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No New Weapons for the UN Ombudsperson?

by Joe Stevens

Introduction and Historical Background

On 17 June 2011, the United Nations Security Council (UNSC) unanimously adopted resolutions 1988 (2011) and 1989 (2011) as a successor to resolution 1904 (2009), these resolutions extended for a further eighteen months the office of UN Ombudsperson which was established under Security Council Resolution to oversee the de-listing of those placed on the targeted sanctions list by a Committee which had been established under UN Resolution 1267 (1999). This paper will discuss the introduction and development of the role of Ombudsperson within the UN, examining the present and previous Resolutions and consider the legitimacy of the role in dealing with concerns over judicial protection for those subjected to these targeted sanctions.

This article will also consider if the introduction of the Ombudsperson and the other provisions contained within the new resolutions have managed to balance the UN's competing needs to maintain international peace and security with upholding fundamental human rights and freedoms, as outlined for example within the Universal declaration of Human Rights (UDHR) and other international human rights documents [2].

Following the formation of the United Nations, member states bound themselves through its charter to maintain international peace and security and to take collective measures for the prevention and removal of threats to that peace as well as to promote and encourage respect for human rights and fundamental freedoms (article 1 [3]). The Security Council had primary responsibility for maintaining this peace and security and member states agreed through the charter to be bound and carry out the decisions of the Security Council to achieve this end (Article 24).

Since the formation of the UN there have of course been numerous threats to international peace and security. Various Security Council Resolutions have been adopted, calling upon the members of the United Nations to take measures under article 41 of the UN Charter. Prior to the terrorist attacks carried out on 11 September 2001 ("9/11") they were directed primarily to the interruption by means of sanctions of economic and other relations between states. As the Security Council's practice evolved they were directed to what states themselves might or might not do. SCR 1267(1999) provided for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban Al Qaida, Osama Bin Laden or by any undertaking owned or controlled by them. A 'Sanctions Committee' was established to oversee implementation of these measures, known as the 1267 Committee.

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Following 9/11 there was an appetite on the international stage, led mainly if unsurprisingly by the USA to give the UNSC a wide latitude in the measures it decided and the methods it employed to deal with international terrorism, however there were concerns regarding the lack of judicial protection for those subjected to these regimes and a call for a fundamental human rights to be upheld. Provision was finally made in Resolution 1822 (2008) for a de-listing procedure as well as a full review and maintenance of the Consolidated List. Individuals, groups, undertakings and entities were now given the option for the first time of submitting a petition for de-listing directly to a body known as the 'Focal Point'. This Committee was directed by the UNSC to work, in accordance with the guidelines set by the Security Council [4], however these only require consideration for any petitions to be removed from the 'Consolidated List' those who the committee felt no longer met the criteria established in the relevant resolutions. However none of these processes actually entitle any person subjected to these measures to the right to be heard or for the committee to actually take any notice of the submissions given to them by those subjected to the measure or in fact any state actor petitioning on their behalf.

Over time these measures have been developed and refined but are still criticised by some commentators as they lack an effective remedy being available to those subjected to the measures should they wish to be removed from the list and allow their assets to be unfrozen. [5]

Whilst the UN suggests the implementation of these measures by imposition of targeted sanctions is not supposed to be criminal in nature, merely a preventative 'civil' measures designed to change both behaviour and frustrate terrorist activities it does seem on the face of it that these measures have many similarities to those imposed to deal with and frustrate organised crime and other criminal activity, however, it is not the purpose of this article to discuss the actual effectiveness or other wise of these sanctions in their ability to diminish terrorist activity.

These reforms alone have not proved sufficient to satisfy the criticism of those who advocate human rights including the European Court of Justice (ECJ). In the leading case involving UN sanctions, *Kadi v Council of Europe* [6] the ECJ was asked to consider the legality of Council Regulation (EC) No 881/2002 implementing UN resolutions under Chapter VII of the Charter of the United Nations for the freezing of the funds and economic resources controlled directly or indirectly by persons associated with Osama bin Laden, Al Qaeda or the Taliban. It ordered the freezing of the funds and other economic resources of the person and entities whose names appeared on a list annexed to that regulation. Mr Kadi was one of those named on that list kept by the Sanctions Committee of the United Nations. Advocate General Maduro observed in his opinion that the existence of a de-listing procedure is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. [7] He said that within the EU the right to effective judicial protection holds a prominent place in the

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firmament of fundamental rights [8]. Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, this might be suggested, have released the Community from the obligation to provide this within the Community legal order but as there was not He considered Mr Kadi's claim that the regulation infringed his rights was well founded. [9] In its final judgment the ECJ endorsed this approach [10].

As well as the ECJ, the Federal Court of Canada also found that the de-listing procedure offered insufficient judicial protection. In *Abdelrazik v Canada (Foreign Affairs)* 2009 FC 580 Zinn J said that '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'. He felt that there was nothing in the listing or de-listing procedure that recognises the principles of natural justice or that provided for basic procedural fairness. In *Aldelrazik*, Justice Zinn reiterated many familiar shortcomings of the 1267 regime, including that fact that the committee gives no reasons for its decisions not even in narrative form, despite the requirement to do so for some of those listed under SCR 1822

In September 2009 the UN's own United Nations High Commissioner for Human Rights in its report entitled 'Human Rights and Fundamental Freedoms, While Countering Terrorism [11]' commented that because individual listings are currently open-ended in duration, they may result in a temporary freeze of assets becoming permanent which, in turn, may amount to criminal punishment due to the severity of the sanction. This threatens to go well beyond the purpose of the United Nations to combat the terrorist threat posed by an individual case. In addition the report points out there are no uniform standards in relation to evidentiary criteria and procedures by member States. This poses serious human rights issues, as all punitive decisions should be either judicial or subject to judicial review [12].

Introduction of Ombudsperson

On 17 December 2009 the Security Council adopted SCR 1904(2009 [13]) which stated when considering de-listing requests, the Committee would now be assisted by an Ombudsperson appointed by the Secretary-General. The Ombudsman would deal with requests for de-listing from individuals and entities in accordance with procedures outlined in annex II to the resolution [14]. The Secretary-General, in close consultation with the Committee, was asked to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions. In June 2010 Security Council Sanctions Committee appointed Judge Kimberly Prost, [15] as the first ombudsperson in accordance with UNSCR 1904. She formally commenced her role on 17 July 2009. Although this role was seen by the UN as assisting the Committee in its consideration

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of delisting requests received from individuals and entities subject to the Security Council's relevant sanctions measures, it did not give her any particular power or authority over that committee's decisions or its processes. The Ombudsperson was simply required to perform these tasks in an 'independent and impartial manner' and not to seek nor receive instructions from any government, in accordance with the procedures outlined in annex II of the resolution, which gave details of the time line to be followed when considering de-listing applications. Under this resolution now that this appointment has been made, it is the Ombudsperson, not the focal point mechanism established by SCR 1730 (2006) that receives any requests for removal from the 1273 Committee. The Focal Point would continue to receive requests from individuals and entities seeking to be removed from other sanctions lists established under SCR 1333, thereby creating a two tier de-listing procedure for those placed on sanctions under each committee. The initial period for the appointment of the 1267 Committee Ombudsperson was for eighteen months.

Petitioners seeking delisting could now present their case to an independent and impartial ombudsperson, who, after a period of information gathering and dialogue with the petitioner and relevant states, and with the help of a Monitoring Team, present a comprehensive report to the 1267 Committee laying out the principal arguments concerning the delisting request based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations.

The Committee saw the appointment of the ombudsperson as an important step in ensuring that the Sanctions Committee's procedures for removing individuals and entities from the 'Consolidated List' were seen by the international community as being both fair and clear, as called for by the General Assembly in October 2005 [16]. Whilst the Committee may have seen this appointment as going some way in address the concerns regarding transparency and fairness, the inability of ombudsperson to compel the sanctions committee to de-list anyone regardless of the evidence she may produce, nor her lack of authority to compel states to share with her any information or evidence that may have used to instigate listing in the first place has done little to remove the criticism that the appointment is nothing more than window dressing and still fails to provide a competent tribunal.

Whilst giving judgement in the leading UK case involving UN sanctions, *HM Treasury v Ahmed* [17] Lord Hope commented on the implementation of an ombudsperson by the UN. Although he agreed these improvements were to be welcomed, he pointed out that the fact remained it did not amount to any form of effective judicial protection from those placed on the UN sanction list. In fact the inability of the 1267 Committee's procedures to provide an effective remedy meant that those subjected to this regime were unable to have their case heard by a competent tribunal capable of providing an effective judicial remedy [18]. In the present case he said was that what the complainants required was not a review from HM Treasury, which due to the UK's

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obligations under the UN charter was powerless to ‘un-designate’ them, but an effective means of subjecting the 1267 Committee to judicial review, something which at this present time, even with the imposition of the ombudsperson was not possible. [19]

The ombudsperson, submitted her first biannual report to the Council on 21 January 2011. The report summarised the initial phase for her office outlining the setup of her office and identification of the issues involved for the Council to consider. These included the need for the committee to provide reasons for its decisions on delisting persons from the targeted sanctions list. Also, she raised the practical need for the ombudsperson to be able to disclose the identity of the designating state to the petitioner and other relevant states.

On 16 May 2011, the chairs of the 1267 Committee, the CTC (1373 Counterterrorism committee) and the 1540 committee (non-proliferation of weapons of mass destruction and terrorism) addressed the Council in a regular biannual briefing. The chair of the 1267 Committee, Ambassador Peter Wittig of Germany, said that the Committee had built on last year's review of the consolidated list by approving the most comprehensive set of updates to the list in its history. The committee had recently agreed to 78 list amendments and to making publicly available almost 200 additional summaries of reasons for listing. The Committee is currently reviewing the listings of 48 individuals who are reported to be deceased and aims to conclude that review by the end of May before conducting other regular reviews requested in resolution 1904.

Wittig reported that to date the ombudsperson had received ten delisting requests and had submitted her first report on a specific delisting request to the committee in February. Two further ombudsperson reports on delisting requests were completed in April. He said the Committee is considering these delisting requests. He also recalled that resolution 1904 encourages committee members to provide reasons for objecting to delisting requests. He said he had insisted that committee members do so promptly. The Committee had reached consensus on the form in which reasons for the Committee’s decision could be communicated on a case-by-case basis. The Committee will also be considering a draft checklist of necessary supporting documentation for delisting requests from the government of Afghanistan. The Monitoring Team in its Eleventh Report to the 1267 Committee recommended that Member States treat listed Taliban and listed individuals and entities of Al-Qaida and its affiliates as two separate list. [20]

Renewal of Ombudsperson mandate UNSCR 1988 & 1989 (2011)

On 17 June 2011, the Security Council unanimously adopted resolutions 1988 (2011) and 1989 (2011) as a successor to resolution 1904 (2009). By adopting these two resolutions, the Security Council extended the office of ombudsperson and the monitoring team for a further period of eighteen months and split the Al-Qaida and Taliban sanctions regime into two separate lists as suggested by the like-minded countries and the monitoring team. Resolution 1989 (2011)

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stipulates that the sanctions list maintained by the Security Council Committee established pursuant to resolution 1267 (1999) will henceforth be known as the “Al-Qaida Sanctions List” and include only names of those individuals, groups, undertakings and entities associated with Al-Qaida.

The new resolution recognises the administrative difficulties for the office of the ombudsperson and recommends that she is given more resources in order to fulfil her mandate which requires various actions to be completed within strict time limits that have been set. As far as extending her authority, the resolution makes it very clear that although Member States should provide the relevant information to enable her to make the correct recommendations of whether de-listing should take place, including where appropriate making available any relevant confidential information, the ombudsperson must still comply with any confidentiality restrictions which are placed on such information by the Member State providing it, she has been given no authority to decide herself what information may be released effectively only allowing the Ombudsperson to release only what the Member States allow.

Where multiple states have submitted names for inclusion on the sanctions list then the resolution insists there must be consensus amongst them all before de-listing can be recommended. States that have designated are strongly urged but not compelled to allow the ombudsperson to reveal their identity as designating states.

This resolution further requests that Member States and relevant international organizations for example the ECJ are to encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through the national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson in the first instance. Whether this will occur in practice remains to be seen. Certainly unless those subjected to this regime consider that the process offers sufficient judicial protection and the ability to offer an effective remedy it is difficult to imagine why they would engage in the process. The message seems far more likely to be for the benefit of states and other international organisations such as the EU in trying to control and direct their approach in dealing with UN sanctions in the light of the recent judgments and criticisms of the system for sanctions as seen in the ECJ decision in Kadi, Aldelrazik in Canada and Ahmed in the UK. Perhaps as an attempt to reassert the authority of the UN as the principle international organisation for the decision making process in cases involving UNSC sanctions regarding terrorism, which with the recent aforementioned regional and national cases may have started to lose credibility.

Annex two of this resolution gives the mandate for the Ombudsmen in detail. It is similar in effect to the 1904 document, it outlines the specific time scales to be employed when considering an application for de-listing, the ombudsperson is given four months in which to gather information from the petitioner who wishes to seek de-listing, during which period she must contact and inform them of the procedure under the resolution as well as requesting all the

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relevant information from the State(s) concerned. On completion of this phase there is a two month dialogue process in which the ombudsperson discusses with the petitioner the information she is able to disclose. During this period she may ask specific questions of the petitioner and can if necessary lengthen this time in order to fully explore the answers given or likewise if she feels she has concluded her enquiries she can shorten the process. At the conclusion the ombudsperson should obtain a signed statement that the petitioner is not or no longer involved with Al-Qaida and nor will they be in the future. On completion of this phase, the ombudsperson compiles a written report for the committee in which she considers all the information available to her from the relevant member states and the petitioner and then makes her recommendations to the Committee or whether de-listing should take place or not. The committee then has fifteen days to review this report and a further fifteen days to consider its recommendations. Should the ombudsperson recommend de-listing then the obligation of States to maintain sanctions on that petitioner will automatically cease after sixty days unless the Committee decides by consensus that the measures must remain. If consensus to maintain the petitioner on the list cannot be reached then a member of the committee may ask the chair to contact the Security Council for a decision within a further sixty days of whether the petitioner should be delisted or not. If the Committee decides to reject a request for de-listing by the ombudsperson, then the Committee shall tell her their reasons for this decision. If the petitioner is not successful in their request the ombudsperson should write to them explaining in as much detail as is allowed under the circumstances the reasons for continued listing. Now under this new resolution no matter before the committee should take more than six months to complete unless there are exceptional circumstances which will only be considered on a case by case basis. It is not made clear under what circumstances a petitioner made reapply for de-listing if unsuccessful this stage.

Conclusion

Whilst these new SCR's make minor changes in terms of time lines and an assumption to remove individuals and entities from the list unless the Committee makes a positive decision to the contrary, they are unlikely to be seen as going far enough by many to satisfy the concerns over judicial protection for those subjected to the regime. The office of Ombudsperson whilst clearly a step forward in offering some protection to those subjected to sanctions does not carry any additional authority of ability to compel the committee to accept her recommendations, disclose information or even reveal their identity. The issues and concerns regarding judicial protection highlight the problems of having an essentially political body such as the UNSC making what are quasi legal decisions on the international level. Under the UN Charter there is no separation of powers the Security Council having been given all three roles, legislative executive and judiciary. The strongest hand the UN Ombudsperson may hold is more likely to be on the political front in that the Committee is committed to explain why it should not follow any

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recommendation to de-list made by her. Whilst many agree that there are still significant shortcomings in the judicial safeguards for listing and delisting there is still major disagreement of how these issues should be tackled. Some members were supportive of some kind of time limit or sunset clause relating to listings however the new resolution only requires review every three years it seems that long term inclusion on the list will remain the norm. Recent decisions from the ECJ and other courts may be heralding a sea change certainly of legal opinion regarding sanctions that have been in place for nearly ten years post 9/11. With the recent death of Osama Bin Laden the mood to continue to allow the UN its wide approach to employing sanctions is slowly being challenged and eroded. As the High Commissioner for Human Rights pointed out, the longer individuals and entities are left on these lists, the more it appears to be more of a criminal sanction where there is a need for full judicial protection and review which at this time is not currently available.

***About the author:** Joe Stevens is second year PhD candidate at the University of Bedfordshire, his doctoral research is concerned at looking from a human rights perspective the main issues in relationship to the United Nations efforts to control and suppress terrorism and the use of targeted sanctions against individuals and entities. Joe obtained a first in his LLB(Hons) in 2008 and a merit in his LLM which was in International Criminal Law and Security in 2010, both of which are from the University of Northampton his home town. On completion of his PhD Joe hopes to become a university lecturer. Joe is married with two grown up and one young child. In his spare time he enjoys flying having obtained his private pilot's licence (PPL) in May 2010.*

Notes

[1] Joe Stevens is currently a PhD candidate at the University of Bedfordshire. Thanks to Dr Richard Lang and Dr Silvia Borelli, for their assistance in completion of earlier drafts of this article.

[2] For example see Article 8 UHDR: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 17(2) No one shall be arbitrarily deprived of his property. ICCPR Article 17 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation

[3] For a full list of all the Articles of the Charter of the United Nations See: <http://www.un.org/en/documents/charter/>,

[4] UN 1267 Sanctions Committee Guidelines see: http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf

[5] See for example; para 109 of A/res/60/1 adopted by the General assembly of the UN in Oct 2005 which calls upon the Security Council, with the support of the Secretary- General, to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.

[6] *Kadi v Council of the European Union and Commission of the European Communities (Joined Cases C-402/05P and C-415/05P)*



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[7]Opinion of Advocate General Poiares Maduro, delivered on 16 January 2008 in *Kadi v Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05P and C-415/05P)para 51

[8]Opinion of AG Maduro Op Cit, para 53

[9]Opinion of AG Maduro Op Cit, para 54-55

[10]*Kadi v Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] AC 1225, judgement of the Grand Chamber 3 September 2008, para 281-283

[11]Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism dated 9 September 2009 document A/HRC/12/22

[12]*Ibid*, para 42

[13]SCR 1904 (2009), at: <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement>,

[14]SCR 1904 (2009) para 20-21

[15]The first Ombudsperson appointed under UNSCR 1904 is Judge Kimberley Prost. She has held many international judicial positions including Chief, Legal Advisory Section for the United Nations Office on Drugs and Crime (UNODC). Since 2006 She has been an ad litem judge of the International Criminal Tribunal for the former Yugoslavia since.

[16]General Assembly of the UN Sixtieth Session dated 24 Oct 2005, A/res/60/1, para 109 full text available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan021752.pdf>

[17]*HM Treasury v Ahmed (and others)* [2010] UKSC 2

[18]Lord Philips A(others) at para 80

[19]Lord Philips A(others) at para 81

[20]Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004) and extended by resolution 1904 (2009) concerning Al-Qaida and the Taliban and associated individuals and entities, UN Doc S/2011/245, dated 13 April 2011.