



Security Council

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Letter dated 6 February 2019 from the Ombudsperson to the President of the Security Council

I have the honour to transmit herewith the sixteenth report of the Office of the Ombudsperson to the Security Council Committee pursuant to resolutions [1267 \(1999\)](#), [1989 \(2011\)](#) and [2253 \(2015\)](#) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, pursuant to paragraph 20 (c) of annex II to Security Council resolution [2368 \(2017\)](#), according to which the Ombudsperson shall submit biannual reports to the Council summarizing his activities. The report describes the activities of the Office of the Ombudsperson in the period since the previous report was issued, covering the period from 8 August 2018 to 6 February 2019.

I would appreciate if the present letter, the report and its annex were brought to the attention of the members of the Security Council and issued as a document of the Council.

(Signed) Daniel **Kipfer Fasciati**

Ombudsperson to the Security Council Committee
pursuant to resolutions [1267 \(1999\)](#), [1989 \(2011\)](#) and [2253 \(2015\)](#)
concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida
and associated individuals, groups, undertakings and entities



Report of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017)

I. Background

1. The present report provides an update on the activities undertaken by the Office of the Ombudsperson since the issuance of the fifteenth report of the Office to the Security Council on 8 August 2018 (S/2018/579).

II. Activities related to delisting cases

A. General

2. The primary activities of the Office of the Ombudsperson during the reporting period related to delisting requests submitted by individuals and entities. The Office also sent notifications to newly listed individuals and entities and reached out to Member States seeking address information for newly listed individuals and entities.

B. Delisting requests

3. During this reporting period, three new cases were submitted to the Office of the Ombudsperson and were accepted by the Ombudsperson. The total number of delisting petitions submitted to the Office since its establishment is 84 as at 6 February 2019. Unless the petitioner requests otherwise, all names remain confidential while under consideration and in the case of denial or withdrawal of a petition.

4. In total, the Ombudsperson has submitted 78 comprehensive reports¹ to the Committee since the Office was established. During the reporting period, two reports were submitted to the Committee.

5. Since the issuance of the fifteenth report, there have been no retentions or removals of names from the Committee's sanctions list through the Ombudsperson process.

6. Cumulatively, since the Office was established, 77 cases involving requests made to the Ombudsperson from an individual, an entity or a combination of both have been resolved through the Ombudsperson process or through a separate decision of the Committee. In the 74 cases fully completed through the Ombudsperson process, 57 delisting requests have been granted and 17 have been refused. As a result of the 57 petitions which have been granted, 52 individuals and 28 entities have been delisted and 1 entity has been removed as an alias of a listed entity. In addition, three individuals were delisted by the Committee before the Ombudsperson process was completed and one petition was withdrawn following the submission of the comprehensive report. A description of the status of all of the cases, as at 6 February

¹ This number includes one case concluded in 2011, in which the delisting request was withdrawn by the petitioner after the Ombudsperson had submitted and presented her report to the Committee. It also includes one case concluded in 2013, in which the Committee decided to delist the petitioner after the Ombudsperson had submitted her report to the Committee but before she had presented it to the same. This number does not include two additional cases concluded in 2013, in which the Ombudsperson case became moot following a decision by the Committee to delist the petitioners before the Ombudsperson had submitted her report.

2019, is given on the website of the Office of the Ombudsperson.² The status of the pending cases is contained in the annex to the present report.

7. There are currently six cases pending. Three cases are in the information-gathering phase, one case is in the dialogue phase and in two cases the Ombudsperson submitted the comprehensive report for the Committee's consideration.

8. The six pending cases were each filed by an individual. To date, in total, 76 of the 84 cases have been brought by individuals alone, 2 by an individual together with one or more entities, and 6 by entities alone. In 44 of the 84 cases, the petitioner is or was assisted by legal counsel.

C. Gathering information from States

9. In case 80, one Member State provided the Ombudsperson with relevant information and two Member States advised that they had no relevant information to share.

10. In case 81, the Ombudsperson sent requests for information to two Member States. These States were in addition to the six Member States already cited in the Ombudsperson's fifteenth report. The Ombudsperson also received information from two Member States in this case during the reporting period.

11. In cases 82, 83 and 84, the Ombudsperson sent requests for information to five, four and two Member States respectively.

12. During the reporting period, the Ombudsperson met on two occasions with officials in their respective capitals to gather information on two specific cases. He also met with the authorities of one State at their Mission to the United Nations to discuss broader issues relating to a case and the Ombudsperson process.

13. In this reporting period, none of the designating States consulted during the information-gathering phase indicated that it does not object to delisting. Therefore, the Ombudsperson did not have recourse to annex II, paragraph 3, of resolution [2368 \(2017\)](#) to shorten the information-gathering phase.

D. Dialogue with the petitioner

14. During the reporting period, the Ombudsperson and his Office interacted with all current petitioners and their legal counsel, including through written exchanges, telephone discussions, videoconference and face-to-face interviews.

15. In one case, the Ombudsperson was unable to conduct an in-person interview with the petitioner after a Member State declined to provide the necessary visa for travel at the time requested. The alternative suggested by the Member State did not meet the requirements of the timelines provided for in resolution [2368 \(2017\)](#), therefore the interview had to be undertaken through alternative arrangements.

16. During the reporting period, the Ombudsperson travelled to interview two petitioners in person.

E. Access to classified or confidential information

17. In total, the Office of the Ombudsperson has entered into 19 agreements or arrangements for access to classified information. Of these, two agreements have been

² www.un.org/securitycouncil/sc/ombudsperson/status-of-cases.

entered into with Austria and Romania, and 17 arrangements have been made with Australia, Belgium, Canada, Costa Rica, Denmark, Finland, France, Germany, Ireland, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Portugal, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Ombudsperson continues to make progress towards re-entering the arrangements that are nominative. Efforts continue to expand the list of agreements and arrangements.

III. Summary of activities relating to the development of the Office of the Ombudsperson

A. General

18. On 2 November 2018, the Ombudsperson gave a presentation at the seminar for incoming Security Council members organized by the Security Council Affairs Division and Security Council Report.

B. Interaction with the Committee pursuant to resolutions [1267 \(1999\)](#), [1989 \(2011\)](#) and [2253 \(2015\)](#) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities and the Analytical Support and Sanctions Monitoring Team

19. During the reporting period, the Office of the Ombudsperson continued to engage regularly with the Chair of the Committee, and with the Coordinator and members of the Monitoring Team. The Monitoring Team has continued to provide relevant information in accordance with paragraph 4 of annex II to Security Council resolution [2368 \(2017\)](#).

C. Liaison with States, intergovernmental organizations, United Nations bodies and non-governmental organizations

20. During the reporting period, the Office of the Ombudsperson continued to interact with United Nations bodies and Member States, in particular States of relevance to the pending delisting petitions.

D. Working methods and research

21. Casework in this reporting period involved open-source research to collect information relevant to delisting requests.

E. Website

22. The Office of the Ombudsperson continued to revise and update its website during the reporting period.³

23. The Office continued to publish the “Historical guide of the Ombudsperson process through Security Council resolutions and reports of the Office of the Ombudsperson to the Security Council”, a compilation of the contents of the analytical sections of the

³ www.un.org/securitycouncil/ombudsperson.

reports presented by the Office of the Ombudsperson to the Security Council to date, together with relevant excerpts of the applicable resolutions of the Council.

IV. Observations and conclusions

A. Acting Ombudsperson or another representative

24. Through various resolutions, the Security Council provides sanctioned individuals and entities with an institutionalized instrument for reviewing the application of the sanctions measures. The Ombudsperson takes the view that this function should always be operational. The procedure to appoint a new Ombudsperson after the former Ombudsperson, Catherine Marchi-Uhel, left in mid-2017 lasted more than nine months. It thus became apparent that prolonged vacancies for the Ombudsperson's post were possible. No timeframe for replacement of the Ombudsperson is provided for under the relevant resolutions.

25. The Ombudsperson would welcome a solution to prevent such prolonged vacancies in the future. For example, in the event of a vacancy, an acting Ombudsperson or another person with delegated authority to temporarily represent the Ombudsperson should always be available to consider delisting requests. The Security Council set very strict, specific timelines for the consideration of Ombudsperson cases in annex II to resolution [2368 \(2017\)](#), and for good reason: it is central to the fairness of the process for a petitioner's request to be considered expeditiously.

B. Access to petitioners

26. As mentioned above, in one case it was not possible for the Ombudsperson to meet the petitioner in person, because the State of residence did not agree to issue a visa to the Ombudsperson in time.

27. It is stipulated in the resolution that the Ombudsperson should interview the petitioner in person, to the extent possible (resolution [2368 \(2017\)](#), annex II, para. 7 (c)). As laid out, the petitioner's interview could not be conducted in person for reasons beyond the Ombudsperson's control. The Ombudsperson decided – on an exceptional basis and without prejudice to future cases – to undertake the interview via videoconference, with the petitioner's consent. In this way, the right to be heard was protected.

28. In this connection, it should be emphasized that in order for the Ombudsperson to properly and professionally exercise his or her mandate, videoconferences should be used for interviews of petitioners only as a measure of last resort. Resolution [2368 \(2017\)](#) provides clearly in annex II, paragraph 7 (c), that the Ombudsperson "should meet with the petitioner, to the extent possible". Interviews undertaken by videoconference restrict the Ombudsperson's wholistic observation of the petitioner regarding certain important indices of credibility, such as body language, tone, facial expressions, and overall demeanour. Should a similar situation of non-issuance of visas emerge in the future, the Ombudsperson will consider invoking paragraph 80 of resolution [2368 \(2017\)](#) and request the Committee to authorize travel ban and asset freeze exemptions to enable the petitioner to be interviewed outside the country of residence.

C. Information-sharing

29. On the basis of his initial experience, the Ombudsperson expresses his gratitude for Member States' commitment to providing relevant information. Nevertheless, he

must acknowledge that obtaining relevant and usable information from Member States is often very difficult and has proved to be one of the main challenges in the consideration of delisting requests. It is not uncommon that Member States explicitly oppose the delisting of a petitioner without giving any reasons or providing any recent information which would support their objection to delisting. The Ombudsperson urges Member States to share all relevant information in their possession. In doing so, the Ombudsperson notes that, pursuant to paragraph 20 of resolution [1904 \(2009\)](#), the Ombudsperson shall neither seek nor receive instructions from any Government. If, in one way or another, sufficient information cannot be obtained to justify imposition of the sanctions measures, the Ombudsperson is bound to recommend that the petitioner be delisted.

D. Access to classified information

30. Considering the above, the Ombudsperson underscores that information-sharing on a confidential basis can take place pursuant to an arrangement between a Member State and the Office of the Ombudsperson. The conditions under which Member States can share relevant classified information with the Office of the Ombudsperson can be formalized in an arrangement or agreement for access to confidential, classified or sensitive information.

E. Fairness of the process: use of confidential information and reasons letters

31. One of the most important aspects of procedural fairness regards the right to be heard: to know the case against you in concrete terms, to have the opportunity to respond to all relevant information and to be informed about the reasons for the outcome of a proceeding. In Ombudsperson proceedings the principle of fairness has the potential to be compromised in two respects: (1) when the decision is based on confidential information which cannot be disclosed to the petitioner, i.e., which the petitioner does not know and on which she or he cannot comment; (2) if the reasons letter cannot disclose to the petitioner all the reasons which, in the opinion of the Ombudsperson, are necessary for understanding the Committee's decision, especially in cases where the listing is retained. The Ombudsperson has taken note of the proposal to the Security Council by the Group of Like-Minded States on Targeted Sanctions dated 7 December 2018 ([S/2018/1094](#), annex) and also of the study entitled *Fairly Clear Risks* published by the United Nations University (2018, sect. 3). The Ombudsperson welcomes and supports the proposals made therein with regard to communicating the reasons or the comprehensive report itself to petitioners and, if applicable, to the public. Such a change in practice would significantly improve the fairness and transparency of the procedures. It would still remain possible to redact single passages of the text to address security concerns.

32. In this respect, the Ombudsperson also refers to the reports of his predecessors, who discussed the same issues and made proposals in the same direction (see, for example, [S/2017/685](#), paras. 25 ff.).

F. Contractual arrangement and independence

33. For reasons of independence, the Ombudsperson has been hired under the contract of a United Nations consultant and not under the contract of United Nations staff. The consultant's contract, however, brings a number of unintended consequences that are not always appropriate to the requirements of the

Ombudsperson's position (see resolution [1904 \(2009\)](#), para. 20), have implications for the Ombudsperson's independence in the broader and institutional sense, and compromise the attractiveness of the post issues mentioned also in the biannual reports of the former Ombudspersons (see, for example, [S/2016/671](#), paras. 33 ff., especially paras. 40–42). The contractual conditions should therefore be adapted to address these concerns. The Secretariat is currently exploring options regarding the status of experts (including the Ombudsperson), in line with the recommendation of the Board of Inquiry on the critical incident related to the death of two members of the Group of Experts in the Democratic Republic of the Congo in 2017.

34. The Ombudsperson is also familiar with the above-mentioned letter from the Group of Like-Minded States which raised, among others, the same concern: to explore the option of treating the Ombudsperson contractually as an “official other than Secretariat official”. The Ombudsperson welcomes the review of this issue and supports the idea, currently under discussion, to adapt the contractual conditions.

G. Institutional independence of the Office

35. Since the Office of the Ombudsperson is administratively integrated in the Secretariat, it cannot be said that it is institutionally independent. The institutional independence of the Office has been mentioned in the past several times and by different authors: both predecessors of the Ombudsperson in their biannual reports (see, for example, [S/2016/671](#), paras. 33 ff., and [S/2017/60](#), paras. 36 ff.), the Group of Like-Minded States in the above-mentioned letter and the study *Fairly Clear Risks* (see para. 31 above).

36. On the basis of his initial experience, the Ombudsperson notes that the resources provided by the Secretariat are sufficient to cope with the current workload.

37. The informal arrangements for improving the independence between the Secretariat and the Office of the Ombudsperson continued during the reporting period. These conditions have been implemented gradually under certain conditions, which were reported to the Committee on 27 December 2016 (see [S/2017/60](#), para. 36).

38. A further positive step towards greater institutional independence was taken during the reporting period, the Office itself assuming responsibility for its own budget as from 1 January 2019.

39. The basic arguments put forward in the past in favour of an institutionally independent Office, however, remain valid.

H. Rationale for retaining listings

40. Various Member States have taken the view that a delisting request should be rejected on the basis of the fact that the petitioner was, in the distant past, related to the activities of terrorist group(s). These Member States reason that, on the basis only of this fact, it cannot be excluded that, viewed in the abstract, the petitioner could possibly pose a terroristic threat sometime in the future.

41. The abstract possibility of a future threat can never be completely excluded. However, without any concrete, recent information substantiating this threat, the fact that a person was once listed cannot justify the listing in perpetuity. Moreover, such a threat can be mitigated if a petitioner has undergone a positive evolution and has credibly distanced himself or herself from a formerly held radical position.

Annex

Status of pending cases***Case 84, one individual (Status: information-gathering period)**

<i>Date</i>	<i>Description</i>
4 February 2019	Transmission of case 84 to the Committee
4 June 2019	Deadline for completion of the information-gathering period

Case 83, one individual (Status: information-gathering period)

<i>Date</i>	<i>Description</i>
29 January 2019	Transmission of case 83 to the Committee
29 May 2019	Deadline for completion of the information-gathering period

Case 82, one individual (Status: information-gathering period)

<i>Date</i>	<i>Description</i>
29 November 2018	Transmission of case 82 to the Committee
29 March 2019	Deadline for completion of the information-gathering period

Case 81, one individual (Status: dialogue period)

<i>Date</i>	<i>Description</i>
19 June 2018	Transmission of case 81 to the Committee
7 December 2018	Information-gathering period completed
7 February 2019	Deadline for completion of the dialogue period

Case 80, one individual (Status: Committee phase)

<i>Date</i>	<i>Description</i>
11 December 2017	Transmission of case 80 to the Committee
1 December 2018	Information-gathering period completed
1 February 2019	Comprehensive report submitted to the Committee

Case 79, one individual (Status: Committee phase)

<i>Date</i>	<i>Description</i>
27 March 2017	Transmission of case 79 to the Committee
27 August 2018	Information-gathering period completed
21 December 2018	Comprehensive report submitted to the Committee

* The status of all cases since the establishment of the Office of the Ombudsperson can be accessed at the website of the Office, www.un.org/securitycouncil/sc/ombudsperson/status-of-cases.