

Statement by Ms Catherine Marchi-Uhel,

**Ombudsperson of the Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee,
to the 51st meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
of the Council of Europe**

(Strasbourg, 4 March 2016)

INTRODUCTION

It is a great pleasure and an honor for me to be given the opportunity to address the CAHDI on the occasion of its 51st meeting and to share some of the recent developments in the Office of the Ombudsperson.

A year ago, my predecessor Ms Kimberly Prost was here in my stead. On the eve of the end of her term and after five years in the position as the first Ombudsperson, she was sharing some thoughts on the office of the Ombudsperson. She reminded you of the origins of this office and of the mechanism purpose and process of the Ombudsperson which offers to individuals and entities on the ISIL (Da'esh) and Al-Qaida sanctions list recourse to an independent and impartial review for their delisting requests. She insisted on some of its assets and notably the opportunity for petitioners to know, subject to confidentiality restrictions, details of the information gathered in their case, and to be heard by the Committee via the Ombudsperson's comprehensive report. She also shared her thoughts about the impact of the Kadi II decision, before elaborating on some of the key remaining challenges for the Office, namely its lack of institutionalisation, the lack of transparency as well as the difficult access to information.

I will focus my address on the transition which took place during the few first months of my term. It is the first time such transition between two Ombudspersons occurs since the function was established. It may therefore be interesting to reflect on it. Then I will share my thoughts about some of the challenges I face as Ombudsperson, before updating you on developments in these areas.

TRANSITION

I was appointed by the Secretary General of the United Nations on 13 July 2015, on the very day the term of my predecessor expired. I was able to report on duty on 27 July. My interaction with Ms Kimberly Prost was crucial during the first few months following my appointment.

We had to deal with four transition cases, i.e. cases for which she had issued the comprehensive report before the end of her mandate but for which the oral presentation of the report to the Committee was yet to come. She and I were of the view that it was critical that she be associated to such oral presentation. This was for several reasons: to respect the procedure required by the Committee and for its full information as well as in fairness to the petitioners.

There were a few administrative hurdles on the way but we were able to achieve our goal. While I, as the Ombudsperson, formally introduced the four such cases before the Committee, Ms. Prost was able to orally present her reports to the Committee and to respond to questions from members of the Committee when they arose. I also associated her to my exchanges with members of the Committee during the critical phase of the drafting of reasons in the four transition cases.

All of these cases have been presented to the Committee within the timelines prescribed by the Security Council. They have now been disposed of by the Committee following review and recommendation by the Ombudsperson, resulting in the delisting of three individuals and in the retention of the fourth individual's name on the list.

The second aspect of the transition period which I wish to address is about the legacy of the first Ombudsperson and transmission between the two Ombudspersons. The transition involved extensive exchanges between us immediately after my appointment as well as once I had more concrete and to the point questions for her arising from my reading of her comprehensive reports and other internal working documents.

My focus, I should probably say, my obsession, as I was starting to deal with my first cases was to ensure consistency of approaches in the practice of the Ombudspersons. I therefore had to quickly familiarise myself with the content of about 60 comprehensive reports she had issued as a result of her review of delisting requests. Only those reveal the way she has concretely applied such approach in cases. If I were to at any stage even slightly depart from a previous approach, it would have to be in full knowledge and with cogent reasons to do so, not as a result of my ignorance of such practice.

When I joined the Office it had no data base capturing key findings in the comprehensive reports to illustrate this practice in cases dealt with by the Ombudsperson and organising them in a searchable way. Having conducted the exercise of reviewing all of these reports, I found it important to organise the product of this review into such an internal database which is now available to the Ombudsperson and her support team.

I learned two main lessons from the transition exercise. First, there is a need to make timely arrangements in the future to avoid any serious impact the next transition could have on the fairness to petitioners. In one of the cases referred to by the first Ombudsperson in her last report to the Security Council fairness issues arose from the minimal amount of time she had to present her comprehensive report. Second, it is already time for me to think of further legacy tools for future transition.

Let me now turn to a few of the challenges I face as Ombudsperson as announced in my introduction. The first one concerns the nature, amount and quality of information I have access to. The second concerns the lack of transparency about the practice of the Ombudsperson. On this last point, I will share with you some positive developments.

NATURE, AMOUNT AND QUALITY OF INFORMATION

Nature of the information:

For a practitioner with a judicial background it is unusual to apply a legal standard based on material which rarely amounts to evidence in a strict sense. Of course, when I test the credibility of the Petitioner, or when I get to review a document whose source is identified and can be tested, I feel on familiar ground. But the information I gather from States consists for a large part of statements – or I should say – of summaries of the relevant information about the activities of the Petitioner they 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. I carefully review all the information. However, my assessment of whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing at the time of review – this is the test I apply – is a challenging task.

Another consideration relating to the nature of the information is confidentiality. Such type of information can be very useful, notably when it supports or corroborates information of a general nature, or even when it associates a source to a piece of information already gathered. But in itself making use of classified or confidential information is complex. Providers of such 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. The Ombudsperson's mechanism does not involve a special advocate or an equivalent that would mitigate this problem. Depending on

how decisive the confidential information is, and especially if it is the only base on which the listing could be maintained, relying on such information without sharing it with the petitioner may raise serious fairness issues.

Amount of information

The amount of information I gather is another part of the challenge. In part, it depends on the capacity of States and other providers to actually acquire relevant information. Then it depends on their willingness to share such information, particularly when it comes to classified information. My office has concluded arrangements/agreement on access to confidential or classified information with 17 States. I signed the last in date with the United States in November 2015. The signature of such instruments is very important and I strive to convince a maximum number of States to do so. But it is important to recall that States with which I have concluded such arrangements determine in the context of each case whether they have relevant classified information they are in position to share with me.

Quality of information

The quality of the information communicated is also at issue, particularly in so far as it consists of statements or summaries. It is very difficult to weigh vague statements which are devoid of any details or specifics. Like my predecessor, 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 such allegation is supported by credible and specific material.

LACK OF TRANSPARENCY ABOUT THE PRACTICE OF THE OMBUDSPERSON

The Security Council requires that the Ombudsperson treat its comprehensive reports and their content as strictly confidential. Even Petitioners do not access to the full comprehensive report issued in their own case. To improve this situation the only thing I could do was to continue to engage with the Committee and to convince it to disclose to the fullest extent my analysis to the petitioner through reasons letters. Real progresses have been made in this respect compared with the situation deplored by my predecessor in several of her reports to the Security Council. In spite of these progresses, such disclosure does equate access to the full comprehensive report.

There is another consequence of the confidentiality requirement. Since I took up my functions as Ombudsperson, I have interacted with a number of petitioners and their counsel. They have expressed that the absence of a case law – or equivalent – of the practice of the Ombudsperson has a negative impact on the presentation of their case. As comprehensive reports are not publically available, even duly diligent counsel cannot review past practice of the Ombudsperson to assist their client.

Of course petitioners and counsel have access to some information about the Ombudsperson process. There is the information I mentioned earlier placed by the first Ombudsperson on the website of the Office. When acknowledging receipt of a request for delisting, I inform the petitioner or counsel of the general procedure for considering delisting requests and the various phases of the process. I also refer them to the website for further information about the applicable standard and the assessment of information.

The first Ombudsperson published the document on the evaluation of information in November 2012. This was in response to grave concerns expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. At that time only 22 comprehensive reports had concluded through the Ombudsperson process, about a third of cases concluded as of today. The Ombudsperson's approach has obviously expanded through the examination of cases in the last three years. In addition, this document does not elaborate on other important aspects of the approach of the Ombudsperson with respect to the

assessment of information in the context of delisting requests and how recommendations are reached. This in turn has an impact on the quality of petitions and information they contain.

I have therefore come to the conclusion that the best approach to address these concerns would be to expand the information already available on the website. Specifically, I have drafted a document addressing the Ombudsperson's approach to analysis, assessment and use of information. Before finalising this document I consulted the Monitoring Team, the UN Department of Political Affairs as well as the Office of Legal Affairs and the Office of the High Commissioner for Human Rights. The document in question contains explanations on the assessment of information pertaining to issues such as:

- determining the existence of an association with ISIL (Da'esh) or Al-Qaida;
- the 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.

I then briefed the 1267 Committee on my intention to publish this update on the Website of the Office of the Ombudsperson and the reasons for it. This was on 27 January 2016. I did not seek the endorsement of the members of the Committee but I informed them of my intention and gave them an opportunity to comment on the draft before finalising it. The document was uploaded on the Website of my office on 17 February. In making this information publicly available while respecting the confidentiality of comprehensive reports my primary aim is 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 process before the Ombudsperson remains shrouded.

CONCLUDING REMARKS

In concluding I would like to stress that if the recourse to the independent Ombudsperson to the UN Security Council, 1267 Sanctions Committee is short of offering a judicial protection, it is an effective recourse. The Ombudsperson does not decide on the merits of delisting petitions, but the weight of her recommendations is as you know much higher than the term would suggest. Ms Kimberly Prost was stressing last year that none of the two scenarios under which, according to the terms of resolution 1989 (2011), the Committee can decide not to follow a recommendation by the Ombudsperson that it considers delisting the name of a petitioner occurred. This remains the case to date. The Mechanism has been seized by 67 individuals and entities seeking to be delisted from the ISIL (Da'esh) and Al Qaida sanctions list. Out of the 59 delisting requests fully completed through the Ombudsperson process, only 11 delisting requests have been refused and 43 individuals and 28 entities have been delisted. Thus, I repeat, the recourse before the Ombudsperson is particularly effective.

From a pragmatic perspective, some of those individuals or entities whose names have been retained by the Committee following recommendation by the Ombudsperson may have been tempted to turn to regional courts. Even some of the petitioners delisted may have been tempted to seek ruling that they should not have been listed in the first place. Indeed, unlike a judicial body which would decide on a delisting request on facts and evidence underlying the listing, the Ombudsperson considers such requests at the time it reviews it. But it is a fact that the existence of the Ombudsperson has filtered off a number of cases to this mechanism. I am convinced that this will only continue as efforts to increase transparency and fairness of the process before this mechanism will produce their effects.

From a human rights perspective, the establishment of this mechanism and its progressive reinforcement significantly improved the situation of individuals and entities listed by the 1267 Committee. My predecessor Ms Kimberly Prost has gone to considerable lengths to afford

petitioners maximum fair process within existing limitations and I am firmly committed to pursue this approach.