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A REFLECTION ON INNOVATIONS IN THE SECURITY COUNCIL: THE INTERNATIONAL TRIBUNALS, COUNTERTERRORISM, AND THE OFFICE OF THE OMBUDSPERSON

*Judge Kimberly Prost**

Good afternoon, everyone. It's a real pleasure for me to be here at Case Western. I'd like to thank Professor Cover, my old friend, and long time friend Assistant Dean Scharf for inviting me and for the tremendous hospitality. I've had a terrific time already here in Cleveland. I'm going to go back to New York to promote Cleveland and Case Western.

It's always a great opportunity for me to have these occasions. The job that I currently occupy as Ombudsperson is a very lonely job and up until about eight months ago, I was on my own. I've been doing this just a little over three years. I had no one at all in terms of staff. I now have a legal officer. So this is a great opportunity for me to talk a bit about the work and the operations of the office in the context of the Council and also just to talk today. I'm going to speak a bit more broadly about the Security

* Graduating as a gold medalist from the University of Manitoba Law School, Judge Kimberly Prost worked for the Canadian federal Department of Justice for eighteen years. She served as a federal prosecutor, including with the Crimes against Humanity and War Crimes Section and appeared before all levels of the Canadian courts, including arguing several cases before the Supreme Court of Canada. For ten years, she was with the International Assistance Group, Canada's central authority for international criminal cooperation matters, serving as Director from 1993 until 2000. She participated in the negotiation of over forty extradition/mutual legal assistance treaties and was a member of the Canadian delegation for the negotiation of the *Rome Statute of the International Criminal Court*, the related *Rules of Procedure and Evidence and Elements of Crime*, the *United Nations Convention Against Transnational Organized Crime*, and the *United Nations Convention Against Corruption*. In July 2000, Ms. Prost joined the Commonwealth Secretariat as Head of the Criminal Law Section. In March 2005, Ms. Prost was appointed to the post of Chief, Legal Advisory Section with the Division of Treaty Affairs within the United Nations Office on Drugs and Crime. After election by the General Assembly, in July 2006, she was appointed to sit as an *ad litem* judge of the *International Criminal Tribunal for the former Yugoslavia*. In June of 2010, Ms. Prost was appointed by the Secretary General as Ombudsperson for the United Nations Security Council Al Qaida Sanctions Committee (1267 Committee). She is currently serving in that position in New York.

Council and some of the innovations in the Security Council, including my office and the work of the tribunals.

I realized it's a very timely opportunity to speak about the Security Council. For anyone who is following international news in the press these days, a lot has been said about the Council—a lot not necessarily all positive. I think in times of difficulty for the Council, it is important to reflect, not just on the challenges—and there are many for this highly political body—but also to reflect on some of the innovations and successes of the Security Council. That is what I want to try and do today because it is an important body within the United Nations, and I don't think we can ever lose sight that this was a mechanism born of two catastrophic world wars in a time period when the world was very much in tatters. So I think it is important to bring that perspective, especially for the young people who are here today, because we can't lose sight of the role that the Council plays in a positive sense. So I'm going to speak a little bit about the two areas that I think represent some of the innovations and important innovations of the Council, and I'll tell you a little bit about the world of al-Qaida and the Ombudsperson.

The Security Council, as you all know, is the body of the United Nations, which, under the Charter, has the primary responsibility for dealing with threats to international peace and security. It is to identify and respond to those threats and has a full range of powers, from the ability for a pacific activity for settlement through the imposition of economic sanctions and general sanctions, which is something I will speak about, to military intervention. Since almost its inception, the Council has used its powers, both as accorded explicitly and in innovative ways.

In 1948, and it's something that all Canadians always speak to about the Council, we used the concept of the military powers to send observer missions to the Middle East and to Pakistan, which were the beginnings of the peacekeeping role that the U.N. still plays to this day all over the world. It is important to Canadians because Lester Pearson, who was one of our Prime Ministers, won the Nobel Peace Prize partially for his role in that activity in the starting of that program.

By the 1950s the Security Council had already invoked its military power with the intervention into the Korean crisis, which took place at that time. From early days it was using its sanction power in the context of the struggle in South Africa in reaction to the apartheid government of South Africa.

So, right from the start, the body was, I think, important and did play an active role in international matters. But it's really in the 1990s when there was, for our world, an unusual rapprochement—politically, the end of the Cold War, and massive changes with the end of the Soviet Union and the transformation in that context—and the Council grew more active and quite bold in many ways. And in

my view, the watershed moment for the Council came in the face of the brutal conflict in the former Yugoslavia: first Croatia, Bosnia and Herzegovina, Kosovo, and the former Yugoslav Republic of Macedonia.

There was a conflict that had the potential to destabilize the region and really was a significant threat to international peace and security. Perhaps it was because of the nature of the conflict, perhaps it was the history of that region and what it had represented in the context of the world wars, but for whatever reason the Council began to take some extraordinary steps. First, they sent a commission of experts in to look at the question, not so much of the broader questions of peace or resolution, but the questions of crimes—whether war crimes and crimes against humanity were being committed in the area. And in response to the report, which confirmed those activities, on the 25th of May, 1993, they adopted quite a historic resolution, Resolution 827, which overnight created the International Criminal Tribunal for the Former Yugoslavia,¹ on which I served for four years as a judge.

It was followed less than half a year later in 1994, in the face of the horrific genocide in Rwanda, by establishment of that tribunal. And the important thing to recognize here, and especially for young people whom I speak to about this, the tribunals have been in existence for quite awhile, so to some degree, people accept them as part of the landscape. But this was an extraordinary step by the Security Council, particularly given that nothing in the Charter—nothing in Chapter VII—talks about establishing a court, and what the Council did was something that they tried to do at the time the Charter was written—create an international criminal body, which they were unsuccessful in doing. Overnight, it suddenly appeared.

The ramifications for international humanitarian law and international criminal law have been mammoth. I don't think anyone, not even the staunchest critics (and there are many) of the work of the tribunals, can detract from the fact that the tribunals have contributed an enormous amount of case law. These were the first tribunals post-Nuremberg and post-Tokyo to deal with individual accountability for crimes of the gravest nature, and we have that body of case law due to the action of the Council in creating the two tribunals.

Also important contributions to peace in those regions and to justice, and most significantly, one of the main impetuses, we had a window in the world when forces came together and allowed for the negotiation of the Rome Statute and the International Criminal Court. And in no small measure we have today an International Criminal Court because of the steps taken to create those two

1. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

tribunals and what they showed the world about the possibilities of individual accountability in this context.

You will hear lots of discussion—that it's not the best time for international criminal justice—today. You'll hear lots of critiques of the International Criminal Court, but at the end of the day, I am a staunch believer who says the world is a much better place with a possibility of justice, with the possibilities that the International Criminal Court presents than without it. So that body of activity started by the Council's actions, I think, is one of the last century's, and into this century's, most important steps forward in terms of international humanitarian and criminal law.

It's also interesting: people forget the implications in terms of the Security Council. This was a pretty dramatic step that they took. The Tadic Court dealt with the question of whether the Council had the ability or the jurisdiction to take the action that they did.² It's not surprising that the judges of the Tribunal found that they were properly constituted, but it's still an important decision that reflected that the Council could take these kinds of innovative actions and successfully do so.

It was also a change in how the Security Council was interacting with states. At the time I was head of Canada's International Assistance Group. I woke up one morning to find that the Security Council had just said, in a binding way, that every country had to be able to cooperate with this Tribunal. This wasn't just about setting up a tribunal. Countries had to be able to turn people over and had to be able to turn evidence over.

Well, I'll tell you, I had a few nightmares about that issue because the legislation in Canada certainly permitted me to arrange for extradition to another state and arrange for the sharing of evidence with another state, but there was no capacity to compel someone to go to the Tribunal or to compel evidence. I must say that the Canadian efforts to change legislation, which every country had to undertake, took much longer than I was comfortable with. They enacted the legislation about two months after I left. I don't take that personally, but still it gives you a sense that this was the Security Council, in essence, starting to mold domestic law, in a way, and mold international cooperation, in a way.

They did something similar only once since, in my view, and that was in 2001 after the tragic events of 9/11 with Resolution 1373³ on counterterrorism, where the first paragraph of that resolution requires all states to have a terrorist financing offense. That was a remarkable

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2. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
 3. G.A. Res. 1373, ¶ 1 U.N. Doc. S/RES/1371 (Sept. 28, 2001).

action by the Security Council: again, directly implicating domestic law at that time in response to the threat of counter terrorism. So I cite those as examples of what I think are sort of positive driving steps by the Council changing, a bit, the way the Council interacts with states and certainly creating an important step forward in international criminal and international humanitarian law.

At the same time, moving into the world that I now occupy, it was business as usual for the Council in terms of its traditional powers of considering international threats and imposing various forms of sanctions and various forms of measures, and they were increasingly resorting to the use of sanctions, powerful economic sanctions, in the face of what are, and what are today, increasingly complex security threats in our world. But as the use of sanctions grew, as with anything, the unwanted, if you will, side effects of the use of the Security Council's sanction power became clearer and clearer and began to be the subject of criticism. When you impose, and we see it today with Iran, massive economic sanctions on a country, you certainly can have an effect in terms of trying to change conduct and in trying to restrict their ability (in the case of nuclear proliferation or whatever it might be), but at the same time, it does have a devastating effect on a mostly innocent population. And that was the problem that the Security Council had to try and address, and they were very cognizant of the effects—on Libya and Iraq—of the sanctions, which they viewed as necessary.

So they began again in that period in the 1990s using, what I referred to as, smart or targeted sanctions. What those involved is, rather than employing the sanction against a whole country or whole population, they would direct the sanctions at factions, governments, government officials, and individuals that were responsible for whatever the conduct might be. They were used, for example, in the former Yugoslavia conflict, and they were used in the context of Haiti.⁴ It was a very important innovation for the Security Council.

I took the job that I currently occupy, one, because of my belief in the need for rule of law principles at the international level and fair process. But I also took the job because I believe strongly that the international community and the Security Council should have at its disposal as many weapons as possible. I sat for four years on a genocide trial out of the Srebrenica massacres, and I am strongly of the view that whatever powers are possible, we need to have those in our arsenal to deal particularly with international humanitarian violations.

4. See Gary Clyde Hufbauer & Barbara Oegg, Peterson Inst. for Int'l Economics, Targeted Sanctions: A Policy Alternative?, Symposium: Sanctions Reform? Evaluating the Economic Weapon in Asia and the World (Peterson Inst. for Int'l Economics) (Feb. 23, 2000), *available at* <http://www.iie.com/publications/papers/paper.cfm?ResearchID=371>.

At the same time, the use of those powers has to be done in a credible and effective way, which is part of what motivated me to the job that I now occupy. The problem that arose in terms of the use of the sanctions (it's a problem that probably crosses all of the sanctioned regimes but it was a particular issue in the context of a resolution) was Resolution 1267 which we now call the al-Qaida Sanctions Regime.⁵ I'll talk a bit about the origins of it because it will give you a context that's important for the fairness issues.

So in this context of targeted sanctions: in 1999 there had been investigations in Kenya and Tanzania in relation to the bombings there of the American embassies. The investigations had determined that Osama bin Laden and al-Qaida were responsible for those particular horrific acts. As a result, the Council adopted a resolution, which was aimed at trying to get to bin Laden, who was in Afghanistan at the time.⁶ He was being sheltered by the Taliban, who had control of much of the country at that time. But instead of placing the sanctions on Afghanistan as a whole, they placed them directly onto the Taliban. They placed the three traditional forms of sanctions: economic sanctions, so freezing of all your assets; travel bans, so you can't travel anywhere in the world; and thirdly, a weapons prohibition.⁷

They created a committee, which would be responsible for designating who is a member of the Taliban.⁸ It wasn't a particularly controversial move by the Council. It was a form of targeted sanction, and then there was what, at the time, seemed small and innocuous—it doesn't seem so today—an amendment in 2000, when they added Osama bin Laden and al-Qaida itself. It was now the al-Qaida and Taliban regime. The tricky part was that was the first time the Council ever employed sanctions on non-state actors because, as we all know, al-Qaida is not tied to any particular state. It was not like the Taliban, at the time tied very much to Afghanistan. You can be from anywhere, and you could be a member of al-Qaida. That would come to be a very tricky issue, as I'll highlight shortly.

But still in 2000, it wasn't particularly a difficulty because there were a handful of people on the list, and most of them were in Afghanistan. But again, we have the events of 9/11, and events of that catastrophic nature often have an impact in terms of the Security Council and the activities taken at an international level. Hundreds of names went onto the al-Qaida/Taliban sanctions list

5. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

6. *Id.* ¶ 2.

7. *Id.* ¶ 4 (requiring economic sanctions and travel restrictions); S.C. Res. 1333, para. 5(a), U.N. Doc. S/RES/1333 (Dec. 19, 2000) (prohibiting any supply of arms to the Taliban).

8. S.C. Res. 1267, *supra* note 5, ¶ 6.

after 9/11 within weeks, particularly those believed to have been financing al-Qaida. So you have people all over the world suddenly on this list.

What starts to happen because the Council runs this, even though they're targeted sanctions, it is business as usual for the Security Council. So they're not explaining themselves. They're not sending notices. They're not talking to people, which isn't something the Security Council does. They talk to states. So suddenly, you did have situations where you could go down to your bank and try to move your funds and find out that all your assets were frozen. No one could quite tell you why. The government couldn't tell you why. At that time, you can imagine there weren't published reasons and there was no recourse. There was really nowhere you could turn, other than to your government, to ask them to speak to the Security Council, which is fine if you're in Sweden. But if you're anywhere else, it's iffy whether they're going to actually take some action and try and get the Council to give reasons or explanations or give you some form of recourse.

So the criticisms of the use of the sanctions—and here it's why that amendment was so important—because in a political context, when you put sanctions on states, or you put them even on a faction or government actors, there is a form of recourse because there is the political avenue. You can have debate and discussion with the Council; your representatives can go and speak. But if you're an individual, you have no such access.

So the criticism started almost immediately. States were in an uproar over how to deal with implementation, and academics began to take up the cause that you can't have this complete void of transparency, lack of transparency, lack of fair process, and the Security Council did react to that. Over a period of time, they took some measures. Today if you Googled the 1267 al-Qaida regime, you'll see a listing of all the individuals who are sanctioned and what we call the narrative summary of reasons for those sanctions. You will also find now that there are attempts made to give notice to individuals. There's a review process that the committee itself carries out, and they created a focal point as well, someone you could write to. Bredal Sheet (sic), she's a lovely person. I don't like to refer to her as a mailbox, but she's responsible simply to take communications and pass them to the committee.

The tipping point for all of this, because the view was this was still not enough, began to be court challenges. There was a case in Canada involving a man named Mr. Abdelrazik who got stuck in Sudan.⁹ The Canadians wouldn't bring him back because he was on

9. *Abdelrazik v. Canada (Minister of Foreign Affairs)*, [2010] 1 F.C.R. 267 (Can.).

the list even though he was a Canadian. So he was living in the embassy in Sudan. He sues.

And then there was a man named Yassin Kadi, who's a Saudi millionaire, who was put on the list in 2001. He began a case in the European Court of Justice.¹⁰ In 2008, to everyone's surprise I would say in terms of traditional international law, the European Court of Justice found that even though there is Article 103 of the Charter of the United Nations, which says that the decisions of the Security Council in Chapter VII trump and that the U.N. trumps, they found that Mr. Kadi was being subjected to these measures through a European Union regulation, and it didn't matter that it came from the Security Council.¹¹ There was no recourse, there was no fair process, and they struck it down, which meant that twenty-seven countries of the European Union could no longer implement the Security Council's resolution.¹² That got attention, to say the least.

I'm where I am in New York because the office of Ombudsperson was created in December 2009, not because of the Kadi decision, or because of the need for fair process and the recognition of that need, but the court decisions were clearly a factor, a motivating factor, if you will.

So what does this office do? I take applications from individuals. They can come directly to me. If you are on the list, you can come directly to me. Most of the applications I receive come in by e-mail. Sometimes people phone me, and we help put together an e-mail. They don't need lawyers—about half of the applications so far have had lawyers—because my role is as an Ombudsperson. I take the case, and if I'm satisfied, all they have to do is explain to me why they shouldn't be on the list; so they have to address the reasons that are out there for why they are on the list.

Then I start a process whereby I gather all the information about the case. I send out letters to states, I look online, and I go to organizations sometimes. It's interesting—I get very good cooperation. I mean I used to have subpoena power, and I miss my subpoena power, but I must say, the combination of being created by a Security Council resolution and being very, very annoying gets pretty good responses, because they know if they don't answer me, I will phone them, and then I'll come and visit. So I do get responses, but the real challenge, as you can imagine in information gathering, is that many of these listings are premised on intelligence information, and that means the information that they're prepared to share—many

10. Joined Cases 402/05 P & 415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council*, 2008 E.C.R. I-06351, ¶ 40.

11. *Id.* ¶¶ 74, 348–53.

12. *Id.* ¶¶ 348–53.

countries are prepared to share—is very vague. It’s certainly not necessarily sufficient to be maintaining a listing of this nature.

So one of the big challenges is, it still remains a challenge, is trying to get access to that confidential information. I now have about twelve agreements, including with countries like the United Kingdom, France, and Germany, but there’s one big one missing. I bet you can guess which one it is. We’re still working on that.

I gather as much of the information as I can. The whole philosophy I had from the time I took up the position was I’m going to take what the Security Council gave me in the resolution, and I’m going to use it as much as I possibly can to meet those fundamental principles of fairness. So know the case against you, have an opportunity to respond to that case and be heard by the decision maker, and review by an objective individual or entity.

After I gather the information—I have four months to do that, and I extend the period once (but that’s it) for two months, and then I move to what’s called the dialogue phase. In this phase, I actually engage with the petitioners in the resolution, which I’ll speak about in a minute, which changed the process in a pretty dramatic way; the Security Council also encouraged me to go meet as many of the petitioners as I could.

They, obviously, can’t come to me. It’s a little tricky. So I do go to meet with the petitioners, and it’s quite a remarkable part of the process. It’s during that phase that I put to the petitioner everything I’ve gathered unless I have confidential material. They then have an opportunity to tell me their response and what they want said to the committee. It’s interesting because several of them have said, including Yassin Kadi, who did bring an application before me, who I interviewed for a day and a half—he and others have said, “I’ve been on this list for ten years, and this is the first time anyone has sat across the table from me and asked me questions and heard my side of the story.” For me, that’s a really telling statement about why this is such a necessary measure. Putting everything else aside, that’s why it’s so important for fair process.

So once I gather that information and the information from the petitioner, then I prepare the comprehensive report that goes to the Committee because it is still the Committee’s decision whether to delist or not. However, when I first took up the job, it was when it was a big risk in many ways because many thought that the resolution did not go nearly far enough and that this was just a fig leaf.

Well, I don’t like being called a fig leaf. So when I first took up the job, I didn’t have the power to make a recommendation. I could make “observations.” But I figured, I don’t think they brought me here to give a fact summary. So I don’t care what we call it, but I’m going to call it what I think, which is what I did. That didn’t go over so well in some quarters but they sort of got used to it. I think the

attitude was, well, if she's going to do it anyway, we might as well get the credit for it. So in the renewal—my original mandate was for eighteen months, although I got there six months in, so it was about a year—in June 2011, they gave me the recommendation power.

But more importantly, by then the European Court of Justice had struck down the regulation. The European Council had tried to amend it; ECJ strikes it down again. So there's a lot of pressure on. So, the resolution—and I got a call late at night telling me that this is what I'm going to get, which is quite a shock to me—it gave me the trigger power where I now make a recommendation. When I recommend delisting, the person or entity will come off the list in sixty days, unless there is a unanimous decision to the contrary, or it can be referred to the Security Council for a vote—but that's a very significant political step to take for an individual case.

So that was the compromise, which was achieved to try and give more, if you will, more independence, more emphasis to the role of Ombudsperson for fair process purposes. The two things, unanimous overturn and Security Council references have never happened. Since the time of that resolution, my recommendations have been effectively carried out by the decisions of the Security Council's committee. It's interesting because the other sort of aspects of this, I have said from the start, is the Council did not give me a power of judicial review. I think that's politically very unlikely, if not impossible, that they're going to let an outside party review the actual decisions of the Security Council.

So I'm not reviewing anything to do with the original listing. I'm simply asking the question today, presently, looking at the information—and I made up a test. I admit that. There was no standard, so I just made it up. The standard I employ is whether there's sufficient information to provide a reasonable and credible basis for the listing: sort of a mix of common law, civil law—it has words in it that everybody recognizes. It seems to work. That's the test I use, and that present day assessment is now in the resolution because it's of some comfort that this isn't a review of the Council. It's an independent *de novo* assessment of the information.

The other important thing is that I made it very clear that I will do these assessments solely on the information that I gather. So it's not open to a state to say to me, "We know things, and you should rely on us in terms of things that we say about information that we have." Bottom line is: you share the information with me—you can do it such that I'm the only one that sees it, fair enough—but otherwise, I make these decisions, my recommendations, on the information gathered. That's the only fair process for the petitioners. And then the trigger mechanism could operate.

So that is a real impetus for the states to be able to provide me with confidential information, which is why discussions with the United States continue on that very important issue. And also, I

really want to know what the full facts are. This is—at the same time it's important to fair process—a pretty heavy responsibility. I don't want to be the one delisting somebody when there's strong information that you keep them on the list. For both reasons, I'm hopeful that we can try and find better ways forward in terms of accessed information.

I'll give you a few statistics and then just identify a few issues and open it up for some discussions. I've had fifty cases so far of the approximately 375, which I think is pretty good. Thirty-two cases have been completed. Some of the cases involve applications by an individual and several entities, so the numbers don't exactly match, but twenty-six individuals have been delisted. Twenty-five entities have been delisted. One entity was removed as an alias. It wasn't an actual removal of the main name but still through my process.

In three cases there was a denial of delisting, but in one of those, it was before the recommendation power, and there has been a subsequent application, and he was delisted. One petition was withdrawn, brought again, and they were delisted (the entity). Three cases have been concluded by separate decision of the committee. So my process starts, and then the committee takes the decision to delist of its own initiative. That included the case of Osama bin Laden, whose application was brought just recently, well after he was reportedly deceased. Fifteen cases are active at the moment.

So I think when I look at the body of the activity, and I look at it stepping back again into my broader topic today, I think both the use of the targeted sanctions and these remarkable steps of the Security Council—and they are remarkable and perhaps under appreciated. The European Court of Justice just recently issued another decision: they seem unmoved by what the Council has done. I think that's an under appreciation, with great respect to the Court, of the extraordinary steps the Security Council has taken—they make no mention of the work on the Ombudsperson. I think, putting aside whether you think ultimately it's sufficient, that there should be recognition that it has brought a level of fair process. I've been satisfied in each of the cases on a practical level that the individuals have had a fair process in line with those principles I described. But the Court, at least the European Court of Justice, is not yet convinced and considers they have to review the underlying information. Although what they suggest in terms of how they will access confidential material, I think we'll have to see how that works out in practice.

This Special Rapporteur, Terrorism in Human Rights, wrote a report on the office last year.¹³ It was pretty positive in many

13. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Second Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms*

respects, but because there is still the potential of the Security Council override, it's not enough. I respect Ben Emmerson—he's a terrific human rights lawyer. I respect his position. I don't necessarily agree that that has to be tested, but I certainly understand those concerns.

So there are still issues about whether this is sufficient, but I do think that when I look back to 2010, and I look at those fifty applications and those thirty-two completed cases, I think it's remarkable progress in terms of the rule of law and credibility of the regime.

I'm going to stop there on the role of the Ombudsperson. In closing, I just wanted to highlight again that it's unquestionable that the Security Council, which is a highly political body operating in an increasingly complex world, is going to continue to face frustrations and challenges, and perhaps some of those challenges are insurmountable. It's always going to be controversial. It's always going to be criticized, but especially what shouldn't be lost in the valuable debate that surrounds the Council is that we must ensure that it's a balanced discussion that recognizes the strengths of this body as well as its weaknesses. And I started in the same position I am on the International Criminal Court: our world, our global village, is a much better place with the United Nations and the Security Council than it is without one.

So to the young in the room, it's your job to make it all better.

I'm happy to take any questions and comments, totally open, if you want to ask me things about the Tribunal days as well. The only thing is there may be some things, which because of the position I occupy—I work with the Security Council's Committee, not for them—there may be some things I simply don't feel appropriate for me to comment on, and I'm sure you'll all understand that. But I'm happy to take the questions and comments, and we'll see where we get to.

AUDIENCE MEMBER: I believe you said the financiers of al-Qaida are put on the list, not just al-Qaida but the financiers of al-Qaida. So is there at least one nation on the Security Council that is financing al-Qaida in the bloody civil war in Syria? And if so, should the persons responsible for this be put on the list?

HON. JUDGE PROST: Well I'll comment on the first part of your question. The criteria for listing that has been set by the Security Council is association to al-Qaida, and it is defined as any form of support in essence; so participating, preparing, financing—all of those activities are part of the definition. It's not dissimilar from what you

While Countering Terrorism, ¶¶ 12–58 U.N. Doc. A/67/396 (Sept. 26, 2012) (by Ben Emmerson).

would know in United States law as the material support provisions. So, yes, individuals stated to have been involved in financing al-Qaida, or entities, were placed on the list, and some of the narrative summaries still talk about that as being the basis for listing some individual and entities.

On the broader question, this is a list that deals solely with individuals and entities, so I don't deal at all with the question of state responsibility. That's entirely outside my realm.

AUDIENCE MEMBER: Is a state composed of individuals; what do you think?

HON. JUDGE PROST: Well it is, definitely, but as I say, there is this distinction. This is a part of a targeted sanction regime as opposed to, for example, there are sanction regimes, which are aimed at states but totally outside my realm of expertise and responsibility. So on that one, no comment.

AUDIENCE MEMBER: I have an interesting question. I saw you mentioned bin Laden was taken off the list. Did someone apply to have him taken off? I'd be curious why anyone would care if he's off the list. I mean, after all, he can't go anywhere. He's with the fishes, but the money might matter.

HON. JUDGE PROST: No, he was removed by virtue of the decision of the committee; it's an issue. There has been an issue about—and the committee carries out a review of—individuals who are listed who are said to be deceased, because this is not an asset regime. It involves the use of a sanction measure of freezing assets. But it's an individual or entity based regime. So you have to be supporting Al al-Qaida to be on this list, and those who are deceased, obviously, no longer meet, in essence, the criteria.

But there is great concern, and there certainly was in the case of bin Laden, which is why it took some time before he was removed by the Committee because of the asset issue. So they had to be satisfied. The Security Council added a section to the resolution, which specifically said states must ensure and report on or what are done with any assets being unfrozen as a result of his delisting. So that was an extra caution in his case. I think that was totally understandable, given he was, at one point, part of the criteria for listing.

And why does anyone care? Because it's part of the credibility of the regime, and all of the Security Council recognizes that. This is the sanction regime. Everyone accepts deceased persons should not be on the list. You deal with the assets through these kinds of measures.

The difficulty is, of course, it's sometimes very difficult to determine if someone is really deceased. And sometimes it can take a while because of the concerns about the assets.

AUDIENCE MEMBER: If someone gets delisted, do they get a certificate or something?

HON. JUDGE PROST: It's actually a really good question because one of the issues is that I report twice a year to the Security Council. I don't report in the sense of waiting for them to say yea or nay on my activities, but I write reports on my activities. One of the things I've talked about is that there is a problem in terms of follow-up and implementation of the decision. So I've certainly had, and I've written about this in my reports, several petitioners who have come back to me and said, "I know I was delisted because you told me so; I have a letter, but I try to enter country X, and I'm told I can't enter because of the Security Council listing; or I can't get the bank to release my funds." So I actually do, on occasion, write a letter to try to assist, but so far, despite my asking, and I continue to ask, the Security Council has not given me a direct power to intervene formally in those situations. So I just try to do the best I can informally. But they certainly get notifications, and there's press release material we can send to support that.

AUDIENCE MEMBER: I'm surprised that there aren't more people on your list because al-Qaida seems to be thriving anyway. And I wanted to know who advocates for you, and your position, to enable you to have more power?

HON. JUDGE PROST: Very good question. It's interesting. This is not an exhaustive list by any stretch. Like any other act of Council, the determinations to list people are based on the criteria of the Security Council, but there might be reasons that they don't want to include certain individuals or certain entities for other reasons. Sometimes it might be counterproductive, it can be some of the splinter groups—the Council might have very good reasons. Perhaps they're involved in some kind of a peace process where they're trying, I think, for example, some of the groups in the Philippines. I'm not saying they were ever contemplated. Some of them were listed, some aren't. But just as an example in which those kinds of scenarios can arise.

It's obviously quite a small list if you compare it to, for example, and there's sometimes confusion on this, the United States' famous "no-fly" list, which has thousands of names. But it's a very, very different kind of list, and it's also—and this is one of the issues I have—the criteria for listing by the Security Council, the one which I must examine solely, is association to al-Qaida. It's not terrorism, and that's a big, big difference because many of the domestic lists are about those who support terrorism writ large, which is a huge, different question.

So sometimes I might have cases where they might be involved in criminal activity, or they might be involved even in terrorist activity,

but the issue I have to address, and that's what the rule of law of course is all about, is are they associated to al-Qaida.

Who advocates for me? There is, obviously, a great body of NGOs, academics who are very interested in the question of fair process and the sanction regimes. There is what's called the like-minded group of states, who have been extraordinarily influential in this area. The usual suspects, I like to say, are the Scandinavian countries. They're actually formally known; it's not secret in any way—Germany, Costa Rica; I hope I don't forget anyone. But they do a tremendous amount of advocacy work. They do, obviously, political diplomacy work. They were instrumental, those groups of countries, in the creation of the Office of the Ombudsperson. The name came from the Scandinavians because originally Ombudsperson, or it is “ombudsman” originally, is a Danish concept.

So, there are many advocates. I certainly advocate for myself. I have to be very careful. It's not for me to advocate on things like: Should this regime be extended to other sanction regimes? That's a matter for states. There are certain broad questions, but on things like where do I see weaknesses in the process, or where do I see unfairness in the process—those points, the follow-up point, for example, I write and speak about to the Council, and I feel that's within my purview. For example, one of the things when I first took up the job was the designating state. That's the state—that's the term we use—that's the state or states that put the person or put them forward for listing. It's still a committee decision, but it's obviously the state that has the critical information. And from my point of view, a petitioner must know for fair process who the designating state was. Because you can imagine, if your relationship with the state is not so good, that might be a factor you want to raise in your submissions. But that information was not available. It's still not available, but I wrote about it repeatedly. The Special Rapporteur spoke about it, and in the last resolution, they have reversed the onus. So now, unless a state specifically objects to having their name released, and very few have, I'm able to release that information.

That's just an example. And again, by being annoying and writing about it over and over again, you speak about it, they get tired, and eventually you make some progress. There is a fair bit of advocacy, which I think is a really good thing.

AUDIENCE MEMBER: I'm just curious. The people who have been delisted: I recognize that no two cases are alike. I'm just curious if you've noticed any trends or recurring issues that have come up in any or all or a handful of those cases.

HON. JUDGE PROST: It's interesting, and it's always a bit difficult because to date—and this is something that certainly I write about and others write about—my reports are strictly confidential to the Committee. I can't even reveal to the petitioner or to the public what

my recommendations are, though it's not hard to figure out because I'm able to say there's not been an overturn or a Security Council reference, so people can figure it out. As a result, I'm guarded in what I can say.

But interestingly it has not been things that when I first took the job I thought it might be. For example, people arguing mistaken identity. There have been more factors because I operate to this lower standard, and it's not a criminal standard. The Council's made it very clear. This is not punitive; it's preventative. Because you're operating to a lower standard, you can base these listings on reasonable information or inferences that you're drawing from information.

I've had several cases where what became an issue was whether those inferences were correct. Because I take the approach of saying, "I'm looking at all the information now that is critically important, and that includes things the petitioner brings forward." So I have had several cases where the petitioner says, "Okay, I can see why that would look pretty suspicious, and it might even reach the threshold, but here's what the story was," and sometimes they can produce documentation. There's been more of that than I expected, but I think it's an interesting point. I think it's okay in a preventative measure, and a measure that's meant to change conduct, to rely on a lower standard, and those inferences that you draw like you do with a search warrant application, in my old prosecutor days.

But it's important then that you allow a response to that, and you take that information into account. Each case really is different and very, very interesting, and sometimes it's changed circumstances. People have changed, and the situation they were tied to has changed. So there are a lot of interesting scenarios.

AUDIENCE MEMBER: I wonder, given what seems the high rate at which cases have been delisted and people have been delisted, wouldn't it make more sense for the Ombudsperson to adjudicate, or not adjudicate, but to examine these cases at the front-end before the actual listing has gone through, so there is not this stigmatizing effect to those who really shouldn't have been delisted?

HON. JUDGE PROST: There are two points on that question. One is, and the front-end issue has been, a point that's been argued, and it's still discussed.

First, I gave you the numbers, and yes, it's pretty high, but there are some factors that go into that. At the beginning—I spoke about this earlier—there was what the Danish ambassador called the low-hanging fruit. There were cases that were really sitting there. I had a case sitting on my desk before I even arrived. There were cases that, I think, for a combination of reasons, were older, relatively straightforward, and now we're starting to see much more complex cases. I don't think the numbers for over the first three years are trends that will necessarily be the same. The problem with having a

front-end review is it raises this whole political issue, which is: this is the Security Council, which the Charter gives the power to make these decisions under Chapter VII, and there is simply, it is very difficult if not impossible, to have an independent party reviewing. This is the problem with giving full judicial review: reviewing the decisions of the Security Council, which is what a front-end consideration is. Although there's probably ways you can structure it. It's much more difficult, politically, to have that.

And yes, there is the point that it would avoid listings and stigmatization, which is always a very important point. At the same time, I'm less concerned about that now because the day after you're listed, you can apply to be delisted. You'll still have to go through the process, but it's much more effective now, and there's much less of a concern now that there is the mechanism. And also, the mechanism has had a real effect on the listings process because what happens is that the country proposing someone for listing has to provide a statement of reasons, and they keep making the point that these reasons must be very detailed, and it has to be a unanimous decision to put someone on the list.

So the fact that they know they have that Canadian woman at the end of the process, I think, has been a bit of a "well, we'd better think whether we agree with her or not, and we better think how she'll look at this case if it comes to her." So I think there's a lot more strengthening of the process through that end. Not to say that there's still discussion about it, but I think that's the context in which it's been dealt with.