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[Introduction]

It is a great pleasure and an honour for me to be given the opportunity to address you during this meeting of the COJUR, almost a year since I was appointed as Ombudsperson to the Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee. It is also a real pleasure to see in the room representatives of so many States, including members of the informal group of Like-Minded States, which have been consistently supportive of the Office of the Ombudsperson.

I have decided to focus my remarks on various aspects of the **lack of transparency of the Ombudsperson's mechanism**. I assume that my predecessor, Kimberly Prost, would have flagged this issue when she attended a COJUR meeting in the spring of 2014. This has been one of the main challenges to the fairness, and the perception of fairness, of the Ombudsperson mechanism. But today I am happy to be able to share some **positive developments** with you, which I believe **may significantly reduce this lack of transparency**. I thought that, as legal advisers of your respective foreign ministries, these developments may be useful to you in two respects, and by the same token, you may also be **in a position to make use of these developments to assist my own efforts**:

- First, by **creating better conditions for information sharing with the Ombudsperson, and thus allowing you to make a better case when your State is involved in an individual case before the Ombudsperson**. This is also instrumental to the effective delivery of my mandate;

- Second, by **improving the perception by domestic and European Courts of the elements of fairness this mechanism brings about**. I trust that doing so will in turn facilitate the implementation of UN sanctions by States both at the EU level and domestically.

I have picked four angles which I believe will be of interest to you in addressing this issue. First I will tell you about information on the Ombudsperson's practice that has recently become public. I will then come back to the question on creating better conditions for States to share information with the Ombudsperson. I will then tell you about "**reasons letters**" provided to the petitioners, before concluding with the perception of the Ombudsperson process by EU courts and looking at the question whether this mechanism is in fact as irrelevant as some may think.

[1. Public information about the Ombudsperson's practice]

The first positive development aimed at reducing the lack of transparency relates to the recent publication on the website of the Office of the Ombudsperson of information pertaining to its practice.

The procedure applicable to the Ombudsperson's mechanism, the standard applied to the review of delisting requests and a number of issues pertaining to the operations of the Office have been publically available for a long time. They can be found either in the relevant resolutions of the Security Council and the 1267 Committee's guidelines or in the reports of the Ombudsperson to the Security Council and on the website of the Office. By contrast, the practice of the Ombudsperson captured in her comprehensive reports in individual cases is not publically available because these reports are confidential. They are not shared outside the closed circle of the Committee and some States under specific circumstances. Only a few of you in this room represent States which are, or have been, privy to the practice of the Ombudsperson in individual cases.

During the first few months of my term, I realised in my interaction with petitioners and their counsel that having access to the practice of the Ombudsperson, in some form, would have a positive impact on their ability to present their case, and also on the quality of their arguments. I therefore decided to develop a document addressing the Ombudsperson's approach to analysis, assessment and use of information while respecting the confidentiality of comprehensive reports. The document specifically addresses, among others, the following issues: determining the existence of an association; required mental element for retaining a listing; actions of individuals as a basis for retaining the listing of an entity; other forms of support; how inferences are made; and factors relevant to establishing disassociation.

This document has been available on the website of the Office since February 2016. I am convinced that **beyond assisting petitioners, it will help States understanding how they can contribute information in a meaningful way.** Among the **practitioners** who I believe would benefit from a better understanding of the practice of the Ombudsperson, I think particularly of **intelligence services.**

This brings me to my second topic, on creating better conditions for States to share information.

[2. Creating better conditions for information sharing]

As you know, Resolution 2253 (2015) strongly urges Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate. It also encourages Member States to provide detailed and specific information, when available and in a timely manner. **It is a fact that even among States that are clearly supportive of my Office, the level of information sharing could be improved.** But achieving this requires **a better understanding** from relevant authorities, in particular intelligence

services about **how critical access to relevant information is** for the effective conduct of my mandate. I am conscious that it also requires **building trust**. The bottom line is that I can only base a recommendation to maintain a listing on information that is before me. In a few instances, with the assistance of the relevant Ministries of Foreign Affairs, I have met directly with intelligence services. In that context, I saw what a difference that could make in specific cases. **You are particularly well placed within the Ministries of Foreign Affairs to convey to your respective intelligence services my message in this respect.**

I believe that the document describing the practice of the Ombudsperson contains information which could assist you in doing so. In addition to the information it contains, I will add the following remarks. I continue to apply the standard developed by my predecessor when reviewing delisting requests from individuals and entities whose name is on the ISIL (Da'esh) and Al-Qaida Sanctions List. The standard is whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing at the time of review. I apply this standard to the information provided by States or, I should say, summaries of the relevant information about the activities of the Petitioner that they are able and willing to share. I rarely get to know the source of such information. As legal advisers, you are best placed to understand why, in this context, it is important that the information provided be sufficiently specific, for it to amount to a reasonable basis to maintain the listing.

I will take an **example** to illustrate this point. Take a petitioner who is listed for having acted during several years as a financier of a group based in Asia and associated to Al-Qaida. This is a typical example of information lacking specifics: as to the time period in question, the location, the amount of financial support alleged to have been provided, the modalities of such support, the identities of the petitioner's contacts within the group, any intermediaries, etc. Without further specifics, there is not much difference between this vague information and a mere allegation. It may only form part of the basis for a recommendation to maintain the listing if it is bolstered by more specific information.

My independent research may bring such information, but it is not always so. With the support of a team of one legal assistant and one administrative staff member, I clearly do not have the capacity to conduct an exhaustive review of all materials publically available in each and every case. This is especially true because sometimes, none of us speaks the language in which public material is available. Intelligence services are obviously better equipped than we are in this respect. This is why, if my independent research does not suffice, I come back to the relevant States and ask for more details. But even then, I am not always successful. In this example, it would be important that the States use their resources to look for relevant public material, and if there is none, that the provider of the information in question consider declassifying some of the details it possesses about these facts. Finally, if such details are too sensitive to be declassified, this may be a good case to consider sharing confidential information with me on the basis of an agreement or an arrangement

to that effect, if there is one, or on an ad hoc basis. I take this opportunity to insist on the advantage of entering into such an agreement with my office without waiting for a specific case.¹ As I said, it is of course possible to provide confidential information on an ad hoc basis. But this may be difficult to achieve within the limited time frame of four months available to gather information, which can only be extended once for a maximum of two months.

The best case scenario in terms of fairness is when I can put to the petitioner all the information on which I rely, that is public, including declassified information. But sufficient information of that kind does not always exist. This is why confidential information can be useful. Sometimes I obtain access to information supporting a piece of information that has already been shared with the petitioner. In such cases, the fact that I may not be in a position to share such material with the petitioner does not necessarily affect the overall fairness of the process. Going back to the example, say that I obtained access to classified information about the content of a conversation between the petitioner and a contact within the group to discuss the modalities of a funds transfer. The petitioner knows that he is alleged to have transferred funds to the group and I have been able to independently and impartially review the supporting information. I may rely on it without its secrecy affecting the overall fairness of the process. Now, let's say the confidential information contains details on how the petitioner has provided weapons to the group and that the petitioner has not been put on notice that he is also alleged to have supplied the group with weapons. This is a case where I would have, in fairness to the petitioner, to go back to the State to ascertain whether it would consent to declassify the fact that the Petitioner provided weapons to the group, while the specific details of this transaction would remain confidential.

I turn to the **third positive development** in the area of transparency. It relates to the **content of 'reasons letters'** provided to the Petitioner.

[3. Reasons Letters]

As you know, under the Ombudsperson's mechanism, petitioners do not have access to the comprehensive report in their own case. This is to some extent compensated by the fact that the Security Council requires the Committee to provide reasons for its decision on a delisting request. Originally this requirement only applied in retention cases and there was no deadline for the Committee to do so. The obligation to provide reasons in delisting cases was introduced by resolution 2083 (2012). By resolution 2161 (2014), the Council imposed a deadline of 60 days for the Committee to convey reasons to the Ombudsperson, for the

¹ As of 2 June 2016, there are 17 such arrangements or agreements in place, with the following countries: Austria, Switzerland, Belgium, the United Kingdom, Costa Rica, New Zealand, Germany, Australia, Portugal, Liechtenstein, France, The Netherlands, Finland, Luxembourg, Ireland, Denmark and the United States. The full list is available on the website of the Office of the Ombudsperson, at https://www.un.org/sc/suborg/en/ombudsperson/classified_information.

Ombudsperson to transmit to the Petitioner. In several of her reports to the Security Council, my predecessor deplored the fact that, in spite of these important improvements, there was still considerable reluctance, in practice, to provide reasons, particularly in delisting cases. In her ninth report of February 2015, she highlighted that a number of communications from the Committee transmitted by the Ombudsperson to the Petitioners contained no factual or analytical references. In her opinion, these communications did not comply with the requirement for reasons to be provided as mandated by resolution 2161(2014).

You may remember that in the famous case of Mr. Kadi for example, he was notified by the Ombudsperson in October 2012 of his delisting by the Committee. However, it was only in August 2014, after the adoption of resolution 2161, that he received further communication of the 'reasons' for the decision.

As indicated in my first report to the Security Council in January, Petitioners now receive a reasons letter summarizing the basis for the Ombudsperson's recommendation. This summary is not attributable to the Committee or any individual Committee member. The summary now tends to reflect more completely the analysis contained in the comprehensive reports of the Ombudsperson. Of course it is only if the entire report or at least the totality of my analysis was communicated to the petitioner that the comprehensive nature of the report would be properly conveyed. But more specific reasons letters constitute a significant development in the direction of transparency, which I hope the Committee will maintain over time.

I think that this information is particularly relevant to your role. This is because of your privileged position to represent your respective State before regional courts and also to inform your relevant administrative and judicial authorities of developments of interest in their area of work.

[A: Channels for disclosure of reasons letters]

There are two channels through which a reasons letter can find its way into judicial proceedings and thus become public. These channels correspond to situations where, as in the case of Mr. Kadi an individual or an entity listed by the ISIL (Da'esh) and Al-Qaida Sanctions Committee attempts two parallel recourses: on the one hand, a recourse to the Ombudsperson to seek delisting and, on the other hand a challenge of the implementation of sanctions before a court. The challenge could pertain to the implementation of sanctions by the EU and be brought before the Courts of the EU. It could also pertain to the implementation by a State and be brought before its domestic courts. After exhaustion of the domestic remedy, the individual could also allege one or more violations of his rights pursuant to the ECHR before the European Court of Human Rights (ECtHR). So what are these avenues for disclosure of a reasons letter?

First, the petitioner is free to disclose and to produce the reasons letter in support of a law suit before a domestic or a regional court. This will obviously occur only in cases where the petitioner considers that the reasons letter will support his case.

Second, paragraph 88 of resolution 2253 (2015) directs the Committee to consider requests for information from States and international organizations with ongoing judicial proceedings concerning the implementation of sanctions measures. The Committee is required to respond as appropriate with additional information available to it. When it is seized with such a request, the Committee may therefore decide to share information contained in comprehensive reports from the Ombudsperson. It could do so by sharing the full report of the Ombudsperson – subject to confidentiality restrictions –, or by sharing the reasons letter.

[B. Use of such letters from a State's perspective]

From a State's perspective, a reasons letter in a case of retention can obviously assist in demonstrating to domestic or regional courts that there were substantive reasons to maintain the listing. An excellent example can be found in the January 2016 judgement of the Supreme Court of the UK in the case of *Youssef v Secretary of State for Foreign and Commonwealth Affairs*. In this case, the petitioner had been retained on the sanctions list following a recommendation by the Ombudsperson. The Supreme Court notably referred to some of the information contained in the letter providing reasons and the analysis of the Ombudsperson. For those of you who have never had access to one of the Ombudsperson's comprehensive reports, this case is a good opportunity to have an insight into the practice of the Ombudsperson in a specific case.

I understand that Mr. Youssef has now sought legal aid with the EU General Court to enable him to challenge the decision to continue his listing. Assuming that the same information disclosed in the UK case is also produced before the General Court, we may potentially see how this time the General Court deals with material arising from an Ombudsperson's review.

Additionally, I am convinced that both in cases of retention and delisting, a reasons letter can be useful to demonstrate that some of the rights at stake have been respected. I mean, the right to have access to one's case, subject to legitimate interests in maintaining confidentiality, and the right to be heard. The information gathered by the Ombudsperson and summarized in the reasons letter usually exceeds the information that the European Commission or individual States may otherwise be in a position to obtain. In addition, during the dialogue phase, the Ombudsperson puts to the Petitioner all of the information she has gathered, subject to confidentiality restrictions. In this process, she also gets unusual access to the Petitioner, often through face-to-face interviews. Representatives of the EU Commission indicated during the recent EU-UN seminar on Sanctions held in New York, that

they are currently making use of the increased transparency of the mechanism in their submissions before the Courts of the EU. We have yet to see how this will be received.

The last point I would like to address is related to the perception by European Courts of elements of fairness in the Ombudsperson process.

[4. Improving the perception by European Courts of elements of fairness brought by the Ombudsperson's process]

Some of you have been in a position to follow and measure how increased fairness to the petitioner is progressively embedded in the Ombudsperson's process. You would agree that it has gone a long way in the right direction since the Office became operational in July 2010. Further improvements are certainly needed, but the situation of individuals and entities that seek delisting from the ISIL (Da'esh) and Al-Qaida Sanctions List has significantly improved. I have touched on the possibility to be informed of the case subject to confidentiality restrictions and to be heard by the Committee via the comprehensive report. One of the main assets of this mechanism is the independence of the Ombudsperson. Even if the mandate still lacks institutional guarantees, several steps have been taken recently to develop such guarantees and the impartial review of delisting requests it offers. Finally, numbers show that the recourse to the Ombudsperson is very effective. Of the 59 delisting requests fully completed through the Ombudsperson process, only 11 delisting requests have been refused, while 43 individuals and 28 entities have been delisted.

I think it is fair to say that no case has yet given an appropriate opportunity to the ECtHR or to the Courts of the European Union to concretely measure these assets. Either the establishment of the Office of the Ombudsperson post-dated the case at hand, as with the *Nada* case at the ECtHR and the *Kadi I* case before the Courts of the European Union. Or, this recourse was not open to individuals under the sanctions regime in question, as in the case of *Al-Dulimi and Montana Management (Al Dulimi)* before the ECtHR. As alluded to earlier, even in the context of the *Kadi II* case, the concrete impact of the Ombudsperson's mechanism on Mr. Kadi's right to be heard and to be informed of his case, subject to legitimate interests in maintaining confidentiality, was not visible to the ECJ.

The ECtHR and the ECJ have acknowledged the improvements the Security Council has made to the 1267 sanctions regime. However, they have obviously so far been unimpressed with the Ombudsperson's mechanism. In *Al Dulimi*, instead of considering the possible impact of Article 103² of the UN Charter – under which Charter obligations prevail over any other obligation –, the ECtHR decided to examine the alleged breach of article 6 of the ECHR in the light of the 'equivalent protection' criterion. In doing so, it relied on a 2012 conclusion by the UN Special Rapporteur on the "Promotion and protection of human rights and

² Article 103 of the UN Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

fundamental freedoms while countering terrorism". He had noted that, in spite of the significant due process improvements and the creation of the Office of the Ombudsperson, the 1267 sanctions regime continued to 'fall short of international minimum standards in such matters'. In an obiter, the ECtHR 'unreservedly' agreed with this conclusion. I am curious to read the ECtHR's Grand Chamber's decision in this case which is yet to be delivered.

In *Kadi II*, the ECJ maintained that effective review by the courts of the European Union is all the more essential in the absence of guarantees of effective judicial protection at the UN level. The Court made this finding despite the improvements to the Ombudsperson mechanism, in particular after the adoption of the contested regulation.

[Conclusion]

In conclusion, there is no doubt that the Ombudsperson's mechanism falls short of important guarantees necessary to amount to effective judicial protection. It is non-judicial. The scope of the Ombudsperson's review is more limited than that involved in full judicial review. It does not address the question of whether the petitioner should have been listed in the first place. As noted earlier, it is limited to determining whether, at the time of review, there is sufficient information to provide a reasonable and credible basis to maintain the listing. As a result, the only available remedy is delisting – which for most petitioners is sufficient. But there is no financial compensation for what may have been a wrongful listing, the damage to the petitioner's reputation etc, as that question is left open. Furthermore, the decision to retain or delist an individual or an entity rests with the Committee, a political body. This is so, even if the Ombudsperson's recommendations are more effective than the term would suggest. As you know, resolution 1989 (2011) reversed the consensus requirement following a recommendation by the Ombudsperson to delist. None of the two scenarios under which the Committee can decide not to follow such a recommendation has ever occurred.

So to come back to the question raised in my introduction - Does it mean that this mechanism is irrelevant? Clearly not from the perspective of individuals and entities who have recourse to it. Is it irrelevant in the context of challenges to the implementation of sanctions before a domestic or regional court? I hope to have demonstrated the opposite when evoking the Youssef case and the role reasons letters have played before the Supreme Court of the UK and could possibly play in the courts of the EU. But for a court's perception of the Ombudsperson's mechanism to evolve, it needs to be made aware, in the context of its particular cases, of the improvements made in terms of fairness of the process. The EU Commission seems to be fully conscious of its role in this respect. I thought that these reflections could also be of interest to you as representatives your respective governments when they intervene before these Courts.

Domestic and regional courts do not consider the recourse to the Ombudsperson a remedy that individuals and entities must exhaust prior to challenging the implementation of the Committee's sanctions in these fora. However, as you know resolution 2253 (2015) strongly urges Member States and relevant international organizations to encourage individuals and entities to first seek removal from the ISIL (Da'esh) & Al-Qaida Sanctions List through the Office of the Ombudsperson, before challenging their listing through national and regional courts. In fact, the existence of the mechanism has led to a number of cases being filtered off to the Ombudsperson.

I am convinced that this trend will persist, especially because I plan to continue my own and my predecessor's efforts to enhance the transparency and fairness of the mechanism. Those who had hoped that as a result of the establishment of the Office of the Ombudsperson, domestic and regional courts would refrain from judicial activism may be disappointed. I personally see the pressure on the UN to render its sanctions regimes more compliant with human rights as a healthy pressure. And reaching this objective can only facilitate the implementation of sanctions by States and international organisations.