On the Long Road Towards Security Council Accountability
Assessing and Renewing the Ombudsperson

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During the 1990s, the UN Security Council imposed comprehensive economic sanctions to influence recalcitrant governments and rebel groups. But the sanctions caused great harm to innocent civilians and had little or no impact on policy outcomes. Iraq was the most notorious case, with the death of a million Iraqi citizens ascribed to its sanctions-throttled economy. The controversy forced the Council to consider proposals for “targeted” or “smart” sanctions to spare ordinary citizens and focus pressure on key officials as well as other responsible persons and organizations.

In 1999, the Security Council passed Resolution 1267, a targeted sanctions regime aimed at terrorists, particularly persons allegedly involved with the Taliban, Al Qaeda or Osama Bin Laden (“the Consolidated List”). A committee was simultaneously created (the “1267 Committee”) to oversee the sanctions and maintain a list of targeted persons and “entities” (organizations, businesses, etc). The sanctions required governments to freeze the finances of listed individuals and entities and to bar individuals from work or travel.

These targeted sanctions, though crafted to avoid mass suffering, imposed serious consequences on the listed individuals without offering them the right to due process. Key members of the Security Council described the listings as “preventative,” but the effects were clearly punitive, since they denied a person’s access to employment and continued indefinitely. It soon became clear that innocent persons had been placed on the list and that they suffered serious harm without redress. Even dead persons were found to be on the list. While Security Council ambassadors preached about the “rule of law,” their actions were ironically immune from any legal oversight or accountability.

Individuals could only challenge a listing through political and diplomatic channels, by approaching their national government and requesting that it take
their case to the 1267 Committee. If their government accepted the request, which happened very rarely, it then had to negotiate the de-listing with members of the 1267 Committee. Power politics and diplomacy did not easily bend, and de-listings were exceedingly rare. The process was ineffective, secret and completely unacceptable for ensuring due process. The case of Abousfian Abdelrazik, a Canadian citizen, demonstrated the failure of the process. After careful investigation, the Canadian government asked the 1267 Committee for de-listing on December 10, 2007. The request was rebuffed just ten days later, when one 1267 Committee member (presumably the United States) refused to agree to the de-listing. The Committee told neither Abdelrasik nor the Canadian government the identity of the Council member that proposed the listing or blocked the de-listing, and what reasons, if any, that had been given.

Listed individuals and entities inevitably turned to the courts, where they began long legal challenges. Courts in various jurisdictions criticized their own governments - as well as the Security Council - for the absence of due process. Judge Zinn, of the Canadian Federal Court, spoke out strongly on the matter. In a key decision in the case of Abdelrazik, Zinn said: “I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights” (June 4, 2009).

Another case - that of Yassin Abdullah Kadi at the European Court of Justice - had particularly powerful consequences in challenging the Council. The Court issued a judgment on appeal on September 3, 2008, holding that official action to enforce the sanctions violated multiple principals both of European law and of international law, concluding that sanctions enforcement was effectively illegal within the boundaries of the European Union. Kadi opened the door for many similar legal challenges, including those in other jurisdictions. In response, many governments felt that they could not continue to enforce the sanctions. The edifice of Security Council authority was thus challenged and approaching collapse.

Amid judicial pressure, public outcry, and loss of sanction enforcement, the Security Council had to take action or risk irrelevance. For the first time in its history, the Council had to bend to a form of judicial oversight. While some Council members - such as the United States and the United Kingdom - still opposed change, other Council members such as Austria and Mexico argued that change was essential if the Council was not to lose the legal basis for its sanctions and the moral basis of its action. Eventually, such arguments won the day, but the conservative permanent members, furious at the courts’ interference, insisted on a minimal credible reform package. This final stage of the debate lasted over a year.

On December 17, 2009, the Council passed Resolution 1904, creating the Office of the Ombudsperson for 1267 sanctions (no other targeted sanctions were
included in the mandate, even though all suffered from similar problems). The Office was set up as independent and impartial, mandated to receive requests for de-listing from individuals or entities and to make reports on these cases to the 1267 Committee. The Secretary General, in consultation with the 1267 Committee, finally appointed the first Ombudsperson - Canadian judge Kimberly Prost - in June 2010. The long delay suggested continuing controversy. Judge Prost brought to the Office considerable legal expertise and political experience, having held positions with the International Criminal Tribunal for the Former Yugoslavia, the United Nations Office on Drugs and Crime and the Canadian Department of Justice.

The US was ironically the main sponsor of Resolution 1904. Washington’s motivation was clearly not to promote the rule of law but to do the minimum necessary to ensure the continuation of the sanctions regime as it currently stands, while protecting the Council’s ability to act without restriction. Yvonne Terlingen of Amnesty International wrote that “the creation of an Ombudsperson is encouraging, but it seems prompted more by practical considerations of successful counterterrorism policy.” In fact, the Ombudsperson is much weaker than the original proposals of a group of concern composed of Belgium, Costa Rica, Denmark, Germany, Finland, the Netherlands, Liechtenstein, Sweden, Switzerland and Norway. This group had lobbied - beginning in 2006, well before the Kadi decision - for an Ombudsperson, or similar review mechanism, but the P-5 ignored their ideas until the earthquake of the European Court case. By 2009 (post-Kadi), the “practical” arguments were already gaining ground, as expressed by the 1267 expert Monitoring Team in its tenth report (S/2009/502), which said: “[i]t is important to deal with the continued criticism of the fairness and transparency of the regime, so as to allow the 1267 Committee to turn its attention more fully to countering the threat from Al-Qaida and the Taliban.” The team saw due process not as a basic right to be insured, but simply a means to end an unwanted distraction.

Despite the restrictive mandate and the lack of enthusiasm of permanent members, the Ombudsperson marked a considerable improvement. Human rights advocates argued, however, that the Council still fell short of minimum legal requirements.

Judge Prost submitted her first report to the Security Council on January 15, 2011. In it, she made a number of recommendations to improve her office. Six months later, as the Security Council reviews the expiring mandate, it can take up these recommendations and include them in a new resolution. Many Council members see Resolution 1904 is an interim measure - a first step in bringing due process to the 1267 Committee. All Council members recognize that the European Court will review the Kadi case again and that further steps are probably needed to satisfy the Court’s standards of due process. So it seems
likely that the Council will make a number of reforms. But the question remains as to how extensive these reforms will be. The following discussion considers the recommendations made by Judge Prost, and proposes some further steps to ensure due process.

**Beyond De-listing**

The report discusses the limited and narrow mandate of the office, restricted to receiving and commenting on requests for de-listing. Prost proposes that the Ombudsperson’s powers be extended to cover problems that persist after the removal of a name does not necessarily reinstate an individual’s full rights. Further, the Ombudsperson should be able to consider problems associated with name-confusion because some clearly-innocent individuals have had their rights restricted due to the similarity of their name to a name on the list. This arises particularly because of imprecise transliterations of Arabic names into English. Listings are especially prone to such errors because they include only limited identification information, leading easily to mistaken identity. Minor improvements to the listing process, which required states to give reasons for listing, have failed to address this issue. The Ombudsperson needs a broader mandate to receive a wider range of such complaints. Considering that the office was created to ensure the fairness of 1267 Committee procedures, it is not only appropriate, but necessary, that the Ombudsperson be given a wider mandate. She should be able to investigate any complaint related to a wrongful restriction of an individual’s rights occurring under the auspices of the 1267 Committee. To ensure fairness and due process, individuals who are subject to punitive measures, whether delisted or never on the list, must have the opportunity to have their complaints heard and addressed.

**Transparency – Identity of the Accuser**

Another important issue raised in the report is the need for greater transparency. Presently, an individual has no right to know the identity of the state that designated him or her on the list. Disclosure is entirely at the discretion of the designating state. The report identifies this lack of transparency as a “potential impediment to the delivery of effective due process.” It is a widely recognized principle of jurisprudence that an accused has the right to know the case against him or her, which includes the identity of their accuser. While the 1267 Committee argues that listings are preventive, and thus not subject to the highest legal standards, the effects are clearly punitive, justifying the application of this principle. 1267 Committee members regularly cite “confidentiality” as a reason to withhold the identity of the accuser. The report recommends the Ombudsperson be empowered “to disclose the identity of the designating state or states to the petitioner and to relevant states, as necessary in the specific context of an application.” In fact, it is difficult to imagine a
situation where it is *not* necessary for the identity of the designating state to be disclosed in an application. This information is central to the case against the listed individual, and as such, listed individuals should have a *prima facie* right to know their accuser’s identity. States should only be given an opportunity to present a case for non-disclosure where there are serious and exceptional security concerns at stake – in all other instances, the identity of the designating state should be disclosed to the listed individual as a matter of procedure.

**Transparency - Reasons**

The report objects to the Committee’s withholding of factual reasons for de-listings. Where the 1267 Committee has delisted an individual or entity in the past, it has never provided reasons for doing so. Yet, a central principle of the rule of law is the principle of predictability – that like cases be treated alike. Factual reasons are essential to ensure the accountability of the 1267 Committee, and to guarantee the application of a consistent and predictable standard. Further, one of the purposes of the sanctions regime is to change behavior, in order to remove support for the Taliban, Al Qaeda and, before his death, Osama bin Laden. By releasing the facts that led to a de-listing, individuals and entities are able to clearly perceive the actions they can take to ensure their own de-listing. Withholding the facts that led to a de-listing is not conducive to changing the behavior of individuals or entities, and as such, goes against the very purpose of the sanctions regime. The 1267 Committee must change its practices, and provide reasons when it delists an individual, and equally where it denies an application for de-listing.

**Ombudsperson’s Access to Information - Subpoena Powers**

The report notes that lack of access to classified or confidential information is “[o]ne of the major challenges in the work of the Ombudsperson” and “a critical one for due process.” For the Ombudsperson to fully investigate a de-listing request, and thus ensure due process, there must be unconstrained access to all relevant material possessed by a state or states. Despite identifying access as a critical issue, the Ombudsperson’s recommendations in relation to this issue are relatively modest.

Prost advocates an institutional approach that involves pursuing agreements and assurances with individual states - to facilitate access to evidence. While state cooperation is certainly preferable, it is not always forthcoming. Where counterterrorism is concerned, states predictably fall back on convenient “confidentiality” or “secrecy” assertions that avoid scrutiny and frustrate due process. Therefore, the Ombudsperson should be given something like subpoena powers. Such powers would compel states to produce materials that are central to a de-listing request. States are reluctant to permit any
encroachment of this kind on their sovereignty, especially on counterterrorism issues. Yet deference to the rule of law requires that states should submit to the authority of the Ombudsperson, who is appointed as an “eminent individual of high moral character, integrity and impartiality” and entrusted with great responsibility.

**Independence and Resources**

To ensure due process, it is essential that the Ombudsperson act independently of the Security Council. The current mandate raises a number of concerns about independence, which are alluded to in the report. The report notes that the Ombudsperson was originally mandated for a term of only 18 months. Renewal of the mandate is at the discretion of the Security Council – the very body whose decisions the Ombudsperson is tasked with reviewing. This situation exposes the office to potential undue influence. The Council will review the mandate prior to its expiration on 30 June 2011. At this time, it is essential not only that the mandate be renewed, but also that it be extended for a longer period. Using comparable United Nations appointments as a reference, such as the thematic Special Rapporteurs, the Ombudsperson should be mandated for a term not less than three years.

Additionally, the report notes that the Ombudsperson has insufficient resources to carry out the mandate. In fact, the only staff assigned to the Office of the Ombudsperson is the Ombudsperson herself! The Ombudsperson presently gets assistance from staff members of the Department of Political Affairs in the United Nations Secretariat. But to ensure the independence of the Office, the Ombudsperson must be able to employ her own staff. Provision should be made for at least one full-time legal officer and one administrative staff member in addition to the Ombudsperson herself. Budget provision should also be made for necessary translation services.

**Binding Decisions**

The Ombudsperson should be commended for making a number of solid recommendations in her first report. However, one of the issues most critical to maximizing fairness and due process is not addressed. The Ombudsperson merely performs a fact-finding role and is not mandated to make recommendations to the 1267 Committee, much less take binding decisions. The 1267 Committee is thus the final arbiter of its own decisions. Despite appearances to the contrary, there is still no independent third party review and the 1267 Committee retains absolute control over its listing of individuals and entities. After numerous legal challenges, this posture no longer seems viable.
So far, the Ombudsperson has been a means to provide minimal legal cover for an illegal process. But under the stewardship of a talented and politically-savvy jurist, informal progress has been made. Now, under threat of further judgment by the European Court, the Security Council will have to get more serious about formally ensuring fairness and due process. The Council should take steps to respond to all the shortcomings that have been identified, including mandating the Ombudsperson to make binding decisions. The Council should also broaden the mandate to cover all sanctions regimes, not just 1267.

Such steps will require a significant shift in the dominant thinking of the permanent members. The P-5 have consistently balked at any suggestion that the Council could be subject to even the mildest of judicial review. But the courts have laid down their challenge. It is a moment of great significance for the Council, for the UN and for the future of global governance.

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