

Open Briefing to Member States – 23 November 2015

Introduction

I took up my functions on 27 July, three and a half months ago. This is a relatively short period of time but it has been a very busy and rich one. I have built rapport with my many interlocutors including the members of the Committee and other relevant states, I have learned a lot from the legacy of my predecessor Kimberly Prost during a transition period and I started developing my own practice in a few cases already.

The Ombudsperson is given the important responsibility of providing an independent review mechanism which delivers an impartial and effective recourse to individuals and entities seeking to be removed from the Al-Qaida sanctions list. In doing so, the Ombudsperson does *not only* make *recommendations* to the Committee on whether to grant or deny a delisting request in cases where it is activated. She also offers to individuals and entities having recourse to her the *possibility to know* in as much details as possible, subject to any confidentiality constraints, *the information gathered during the initial phase of the process* from various sources - so that petitioners are fully aware of the cases against them. It is also an *opportunity* for the petitioners to *have their side of the story heard* by the Ombudsperson and via her Comprehensive Report, by the Committee.

It would be arrogant of me to claim mastery of the subject matter after only such a short period of time in the position. In light of the preventative nature of sanctions, I apply a *standard* which is *lower than evidentiary standards* generally applied to criminal cases. Of course, the task of assessing **whether there is sufficient information to provide a reasonable and credible basis for the listing presently** - that is the standard I and the former Ombudsperson have applied - raises issues which are very familiar given my domestic and international judicial background. These include weighing information, drawing reasonable inferences from factual circumstances and dealing with sensitive issues which may involve access to and handling of confidential information. I have already immersed myself in the various phases of the Ombudsperson's mechanism through work on my first few cases. I can therefore speak of these as a *practitioner of the review of delisting requests*. I am fully aware of **what it takes to make such a process fair and fully effective** in the context of the Al-Qaida Sanctions regime.

I can directly measure the practical impact for listed individuals and entities of the *significant progress* that has been made *to enhance due process* for that

regime. I also recognize areas where further progress could be made. In addition, my first contacts with a number of states have offered me the opportunity to understand more concretely *issues that are important to them* and the *challenges they face*, including the sharing of confidential information with the Ombudsperson. My instinctive and intellectual approach to these issues is now fed by my new but very telling experience as Ombudsperson.

After this introduction, I would like to give you an update on the status of cases in my office, and to brief you on the progress made with respect to arrangements with states for accessing classified information. I will then briefly address issues of transition, legacy and consistency of approaches within the practice of the Ombudsperson.

Case update

By the time I was appointed on 13 July 2015, there were *four transition cases*, i.e. cases for which my predecessor had submitted Comprehensive Reports to the Committee. The Committee has now concluded all of these cases following review and recommendation by the Ombudsperson, resulting in the delisting of three individuals (Messieurs Eliwah, Yasser Abu Shaweesh, and al Islambolly). In the fourth case, the name of one individual was retained on the list.

There are currently *five on-going cases*. In two of these, I have conducted the dialogue phase with two individual petitioners, interviewed one in person, and I submitted my Comprehensive Reports in their respective cases to the Committee two weeks ago. These reports are now with the Committee for consideration and their translation is on-going. I have moved to the dialogue phase in one more case for which I plan to interview the petitioner in person next month.

I further received *two new requests* from listed individuals. These cases are currently in the information gathering phase. Finally, I received a *repeat request* from a listed individual who had been retained on the list by the Committee following review and recommendation by the former Ombudsperson. I determined that, as presented, this request did not contain relevant additional information and as such did not meet the requirements imposed by the Security Council for repeat requests. I therefore returned it to its author with an explanation.

Access to confidential/classified information

In her last biannual report to the Security Council my predecessor spoke of considerable progress in the negotiation of agreements/arrangements on access to confidential information. She was expressing the hope that these would come to fruition in the very near future. I am particularly pleased to share with you the excellent news that I signed such an agreement with the United States on Friday 13 November. This signature brings to 17 the number of such agreements/arrangements the Office has with states.¹ In resolution 2161 (2014), the Council strongly *urged Member States to “provide all relevant information to the Ombudsperson, including providing any relevant confidential information, where appropriate.”* The Security Council also confirmed that the *Ombudsperson must comply with any confidentiality restrictions that are placed on such information* by Member States providing it. I am acutely aware of this obligation as well as of the responsibility which comes with the trust placed in me by states when they make confidential information available to me.

A limited number of arrangements concluded previously contained language that clearly indicated or suggested that the arrangement was between the state concerned and the previous ombudsperson personally. I have *engaged with the states in question and obtained confirmation that the arrangement remains in force*. I am still awaiting such confirmation from one state. Given the strict timelines applicable to my work, it is particularly helpful to have confidentiality arrangements already in place with relevant states, including in advance of a specific case. This allows States to share information more easily within the applicable timeframes, which is essential if I am to take it into account in my case analysis. I have therefore initiated a dialogue with a number of states which for policy, legal or other reasons have not yet been in a position to conclude an agreement with my office. I have also started to contact relevant states which were not previously approached to explore such possibility or at least ask them to consider the possibility of providing relevant classified information to the Ombudsperson on an ad hoc basis. I have so far received encouraging responses on both fronts.

The Transition phase

Kimberly Prost and I were of the view that it was critical that she be involved in the oral presentation of all cases for which she had submitted the Comprehensive Report prior to the end of her mandate. This was for several reasons: Firstly due to procedural requirements, secondly in fairness to the

¹ Austria, Australia, Belgium, 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.

petitioners and thirdly for the full information of the Committee in the event of questions not covered by the Comprehensive Report or the oral presentation.

There were a few administrative hurdles on the way as expected given the well-known limitations attaching to the consultancy contract under which so far the Ombudsperson is recruited. Notably, in spite of the unique circumstances of this transition period, I could not obtain a waiver of the break in service applicable to this type of contract which would have allowed recruiting the former Ombudsperson for the few days of substantive work required to prepare and present orally her reports in the transition cases. However, thanks to the efforts of all involved and particularly to the commitment of the former Ombudsperson, we were able to achieve our goal. *While I, as the Ombudsperson, formally introduced the four cases to the Committee, Ms. Prost was able to orally present her reports to the same.*

The transition period further involved extensive exchanges between the two of us. This was both in my early days in the Office as well as after I had more concrete and precise questions arising from my reading of Comprehensive Reports in previous cases and other internal working documents. The transition phase is now over.

Legacy, consistency of approach

This brings me to my last point, that is legacy, and how to ensure consistency of approaches in the practice of the Ombudsperson. On two important aspects of her approach to her work, my predecessor issued statements. These concern the standard applicable to the review of delisting requests as well as the treatment of information alleged to have been obtained by torture. These statements are available on the website of the Office and were incredibly useful legacy tools for me as the new Ombudsperson. I am *currently exploring ways to pursue this legacy and transparency exercise engaged by my predecessor.*

I have also received invaluable assistance during this period from the two dedicated staff members supporting the Ombudsperson. Although the legal officer was on maternity leave shortly after my arrival I was able to exchange substantively with her during that period and continue to do so, which is particularly helpful since she has not been replaced to date. I therefore have not missed support.

What I found was missing in the office is a data base where principles guiding the approach of the Ombudsperson - other than the two mentioned earlier - and key findings in cases could be searched and easily retrieved by the

Ombudsperson and her staff. Getting quickly familiar with the reviews undertaken to date not just in the four transition cases but also in the 58 previous cases was therefore a priority with a view to ensure consistency of approach. *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 the same.* Having conducted the exercise of reviewing all of these reports, I found it important to organize the result of this work in a way which could be updated as cases progress and could be turned into an internal database.

Conclusion

I will end by saying that I feel particularly proud of having been vested with the difficult but fascinating task of providing an independent and impartial review of delisting requests, the *raison d'être* of the Office of the Ombudsperson. Although already robust, this process could be further improved and this would only enhance the credibility of the AQ sanctions regime and facilitate the implementation of sanctions by the states. I am happy to answer any questions you may have in this regard. Suffice it to say that in many respects I share the views expressed by my predecessor notably in her reports to the Security Council where she addressed some of the remaining challenges. Of particular concern are the lack of transparency of the process and insufficient institutional guarantees of the independence of the Office. These views are to a large extent reflected in the analysis and very valuable recommendations contained in the compendium presented two weeks ago by the High Level Review of the United Nations Sanctions and even more recently in the Proposal to the United Nations Security Council made by the Group of Like-Minded States on targeted sanctions. I understand that a public presentation of the latter paper is planned for Thursday next week.