Open Briefing to Member States – 22 November 2016

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Introduction

My approach to these briefings since I took office in July last year has been to give a brief update on the status of cases before the Ombudsperson before discussing a few issues of relevance to my practice. I will follow the same format today.

Following the case update, I will first discuss the use of confidential information in my practice. I will then alert you to what I consider to be a set-back in the recent trend in relation to reasons letters provided to petitioners and I will say a few words as to where we stand on the issue of the independence of my Office. These last two issues are as you know of particular concern for the credibility of the Ombudsperson's mechanism.

1. Case update:

To date the Ombudsperson has been seized in 75 cases, that is seven more cases than when I last briefed you. Eight cases are on-going and concern individuals. Three of them are currently in the dialogue phase, and I have or am about to interview the petitioners. Five cases are still in the information gathering phase. I have received another request on behalf of an individual, for which I am awaiting justification of the mandate given by the individual to his counsel. I am also aware of two other petitions under way. Of the 64 delisting requests fully completed through the Ombudsperson process, only 13 delisting requests have been refused, while 46 individuals and 28 entities have been delisted.

My next point is about circumstances where the Ombudsperson may need to access to classified information and fairness issues arising from the use of such information.

2. Use of confidential information and the practice of the Ombudsperson

When I am seized of a delisting request, 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 originates from open source or has been declassified by states. However, sufficient information of that kind does not always exist, or if it does, it may not have been shared with me.

An example can illustrate this point: A petitioner is listed for having acted during several months as a financier of a group based in the middle-East and listed for its association with 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 so as to provide a reasonable and credible basis for maintaining the listing.

My independent research may bring such information, but it is not always so. This is a typical case where I would go back to the relevant providers and request additional details capable of bolstering the information initially gathered. Communication by states of relevant information to the Ombudsperson is as you know strongly encouraged by resolution 2253 (2015).

In this example, it would be important for the states to use their resources to look for more details in publically available material. States have resources I do not have for such research. If there is none, the provider of the information that is too vague may possess further details in the form of classified information. It should definitely consider declassifying some of these details, particularly if it is of the view that the listing shall be maintained. Finally, if such details are too sensitive to be declassified, this would be a good case to consider sharing them with me, on the basis of an agreement or an arrangement to that effect, if there is one, or on an ad hoc basis. As you know if states elect to do so, I am bound to respect the conditions they impose on the way I shall handle such information, including restrictions they may impose on its use in the review of delisting requests.

Now I would like to explain the type of fairness issues which may arise from my access to and reliance on classified information to reach my recommendation. Other practitioners than me, generally judges dealing with challenges related to the imposition of sanctions, operate in legal frameworks allowing them to access classified material *ex parte.* Under certain conditions, they may even rely on it without disclosing it to the party concerned. Like them, I must strike a balance between the security interests at stake and the human rights of the persons or entities seeking their delisting from the ISIL and Al-Qaida Sanctions List.

There are situations where the classified information shared with me is corroborative of public information. In those cases, the public information is shared with the petitioner. Of course the fact that I am not in a position to share classified corroborative material with the petitioner is not ideal. However it does not necessarily affect the overall fairness of the process. Going back to the previous example, let us say 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 one of the 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 corroborative information. I may rely on it without its secrecy necessarily affecting the overall fairness of the process, particularly if I am authorized by the provider to share with the petitioner that I have reviewed confidential information concerning this aspect of his or her conduct.

In this example, the situation would be different if the classified information contains details on how the petitioner has provided weapons to the group and the petitioner has not been put on notice that he is also alleged to have supplied the group with weapons. In such a situation, I would have to, in fairness to the petitioner, go back to the provider to ascertain whether it would consent to declassify the fact that the Petitioner provided weapons to the group. Depending on the level of declassification possible, the specific details of this transaction may have to remain confidential. If none of that works then I will have to strike the balance between fairness to the petitioner and the security interests at stake. In doing so, although states are under no obligation to reveal to me the reason why a particular piece of information must remain confidential in the context of the delisting request, nothing prevents them from doing so. This may evidently be an important factor in this weighing exercise.

I move to issue concerning the content of reasons letters provided to petitioners.

3. Recent **set-back in relation to the content of reasons letters provided to petitioners**

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 Annex two of resolution 2253(2015) reiterates the requirement for the Committee to set out reasons for retention or termination of sanctions following its consideration of the Ombudsperson's recommendation. This requirement is important and publically demonstrates

to the Petitioner and more broadly, the reasoned nature of the decision making process which led to delisting. Transparency in this area is therefore also necessary to improve the *perception* of fairness.

In several of her reports to the Security Council, my predecessor deplored the fact that, in spite of this requirement, 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). I understand that there are differences of views as to the extent of this requirement.

I am of the view that if this requirement was considered to be satisfied by a mere reference to the fact that the Committee has followed the recommendation by the Ombudsperson to consider delisting or to retain a name on the ISIL and Al-Qaida Sanctions List, such an interpretation would defeat the very requirement. Where the Committee follows the recommendation of the Ombudsperson, it does not provide its own reasons but instead a summary of reasons contained in the comprehensive report, specifying that they are not attributable to the Committee or any individual Committee member. For such a summary to provide adequate reasons, it must in my view address the arguments of the petitioner and fully reflect the analysis contained in the Ombudsperson's comprehensive report in the case.

The practice of the Committee during the first year of my mandate shows that this is possible. It is grandly facilitated by the fact that comprehensive reports contain no classified information. When I make a mere reference to the fact that I have reviewed classified information, I get prior clearance from the relevant provider. In these circumstances, sharing with the Petitioner the analysis forming the basis of the Ombudsperson's recommendation does not involve any risk to encroach on state security. Some states may understand the requirement of providing reasons as a minimal one. However, as I reported in my 11th and 12th reports to the Security Council, the Committee provided much more extensive reasons than in the past in retention and in delisting cases. During the periods covered by these reports, this was achieved by reflecting more completely the analysis contained in the comprehensive reports.

Given its impact on transparency and perception of fairness, it would have been important for the Committee to maintain such practice over time.

Unfortunately, recent developments indicate a real risk of reverting to the earlier unsatisfactory practice of providing incomplete, or worse inexistent reasons, both in delisting and retention cases. I am concerned by these developments but hopeful that they can be overcome.

I move very briefly to my last issue concerning the lack of administrative arrangements guaranteeing the independence of the Office of the Ombudsperson. [The Chair has just briefed on this matter]

4. **Lack of administrative arrangements guaranteeing the independence of the Office Ombudsperson**

I will therefore only limit myself to stress that I was hopeful after the Secretariat explored several options capable of strengthening the Office of the Ombudsperson by bringing about the administrative arrangements necessary to guarantee its independence. I was hopeful that it would convince the members of the Committee to endorse one of these options and provide the green light to move ahead. This has not been the case unfortunately.

[I will not reiterate why having such arrangements in place is needed. In my last report to the Security Council, I described in detail concrete examples of the lack of such guarantees arising from the current administrative arrangements under which the Ombudsperson is recruited. In resolution 2253 (2015), the Security Council requested the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson and to make the necessary arrangements to ensure its continued ability to carry out its mandate in an independent, effective and timely manner, and to provide the Committee an update on actions taken in six months. The secretariat explored several options capable of achieving that goal and I was hopeful that it would convince the members of the Committee to endorse one of these options and provide the green light to move ahead. This has not been the case unfortunately.

Conclusion

I will conclude by emphasizing that in my view the two recent developments I just described are paying lip service to the language in resolution 2253(2015) and its Annex. They have the potential to affect the credibility of the Ombudsperson mechanism and in turn that of the ISIL and Al-Qaida Sanctions Regime. Such developments are to be expected in a context where unanimity of all members of the Committee is required to make any decision other than those to which the reversed consensus applies. They are nonetheless regrettable and inconsistent with the basic requirements of independence and

fairness, including an acceptable level of transparency to which the Security Council has expressed its commitment. The numbers I shared with you in my introduction show that this mechanism is effective. However I am concerned that in spite of its effectiveness, the credibility of this mechanism cannot be sustained if these requirements are not met. I am therefore hoping that on both issues the Committee will in due course take the measure of these issues and adopt the appropriate responses they deserve.