will need to be taken into account in practice before any conclusion can be drawn.

All that I can say is that two cases have been decided by the Committee and have resulted in delistings. As I had hoped, the Committee has provided reasons for those delistings and those have been conveyed to the Petitioners. I am awaiting the results of one other case where the report has been presented in writing and orally to the Committee. I have recently submitted two additional reports to the Committee for their consideration.

Overall, it is too early to draw any conclusions about fair process. What I can say is:

1) unquestionably we have seen a significant enhancement of the fairness and transparency of the process; and
2) State cooperation has been good and there is clearly a will on the part of all the members of the Security Council to support to the Office

RESOLUTION 1989 (2011)

What also must be taken into account in assessing the effectiveness of the Office are the modifications brought about by resolution 1989 (2011) adopted last Friday, in which the mandate of the Ombudsperson was renewed for 18 months

To begin with, for a number of political and policy reasons, the Consolidated List and functions of the Committee have been divided into two separate regimes – one for the Taliban and one for Al Qaida. The Office of the Ombudsperson relates only to the latter regime – the Al Qaida sanctions regime. Interestingly, in practice, while the Ombudsperson process was available, no delisting petition was presented by a person or entity said to be a member of, or associated to, the Taliban. The cases all related solely to Al Qaida listings.

In terms of my mandate, there are several important changes.

The time period for information gathering has been extended to four months, recognizing the many challenges faced in accumulating all the relevant information. However, I now have discretion to shorten the dialogue phase if I consider that appropriate.

The Council has strongly urged states to cooperate with my office in providing information, including confidential information, and there is a specific obligation placed on the Ombudsperson to respect the confidentiality of any information provided. There is also strong language urging Designating States to allow the Ombudsperson to disclose the identity of such states to the Petitioner.

Further, the Council has mandated that in the case of a refusal of delisting, the Committee is required to provide reasons.

The most significant changes however come with respect to the Comprehensive Report. I am now empowered, as mentioned, to make recommendations. Specifically, I can recommend "maintaining the listing" or for the Committee to "consider delisting".

Moreover, in the latter case, if I have made such a recommendation, the person or entity will be removed from the list after 60 days, unless the Committee by consensus – all 15 members – decides to keep the individual or entity on the list. The only other possibility, where there is no consensus to that effect, is for a State to ask that the matter be referred to the Security Council itself for a decision on delisting, where the normal rules as to decision making will apply.

The effect of these changes, in particular the last, is very significant. The independent reviewer is now making specific recommendations on the listing and those recommendations have a pronounced role in the ultimate determination as to whether delisting will take place or not. Further, the change addresses directly the criticism that the need for consensus in the Committee in favour of delisting, what ever the Ombudsperson's view, left open the possibility of a single state blocking delisting, perhaps without reasons being provided. For me, this change addresses a fundamental concern with the fairness of the process.

The practice to date under the regime has served to demonstrate, in my view, great potential for fair process. I believe the changes brought about by resolution 1989 serve to strengthen that promise. What is important now in my view is that the Office be given a full opportunity to function before any assessment or judgement is made as to whether it has done so and whether it is sufficient. That is after all – only fair process itself.

In the end, it will be for others to answer whether the Office of the Ombudsperson brings sufficient fair process to the Al Qaida sanctions regime. However, while that ultimate issue is debated and considered, I will continue to focus on the cases – each one of which implicates the rights of an individual or entity. And I will do so with a

view to institutionalizing due process and strengthening the regime for targeted sanctions – a measure which is itself important for the protection of human rights.

Kimberly Prost