Open Briefing to Member States – 29 March 2016

Introduction

In my November briefing, I focused my presentation on the transition between my predecessor and myself and on legacy issues. Since then, I issued in February 2016 my first report to the Security Council, which is the 11th such report by the Ombudsperson. It *gives* you a rather good overview of the activities of my Office during this period.

The Ombudsperson is given the important responsibility of providing an independent review mechanism which delivers an impartial and effective recourse to individuals and entities placed on the ISIL (Da'esh) and Al-Qaida Sanctions List.

The Ombudsperson does not adjudicate the merit of delisting petitions she reviews. This is a prerogative which rests with the Committee. However, in practice, recommendations by the Ombudsperson are more effective than the term would suggest.

After this brief introduction, I would like to give you an update on the status of cases in my office, then I will talk about the standard applied by the Ombudsperson and how the application of that standard is influenced by the nature of the information I gather. I will end by briefing you on recent progress made with respect to increasing transparency of the Ombudsperson's mechanism.

1. **Case update**:

To date the Ombudsperson has been seized in 68 cases, five of which are on-going and concern individuals. In two of these, I issued my comprehensive reports last February. These cases will be placed on the Committee's agenda after it has had an opportunity to review the reports in all official languages of the UN. I have concluded the dialogue phase in the third and fourth cases and I plan to interview the petitioners in person early next month. One of these two cases concerns a new request from a petitioner whose name was retained by the 1267 Committee on the ISIL (Da'esh) and Al-Qaida Sanctions List following review and recommendation by my predecessor. The dialogue phase is pending in the fifth case.

I am also currently communicating with one more individual who seeks to be delisted but is yet to articulate the basis for his request.

My next point is about the standard applied by the Ombudsperson and how the application of that standard is influenced by the nature of the information I gather.

2. Standard of review and how its application is dependent on the nature of the information gathered

In analyzing information, I apply a standard which is lower than standards which are generally applied domestically or internationally to criminal cases. This is because of the preventative as opposed to punitive purpose of sanctions. The standard in question is whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing at the time of review.

For a practitioner with a judicial background, it is unusual to apply a legal standard to 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. 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. I carefully and thoroughly review all the information. However, my assessment of whether the test is met is a challenging task.

My last point is about efforts aimed at remedying the lack of transparency of the Ombudsperson's mechanism.

3. Efforts aimed at remedying the lack of transparency of the Ombudsperson's mechanism

The lack of transparency stems from the fact that the Security Council requires that the Ombudsperson treat her comprehensive reports and their content as strictly confidential.

Even Petitioners do not have access to the full comprehensive report in their own case. To improve this situation the only thing I can do is 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. As I indicated in the Ombudsperson's 11th report to the Security Council, real progress has been made in this respect compared with the situation deplored by my predecessor

in previous reports. In spite of this progress, such disclosure does not equate to access to the full comprehensive report.

But the lack of transparency of the process has another consequence to which I alluded earlier. 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 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.

The first Ombudsperson published a 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 did 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 had an impact on the quality of petitions and information they contained.

I therefore came to the conclusion that the best approach to address these concerns was to expand the information already available on the website. Specifically, I published a document describing the Ombudsperson's approach to analysis, assessment and use of information. The document in question contains explanations on 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.

Before finalizing the document in question I briefed the 1267 Committee about it and it has now been uploaded on the Website of the Office of the Ombudsperson. 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 Ombudsperson mechanism remains shrouded.

Conclusion

I will conclude by saying that 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. Numbers show that the recourse to the Ombudsperson is very effective. Of the 59 delisting requests fully completed through the Ombudsperson process, only 11 delisting requests have been refused, while 43 individuals and 28 entities have been delisted. My predecessor 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.