From adjudicating international crimes to reviewing delisting requests by individuals and entities on the 1267 Sanctions List: *a comparative approach*[1]

Introduction

The topic I am about to address is a reflection on some of the tools used by the Security Council, together or separately, to restore or maintain international peace and security. This occurs notably in situations of conflict during which serious violations of international law take place as well as in the context of countering terrorism. In parallel, I have been asked to reflect on my own professional path. I started my career as a member of the French judiciary but I have since then had the privilege of taking a direct part in various capacities in the implementation of several of the forms of international or internationalized criminal justice I will describe. This topic allows me to share how I went from adjudicating international crimes to reviewing delisting requests by individuals and entities on the 1267 Sanctions List, or "ISIL (Da'esh) and Al-Qaida Sanctions List", as it is now called. You may wonder what an international judge working on *punitive* measures *after* a crime is committed, and an ombudsperson working on *preventive* sanctions measures ideally *before* a crime is committed, have in common. In fact, these functions are surprisingly similar. I will show you how, by comparing the two processes, through the lens of my experience of them.

First, to ensure we are on the same page, I will set the context by taking you quickly through the parallel development since the 1990s of varied forms of international criminal justice and UN sanctions. I will then discuss and compare the role of international criminal justice practitioners and the Ombudsperson.

I. Comparative analysis of the rapid development of modern forms of international or internationalized criminal justice and sanctions

Since 1966, making use of its power to impose non-military sanctions in response to threats to international peace and security, the Security Council has established 26 sanctions regimes, concerning 21 countries[2] as well as terrorist organizations, groups and entities.[3] 13[4] of these sanctions regimes are on-going and focus on supporting political settlement if conflict, nuclear non-proliferation and counter terrorism. Each regime is administered by a sanctions committee chaired by a non-permanent member of the Security Council. There are 10 monitoring groups, teams and panels that support the work of the sanctions committees.

In the same period, over ten courts and mechanisms have been established world-wide to judge international crimes, the last one being the International Criminal Court (ICC). I will tell you a little more about these mechanisms.

Early days

[1] Presentation by Catherine Marchi-Uhel, Ombudsperson, Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee.
[2] In Southern Rhodesia, South Africa, the former Yugoslavia, Haiti, Iraq, Angola, Sierra Leone, Somalia, Eritrea, Liberia, DRC, Côte d'Ivoire, Sudan (2), Lebanon, DPRK, Iran, Libya (2), Guinea-Bissau, CAR, Yemen and South Sudan.
[3] The Taliban, Al-Qaida and ISIL (Da'esh), as well as individuals and entities associated with them.
[4] Following termination of sanctions regimes concerning Côte d'Ivoire and Liberia, respectively in April and May 2016.

In the 1970s, a few decades after the Nuremberg and Tokyo international military tribunals had completed their mandate, the Khmer Rouge were committing war crimes, crimes against humanity and even genocide. At the time, there was no international court or tribunal capable of ensuring accountability for such horrific crimes. Even when mass atrocities started being committed in the Balkans in the early 1990s, negotiations for the establishment of a permanent international court had not yet been initiated by the United Nations General Assembly. As you may know, these negotiations only started in 1995.

The Security Council established the first ad hoc International Tribunal, for the former Yugoslavia (ICTY) in 1993, to bring accountability for serious violations of international humanitarian law during the conflicts which ravaged the Balkans. In 1994, shortly after creating the ICTY, the Council established the second ad hoc Tribunal for Rwanda (ICTR), with the purpose of bringing accountability for the genocide and other core crimes committed in Rwanda during that same year. The Council established these international tribunals by resolution pursuant to Chapter VII of the UN Charter. I worked as a senior legal officer of the ICTY and ICTR Appeals Chambers and as Head of Chambers of the ICTY, for a total of 10 years.

Interestingly, it is also since the 1990s that a major evolution in the area of sanctions imposed by the Security Council has occurred. The Security Council started making extensive use of its Chapter VII power in the 1990s. As can be seen from the list of terminated regimes, a number of them concerned states from the former Yugoslavia, Rwanda, Sierra Leone and Liberia. The territories where sanctions were implemented thus often matched the territories where serious crimes took place and for which modern forms of international criminal justice were created. Indeed, criminal justice mechanisms and sanctions do not operate, succeed or fail in a vacuum. They are most effective at maintaining or restoring international peace and security when applied as part of a comprehensive strategy encompassing peacekeeping, peacebuilding and peacemaking, of which accountability for the most serious crimes form an important component. Security Council resolution 724 (1991) of 15 December 1991 thus imposed an arms embargo on Yugoslavia before the ICTY was established.[5] Of interest is that in its resolution 1074 of 1996 terminating the sanctions, the Security Council underlined the need for full cooperation by States and entities with the ICTY. Similarly, just a few months before the ICTR was established in November 1994, the Security Council imposed an arms embargo on Rwanda.[6]

These two examples alone show how intertwined the two types of processes are. These forms of criminal justice are not designed to adjudicate all serious crimes committed during time of conflict. They are meant to address the most serious crimes until such time that domestic justice is able to take over in the fight against impunity. It is an important part but just one part of the many processes needed to restore and maintain peace. Similarly, sanctions do not operate in isolation.

Sanctions of the first generation were global ones addressed against States. They included interruption of economic relations and of the various means of communication as well as severance of diplomatic relations. The objective was to isolate the State at the origin of the threat and as such to exercise pressure on that State to incite modification of the attitude which constituted threat.

[5] These sanctions were terminated pursuant to resolution 1074 of 1 October 1996.
[6] Security Council resolution 918 (1994) of 17 May 1994 imposed an arms embargo on Rwanda. The sanctions were terminated pursuant to resolution 1823 (2008) of 10 July 2008.

These global sanctions rapidly became the object of criticism due to their unwanted but devastating consequences for the civilian populations of the concerned States. My participation as a legal officer and as a Director in UN peace keeping missions in Bosnia- Herzegovina and in Liberia gave me an opportunity to understand the impact of sanctions on the ground and how they are perceived by the concerned States and their populations. In former Yugoslavia, I have observed that sanctions were perceived as punitive both by the authorities and the population. This was a time when simultaneously senior figures of some of the States involved in the conflict were indicted by the ICTY.

New generation of tribunals and sanctions

Fast forward a decade - In 2007, the Council established the Special Tribunal for Lebanon (STL) at the request of the government of Lebanon in reaction to the assassination of Prime Minister Refik Hariri and other related terrorist attacks.

While not directly established by the Security Council, two other forms of internationalized criminal justice were introduced or reinforced in 2000. They were established at the initiative of the Special Representatives of UNMIK and UNTAET, two peacekeeping missions which themselves were created by the Security Council with a transitional or interim administration mandate. UNTAET and UNMIK respectively established panels within the Courts of East Timor and Kosovo. These panels had jurisdiction for core international crimes. In the case of Kosovo, the jurisdiction extended to cases for which the assignment of international judges/prosecutors was considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice. I served as an international judge in Kosovo for a year and a half, notably adjudicating my first terrorism case.

Finally, two hybrid courts and chambers were respectively established by agreements between the UN and a government. The first one is the Special Court for Sierra Leone (SCSL). It was established in 2002, the same year the Rome Statute entered into force, to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Its jurisdiction thus covered the same period as the sanctions, which were imposed by the Security Council with respect to Sierra Leone in October 1997 and terminated in 2010.[7]

The second hybrid institution is the “Extraordinary Chambers in the Courts of Cambodia” (ECCC), also known as the Khmer Rouge Tribunal. This “tribunal” was established in 2006 to bring accountability for the serious violations of Cambodian and international law committed during the period of “Democratic Kampuchea” (in other words, the Khmer Rouge). In the case of the ECCC, unlike with the SCSL, it was the General Assembly, not the Security Council which requested the Secretary General to negotiate the agreement in question. I served as a full-time international judge for the ECCC for a year. I also had a lot of interactions with the judges of the SCSL, the STL, the War Crimes Chamber in Bosnia and Herzegovina during my time in The Hague.

[7] Security Council resolution 1132/1997 of 8 October 1997. In particular, the Council imposed a travel ban on the members of the military junta and adult members of their families. It also imposed a petroleum and arms embargo on Sierra Leone. These sanctions were terminated pursuant to resolution 1940 (2010) of 29 September 2010.

In the meantime, by mid 1990s, the Security Council started making use of selective sanctions known as 'targeted' or 'smart' sanctions. It thus started targeting not States - but more precisely factions or groups or individuals/entities considered responsible for the threat to international peace and security. In addition to more traditional forms of sanctions such as arms embargoes, new sanctions included asset freezes and travel bans. The sanctions imposed against ISIL (Da'esh) and Al-Qaida by the 1267 Committee and with which I am now dealing as Ombudsperson are of this second generation.

Age of accountability

The development of the modern forms of international or internalized justice culminated in the establishment of the International Criminal Court. This development is an expression of the fact that we have reached an 'age of accountability' - here I quote the expression used by the Secretary General of the UN in his opening address at the Rome Statute review Conference in Kampala in May 2010. These mechanisms have some similarities. Unlike the ICC, the forms of justice I have described are all temporary. This reflects the fact that they were established to try crimes committed only within a specific time-frame and during a specific conflict, or to respond to specific acts of terrorism as in Lebanon.

With varying degrees of success, these modern forms of criminal justice have significantly contributed to the fight against immunity for most serious crimes. They were established or backed by the UN, but they have in turn inspired regional and national initiatives. These include the War Crimes Chamber in the State Court of Bosnia and Herzegovina and the Extraordinary African Chambers in Senegal to try the former president of Chad, Hissène Habré. Recently, two Courts have been created in Africa, one with a general jurisdiction over the African continent, and another to try crimes committed in the Central African Republic since 2003.[8]

In the meantime, on the side of sanctions, the new generation of sanctions I mentioned - the targeted sanctions - also led to criticism. Listings are the result of a political process and, when they concern individuals and non-state entities, they raise very valid human rights and fair process concerns, because they impose very strict limitations on a number of rights of those they target. In the 2005 World Summit declaration, the General Assembly called on the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures are in place for the imposition and lifting of sanctions measures. These concerns have also been driven in significant part by litigation related to the implementation of sanctions before domestic and international courts. They led to the establishment of a focal point for de-listing, and in the case of the 1267 sanctions regime, to the establishment of the Office of the Ombudsperson. The Office was established by resolution 1904 (2009) – that is ten years after the adoption of the resolution having established the 1267 Committee.

[8] Also worth mentioning is 2014 Malabo Protocol adopted by the members of the African Union. The purpose of this protocol was to extend the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include Rome-Statutes Crimes and other offences pertinent to the African continent. More recently, the transitional parliament of the Central African Republic established, with international support, a special criminal court for the most serious crimes committed in the country since 2003. Finally, the EU backed "Kosovo Relocated Specialist Judicial Institution" which is expected to start operating this year in The Hague to try serious crimes allegedly committed in 1999-2000 by members of the Kosovo Liberation Army against ethnic minorities and political opponents.

Office of the Ombudsperson

The Office became operational in July 2010. The first Ombudsperson was Kimberly Prost. Her mandate expired in July 2015 and I took up my functions the same month. This mechanism is the product of a compromise designed to bring elements of procedural fairness without affecting the decision making power of the Security Council. Of the 14 sanctions regimes currently in force at the UN level, this regime is the only one offering to listed individuals and entities a recourse to an independent and impartial review of their delisting requests.

As you may know, the 1267 Sanctions List originally concerned individuals and entities associated with the Taliban and then Al-Qaida. In 2011, with the split of the regime introduced by resolution 1989, the 1267 listing focused exclusively on Al-Qaida and associated individuals, groups, undertaking or entities. Resolution 2253(2015), places the emphasis on ISIL (Da'esh) as well as Al-Qaida but ISIL has in fact been listed as AQI (QDe.115) since 2004.

As you can imagine, I have a privileged interaction as Ombudsperson with some of the individuals and entities against which the sanctions are imposed.

II. Comparative analysis of the role of international criminal justice practitioners and the Ombudsperson

I assume that your knowledge of the role of international criminal justice practitioners (particularly the prosecutors and the judges) is more extensive than that of the Ombudsperson. I will therefore focus my comparative approach on showing how the practice of the Ombudsperson, despite appearances, more often than not resembles that of these more classic practitioners. But first I will describe in a nutshell what my role is as Ombudsperson.

Role of the Ombudsperson

The role of the Ombudsperson, defined by the Security Council in its Resolution 2253 (2015) and its Annex 2, is primarily to provide an independent and impartial review of delisting requests made by individuals and entities placed on the ISIL (Da'esh) and Al-Qaida Sanctions List. In doing so, I do not only assist the Committee in its consideration of whether to grant or deny a delisting request in cases of which the Ombudsperson is seized. I also offer to individuals and entities having recourse to the Ombudsperson the possibility to know in as much details as possible the information gathered from various sources during the initial phase of the process. This means that petitioners are fully aware of the case against them, subject to any confidentiality constraints. I also give petitioners the opportunity to have their side of the story heard by the Ombudsperson and via my comprehensive report, by the final decision-maker, the Committee. Since the Office was established, the Ombudsperson has been seized of 68 delisting requests. Figures show that the recourse is very effective. Out of the 59 delisting requests fully completed through the Ombudsperson process, 43 individuals and 28 entities have been delisted and only 11 delisting requests have been refused.

You may think at this juncture that there is not much in common between the role of a judge in a transitional justice context or that of a chambers staff in an ad hoc Tribunal and the role of the Ombudsperson. Let me show you the opposite.

Independence

Like a judge, the Ombudsperson is independent, even if the Office of the Ombudsperson still lacks institutional guarantees of such independence. My status as a consultant, notably, is less protective than that of an official other than Secretariat officials of the United Nations (the status most international judges enjoy).

Nature of cases, support team and deadlines

Unlike international prosecutors and judges, I do not have a large support team and I need to conduct my review of delisting requests within strict deadlines. The information gathering phase of my review is limited to four months and I can only extend it once, for two months maximum. The dialogue phase, including the drafting of my report had to be completed within two months and can only be extended once. While most cases before the Ombudsperson are not as broad as criminal cases before an international tribunal, some of my cases are very complex. A number of them span over several years of alleged actions from an individual or an entity amounting to association with ISIL or Al-Qaida. They often involve various forms of support to a number of listed groups, entities and individuals and they concern actions taking place in several countries. Since I started these functions last July, I have had up to six cases on-going at the same time at different stages and my team consists of one legal officer and an administrative staff member. My predecessor had up to 12 cases simultaneously with the same amount of support. The volume of work can therefore be substantial.

Assessment of admissibility and merit of delisting petitions

When I decide on the admissibility of a first delisting request or of a repeat request, that is, whether the petitioner properly addresses the listing criteria envisaged by resolution 2253 (2015), my role is very similar to that of a judge assessing the admissibility of a novel request or of a request for judicial review.

As indicated, when it comes to assessing the merit of a petition, my role is limited to recommending the 1267 Sanctions Committee to retain the name of the petitioner on the sanctions list or to consider delisting it. The decision rests with the Committee. This may seem like a major difference with the role of judges in an international court, but the Ombudsperson's recommendation is in fact more effective than the term would suggest.

Originally, the Ombudsperson did not have the formal power to make recommendations. In 2011, the UNSC gave the Ombudsperson the power to make recommendations. In addition, it importantly reversed the consensus requirement where the Ombudsperson recommends that the Committee consider delisting. This means that in such cases, the name of the petitioner is delisted unless within 60 days the Committee decides by consensus to retain the listing or refers the matter to the Security Council for a vote. None of these two scenarios have ever occurred. Thus, while it is "just" a recommendation, the document containing the analysis and recommendation of the Ombudsperson is very similar to a judicial decision issued by a court.

Applicable standard and assessment of information vs. evidence

The first thing my predecessor did when she took up the post was to elaborate a standard for the assessment of information. She realized that like a judge, she needed to have a consistent review standard to apply when analyzing information and concluding whether a fact is established or not. This standard is lower than the standard of "beyond reasonable doubt" applied by most international courts and tribunals. It reflects the express intent of the Security Council with regard to the purpose of the sanctions, namely "that the measures…are preventative in nature and are not reliant upon criminal standards set out under national law". At the same time, it must be a measure of adequate substance to sustain the serious restrictions imposed on individuals and entities through the application of the sanctions. The standard in question is *whether there is sufficient information to provide a reasonable and credible basis for the listing at the time of review*.

You may have noticed that I referred to 'information' instead of 'evidence'. This is because the information which the Ombudsperson works with is of a very different nature than that obtained by a judge in criminal cases. However, one of the challenges I face when analysing the gathered information is that I rarely have access to 'evidence' in a strict sense. Of course, when I test the credibility of a Petitioner, or when I get to review a document whose source is identified and can be tested, I feel on familiar "judicial" ground. But the information I gather from States often consists of statements – or I should say - of summaries of the relevant information about the activities of the Petitioner. And this is limited by what States are able and willing to share. I rarely get to know the source of such information. The process whereby I assess the credibility of the information is therefore very different from the one whereby judges or parties test the credibility or authenticity of evidence. But what we have in common is that we both carefully and thoroughly review all the information before us.

Like a judge in a judicial system respecting human rights, I do not rely on information if I am satisfied that it has been obtained through torture. I also give serious consideration to an allegation by a petitioner that information has been manipulated, for example 'planted' by a state, provided that it is supported by credible and specific supporting material.

Access to confidential material

The Security Council strongly urges Member States to provide all relevant information including confidential information to the Ombudsperson. My Office has concluded agreements or arrangements on such access with 17 states, the last in date with the United States. Like a prosecutor getting access to classified information which the provider does not agree to be used in Court, the Ombudsperson gets access to information which will not be shared with the petitioner and counsel and even with the Committee, or only in the way consented to by the provider. Depending on whether the confidential information is decisive, the fact that I may rely on such classified information without disclosing it may raise serious due process concerns. However, such a scenario has not occurred to date.

Publicity v. secrecy

Unlike in a court of justice where debates and judgements are in principle public and where confidentiality, closed sessions, or ex-parte are the exception, the Ombudsperson process is in principle confidential, and transparency is the exception.

In a criminal case, all parties to the case usually have access to the evidence that the court will rely on. They are then provided with the full text of the decision or judgement of the court in their case. And they even have access to decisions in other cases than their own, which allows them to be aware of the case-law of the court when preparing their arguments.

In the Ombudsperson process, the Comprehensive reports of the Ombudsperson are confidential. This is the document which contains the analysis and recommendation of the Ombudsperson – the equivalent of a judge's decision or judgement in a court. Comprehensive reports are not shared outside the closed circle of the Committee and some States under specific circumstances. Not even the petitioner or his counsel receive a full version of the comprehensive report in their own case. Let alone the public. However, the Security Council requires the Committee to provide reasons for delisting or retention. In practice, the Petitioner receives a summary of the analysis in the comprehensive report, which does not as such reflect the view of the Committee or of any of its members. My only room for action there is to convince the Committee to reflect as widely and completely as possible my analysis in this summary. These Committee "reasons letters" are consistent with the observations, analysis and findings or the Ombudsperson. And in fact, they tend to be more comprehensive than in the past. A summary does not however necessarily convey the comprehensive nature of the report. Only a transmission of the full report or at least of the totality of the analysis would achieve that result.

However, there are other things that can be shared with petitioners, legal practitioners and the public more generally. Since I took up my functions, I have interacted with a number of petitioners and their counsel. I realized that having access to the case law – or equivalent - of the practice of the Ombudsperson, as in judicial proceedings, would be very helpful for them. I realized this would have a positive impact on their ability to present their case, and also on the quality of their arguments. This was all the more important because comprehensive reports are not publically available.

Petitioners and counsel did previously access to some information about the Ombudsperson process, but it used to be limited to procedural issues, applicable standard and the treatment of information alleged to have been obtained by use of torture. But it turned out that this was insufficient. I therefore posted on the Website of the Office of the Ombudsperson a document describing the Ombudsperson's approach to analysis, assessment and use of information, in other words, the Ombudsperson's "case law". The document contains explanations on various issues. These include an explanation on how the Ombudsperson determines that an association with ISIL (Da'esh) or Al-Qaida exists. Another topic is the required mental element for retaining a listing. The document also covers 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. My primary aim in making this document public was to facilitate the task of petitioners and their counsel in the preparation of their case, a further step towards fairness. It should also lift some of the unnecessary mystery in which the Ombudsperson mechanism was shrouded and thus make the mechanism one step closer to its judicial counterparts.

[Another avenue whereby the practice of the Ombudsperson may progressively become more known to interested public occurs in some instances where an individual seizes both the Ombudsperson to be delisted and the courts to challenge the domestic or regional implementation of sanctions imposed against them. In that context, there are two channels through which the information or analysis made by the Ombudsperson can become public. First, the Petitioner is free to disclose the content of the information contained in the reasons letter summarizing the basis for the Ombudsperson's recommendation. He can obviously disclose if it supports his position before the court. There is another way whereby such material can find its way in judicial proceedings. 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.]

Conclusion

There would obviously be a lot more to say in this comparative approach context, but I would like to leave some time for questions. I will only add that I feel particularly proud of having been vested with the difficult but fascinating task of providing an independent and impartial review of delisting requests, the *raison d'être* of the Office of the Ombudsperson. With all the similarities I have described, I measure every day how much my domestic and international judicial background as well as my human rights background influence my approach of the Ombudsperson's process. Although it is already robust, this process could be further improved and this would only enhance the credibility of the ISIL and Al-Qaida sanctions regime and facilitate the implementation of sanctions by the states. I am firmly committed to continuing my efforts in that direction.