Delisting Procedure involving the Ombudsperson before the 1267 Sanctions Committee :
Confidentiality issues in the context of the Ombudsperson's process[1]

Organized by

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[Introduction]

I thank the Max Planck Institute and Prof. Dr. Sieber for giving me this great opportunity to share with you my thoughts on various confidentiality issues arising in the context of the Ombudsperson's process. It is a real honour for me to address such a distinguished group of academics and experts.

I will describe the various forms of confidentiality applying to the Ombudsperson's process. I will then focus on the use of classified information by the Ombudsperson and the fairness issues arising from such use. I will thereafter explore various channels permitting non-classified information gathered by the Ombudsperson and her analysis of the same to find its way into domestic and regional proceedings and become public. But before doing so, it may be helpful to place the 1267 sanctions regime in context and to give you a short presentation of the procedure pertaining to delisting requests.

[I. 1267 Sanctions Regime in Context and procedure pertaining to delisting requests]

A. 1267 Sanctions Regime in Context

Sanctions constitute an important tool to which the Security Council has recourse under Article 41 of Chapter VII of the United Nations Charter to maintain or restore international peace and security. Since 1966, the Security Council has established 26 sanctions regimes, 13 of which are active. The Council really started making extensive use of sanctions in the 1990s. Sanctions are imposed to support peaceful transitions, deter non-constitutional changes, protect human rights, promote non-proliferation and constrain terrorism. Sanctions of the first generation were global and aimed at States posing a threat. They included interruption of economic relations and of 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 thus to incite that State to modify the attitude which constituted the threat. These global sanctions rapidly became the object of criticism due to their unwanted but devastating consequences for the civilian populations of the concerned States.

In response to these criticisms, by the mid-1990s, the Security Council started making use of selective sanctions known as 'targeted' sanctions. These sanctions did not target States - but instead specifically the factions, groups, individuals or entities which were 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. Targeted sanctions were soon the subject of equal criticism. This was particularly so in the context of the 1267 sanctions regime when, after the tragic

[1] Presentation by Catherine Marchi-Uhel, Ombudsperson for the United Nations Security Council, ISIL (Da'esh) and Al-Qaida Sanctions Committee (1267 Sanctions Committee).

events of 9/11, the names of hundreds of persons were placed on the list without proper notice of reasons for being listed and without recourse.

Sanctions are imposed as a result of a political process. When they target individuals and non-state entities, they raise valid human rights and fair process concerns, because they impose very strict limitations on a number of these rights. 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 were driven in significant part by litigation related to the implementation of sanctions before domestic and international courts (notably the ECtHR and the ECJ). The Security Council has taken a great number of measures to enhance the fairness and transparency of the 1267 sanction regime and other sanctions regimes. It now requires objective listing criteria, more detailed statements of case as well as publicly available summaries of those statements of case. A recourse is also available to listed individuals or entities, through the Focal Point for delisting or the Ombudsperson, depending on the regime. The establishment of the Office of the Ombudsperson, although limited to the 1267 sanctions regime, is without doubt a major milestone in creating fair and clear procedures.

B. Establishment of the Office of the Ombudsperson

The Office was established by resolution 1904 (2009) – that is ten years after the establishment of the 1267 Committee - and it 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. The Ombudsperson mechanism is the product of a compromise designed to bring elements of procedural fairness without affecting the decision making power of the Security Council. The role of the Ombudsperson is defined in Security Council resolution 2253 (2015) and its Annex 2. It offers individuals and entities whose name is inscribed on the ISIL (Da'esh) and Al-Qaida Sanctions List a recourse to an independent and impartial reviewer. Since its establishment, the Office of the Ombudsperson's mandate has been significantly strengthened through successive resolutions.

C. Procedure applicable to delisting requests

I am **seized in the simplest way** by individuals and entities who seek removal of their name from the ISIL (Da'esh) and Al-Qaida Sanctions List, usually by e-mail. When I receive a delisting request, I first assess whether it properly addresses the listing criteria. In practice, to do so a petitioner would raise one or more of the following types of arguments:

- that facts in the narrative summary are non-existent; or
- that such facts do not amount to support to ISIL or AQ as defined by the SC or
- that such support does no longer exist in other words, that the Petitioner has disassociated from ISIL or AQ.

If I am properly seized, I inform the petitioner of the general procedure for processing delisting requests and I start the **information gathering phase** of the process. I circulate the request to relevant actors (Committee – via the chair – Designating State(s); State of nationality, residence or incorporation; and any other relevant State (as I can infer from the case) and the Monitoring Team). I also conduct independent research, reviewing relevant articles, books, the activity of the petitioner

on social media where it exists. The purpose of this phase of the process is to obtain as much relevant information as possible. If I determine that more time is required for information gathering, I may extend that phase once for up to two months.

Then comes the dialogue phase. To the extent possible I meet with the Petitioner, who may be accompanied by Counsel, in person. During this interview, I put to the Petitioner 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 them the opportunity to tell me their side of the story and through my comprehensive report, to be heard by the final decision-maker, the Committee. The comprehensive report contains a summary of the information gathered, the position of the Petitioner, my analysis, observations, and my recommendation that the Committee consider delisting the individual or entity or that the listing be retained. I have two months to complete the dialogue phase and issue my comprehensive report. This period can only be extended once for two months.

My report is then translated into all United Nations official languages, which takes about a month on average. After the Committee has received my report in all those languages and it has had 15 days to review it, the report is placed on the Committee's agenda for consideration. The Chair then invites me to orally present my report to the Committee and to answer questions Committee members may have. The Committee is to complete its consideration of the delisting request no later than 30 days from the date my report is available in all languages.

Within 60 days of such consideration, the Committee conveys to me whether sanctions are to be retained or terminated. The decision to delist or to retain a name on the ISIL (Da'esh) and Al-Qaida sanctions list rests with the Committee. However, if I recommend that the Committee consider delisting the petitioner, sanctions no longer apply after 60 days unless there is a consensus of the 15 members of the Committee to retain the listing. In the absence of such consensus, it is also possible for a member State to refer the matter through the Chair to the Security Council for decision. This reversed consensus was introduced by resolution 1989 (2011) and since then none of these two scenarios has occurred.

The letter from the Committee informing me of its decision also sets out reasons for the retention or termination of sanctions. In fact, in cases where the Committee's decision follows my recommendation to retain or to consider delisting the Petitioner, the Committee's letter contains a summary of the reasons which reflect the basis for my recommendation. The letter specifies that these reasons are not attributable to the Committee or any individual Committee member. Where appropriate, the Committee also provides an updated Narrative Summary. I then transmit this information to the Petitioner.

Since the Office was established, the Ombudsperson has been seized of 69 delisting requests. Figures show that the recourse is very effective. Out of the 61 delisting requests fully completed through the Ombudsperson process, 44 individuals and 28 entities have been delisted and only 12 delisting requests have been refused.

I now turn to the various forms of confidentiality applying to the Ombudsperson's process.

[II. Forms of confidentiality applying to the Ombudsperson's process]

There are three forms of confidentiality applying in the Ombudsperson's practice. The first applies to the comprehensive reports of the Ombudsperson on a delisting request. According to resolution 2253 (2015), these reports and their contents shall be treated as strictly confidential and not shared with the petitioner or any other State without the approval of the Committee. In addition to members of the Committee (that is the 15 members of the Security Council), only a close circle of States can, with permission of the Committee, receive an integral or redacted copy of the comprehensive report. These are the designating State, and the States of nationality, residence or incorporation. Outside this close circle, even States which have provided information to the Ombudsperson have no standing to request access to the comprehensive report.

The second category of confidentiality is self-imposed by the Ombudsperson. According to the practice established by my predecessor, unless the petitioner requests otherwise, petitioners' names remain confidential while under consideration and in the case of denial or withdrawal of a petition. I have retained the same approach.

The third category of confidentiality pertains to classified information which States consent to share with me. Providers of classified information place restrictions on its use which I am bound to respect. I cannot share it with anyone, including the petitioner, or only in the way consented to by the provider. My office has concluded agreements or arrangements for access to confidential and classified information with 17 States, the last of which was signed with the United States in November 2015. There is an undeniable advantage in entering into such an agreement with my office without waiting for a specific case. Even if it is possible to provide confidential information on an *ad hoc* basis, this may be difficult to achieve within the limited time frame allotted to gather information.

I now turn to the use of classified information by the Ombudsperson and fairness issues arising from such use.

[III. Use of classified information by the Ombudsperson and fairness issues arising from such use]

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. Having access to information is critical to the effective fulfilment of my mandate.

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 petitioner's activities that the States are able and willing to share. I rarely get to know the source of such information. In this context, it is critical 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: A petitioner is listed for having acted during several years as a financier of a listed group based in the middle-East 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 go back to the relevant States and request additional details. But even then, I am not always successful. In this example, it would be important for the States to use their resources to look for relevant public material. If there is none, the provider of the information in question should 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 now move to some of the fairness issues arising from the use of confidential information. 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 when the information in question is public or declassified. 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 the full material with the petitioner does not necessarily affect the overall fairness of the process. Going back to the example, let's imagine that I obtain 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. Imagine now that 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. At the same time, the specific details of this transaction would remain confidential.

As you can see, depending on how decisive a piece of confidential information is, relying on it without being able to disclose it to the petitioner could raise serious fairness issues. Moving now to my last point, I will revert to the reasons letter I mentioned earlier and explore various channels permitting non-classified information gathered by the Ombudsperson and her analysis to find its way into domestic and regional proceedings and thus become publicly available.

[IV. Reasons letters and channels permitting disclosure through domestic or regional proceedings]

A. <u>Reasons letters</u>

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, who then transmits them 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 to provide reasons as mandated by resolution 2161 (2014).

Petitioners now receive a reasons letter which actually summarizes the basis for the Ombudsperson's recommendation. This summary is not attributable to the Committee or any individual Committee member. It now tends to reflect more completely the analysis contained in the Ombudsperson's comprehensive reports. Of course, only if the entire report were communicated to the petitioner would the comprehensive nature of the report be properly conveyed. But there is no doubt that more specific reasons letters constitute a significant development in the direction of transparency. It would be important for the Committee to maintain this trend over time.

B. 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 famous case of Mr. Kadi, an individual or an entity listed by the 1267 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, or the reasons letter.

[C. Use of such letters by Courts]

An example of such use 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. Incidentally, given the confidentiality attached to the comprehensive reports of the Ombudsperson, 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 the right to have access to one's case, subject to legitimate interests in maintaining confidentiality, and the right to be heard have been respected. I am making this assessment based on the reasoning of a judgement of the General Court of the EU in the case of Al-Faqih et al, in December 2015. The case in question concerned another sanctions regime but the Court's reasoning in relation to the rights I just mentioned give a good idea of how the process conducted before the Ombudsperson and the information contained in a reasons' letter could be relevant to such assessment. 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 a 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.

[D. Perception by regional courts]

Before concluding, I wish to stress that despite the significant improvements to the Ombudsperson mechanism both the ECtHR and the ECJ have obviously so far been unimpressed with it (See the cases of Al Dulimi and Kadi II).[2] Yet, elements of increased fairness to the petitioner have been

[2] In its judgement of 26 November 2013, a section of the ECtHR examine in the case of Al-Dulimi the alleged breach of article 6 of the ECHR in the light of the 'equivalent protection' criterion, the ECtHR 'unreservedly' agreed with the conclusion reached in 2012 by the UNSR on the "Promotion and protection of human rights and fundamental freedoms while countering terrorism' that in spite of the significant due process improvements and the creation of the Office of the Ombudsperson, the 1267 sanctions regime continues to 'fall short of international minimum standards in such matters' . The ECtHR's Grand Chamber's decision in this case was delivered on 21 June 2016. The Court notably considered that access to the focal point could not replace appropriate judicial scrutiny by Switzerland, or even partly compensate for the lack of such scrutiny. It further found that before freezing the assets and property of senior officials of the former Iraqi regime, as imposed by paragraph 23 of resolution 1483 (2003), the Swiss authorities had a duty to ensure that the listing was not arbitrary. Additionally, the listed individual should have been afforded at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the impugned lists had been arbitrary. In Kadi II, the ECJ maintained that, despite the improvements to the

progressively embedded in the Ombudsperson process. As a result, the mechanism has come a long way 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 Office still lacks institutional guarantees of independence, several steps have been taken recently to develop such guarantees. Finally, as indicated earlier numbers show that the recourse to the Ombudsperson is very effective. The fact is that the European regional courts have not so far had a case which would give them an opportunity to concretely measure in the case in question the elements of fairness embedded in the mechanism.

[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. It focuses on 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 and importantly the damage to the petitioner's reputation 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.

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? It is not for me to answer this question, but my previous observations concerning 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 would incline me to think that this is not the case. 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

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Ombudsperson mechanism, in particular after the adoption of the contested regulation, effective review by the courts of the EU was all the more essential in the absence of guarantees of effective judicial protection at the UN level.

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. I will end by quoting the concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hajiyev, Pejchal and Debov to the recent judgement of the ECtHR in the case of Al-Dulimi: “As a matter of principle, nothing hinders the adoption of adequate substantive and procedural safeguards by the United Nations bodies, in conformity with the Charter and the ICCPR themselves, when they take binding decisions which impose sanctions on individuals and entities. The Office of the Ombudsperson is not an insignificant development, which shows that incremental changes in the system are possible.”