

Historical Guide  
of the Ombudsperson Process  
through Security Council resolutions  
and  
Reports of the Office of the  
Ombudsperson to the Security Council

*Office of the Ombudsperson*

*Last updated June 2019*

# Historical Guide of the Ombudsperson Process through Security Council resolutions and Reports of the Office of the Ombudsperson to the Security Council

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# Introduction

## Foreword

The Office of the Ombudsperson to the Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee has been operational for nine years. The Office of the Ombudsperson has compiled the contents of the analytical sections of seventeen reports presented by the Office of the Ombudsperson to the Security Council in that time, together with relevant excerpts of the applicable resolutions of the Security Council.

The historical guide is divided in four general themes: the Ombudsperson process, the Consideration of delisting requests, Administrative issues and Proposals to expand the mandate of the Ombudsperson. Each theme is organised by sections inspired by the subjects covered by the Office of the Ombudsperson's reports over the years. The text is quoted from the reports and resolutions.<sup>1</sup>

A list of the relevant Security Council resolutions is available at the beginning of the guide, together with the key elements of each resolution from the perspective of the work of the Office of the Ombudsperson. A list of the reports has also been placed at the beginning of the guide for ease of reference of the reader.

The guide is not an official document of the United Nations. Its purpose is to facilitate the reader's understanding of issues relevant to the Office of the Ombudsperson over the years, the concerns raised by the three Ombudspersons and the Security Council's response to the same. For a full picture of the resolutions and the Ombudsperson's reports, these documents should be consulted directly.

More information about the Office of the Ombudsperson and reference to (future) reports of the Office can be found on the [website](#) of the Office of the Ombudsperson.

*The Office of the Ombudsperson*

*June 2019*

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<sup>1</sup> While paragraph numbers are true to the original, footnote numbers have been changed for the purpose of this guide. However, the original footnote number is indicated in the footnote itself.

## Relevant Security Council resolutions and key elements

[Security Council resolution 1267 \(1999\)](#) adopted on 15 October 1999: establishes the sanctions regime and the Committee

[Security Council resolution 1904 \(2009\)](#) adopted on 17 December 2009: establishes the Office of the Ombudsperson (paragraphs 20 and 21) and procedure (Annex II) (no recommendation power, decision by the Committee through normal decision-making procedures)

[Security Council resolution 1989 \(2011\)](#) adopted on 17 June 2011: splits the Al-Qaida and Taliban sanctions regimes (the Ombudsperson process applies only to Al-Qaida); gives the Ombudsperson the mandate to make recommendations on delisting requests; introduces a double sunset clause to block the Ombudsperson's recommendation (reverse consensus procedure in the Committee and possibility to bring question to the Security Council)

[Security Council resolution 2083 \(2012\)](#) adopted on 17 December 2012: provides for reasons of the decision to be given regardless of outcome; introduces some elements enhancing transparency; reverses the burden for designating States not wishing for their identity to be known to specify the same

[Security Council resolution 2161 \(2014\)](#) adopted on 17 June 2014: gives the Ombudsperson the discretion to shorten the information-gathering period in cases where all the designating States consulted do not object to delisting; sets deadline for transmittal of reasons letters

[Security Council resolution 2253 \(2015\)](#) adopted 17 December 2015: incorporates ISIL (Da'esh) into the name of the Committee and the sanctions list (although it was already listed as Al-Qaida in Iraq in October 2004); requests the Secretary-General to provide an update to the Committee on actions taken with respect to the necessary arrangements to ensure the Office of the Ombudsperson's continued ability to carry out its mandate in an independent, effective and timely manner

[Security Council resolution 2368 \(2017\)](#) adopted 20 July 2017: provides for immediate notification of the Committee's decision in all cases; details the requirements for the content of reasons letters

## Reports of the Office of the Ombudsperson to the Security Council

[First Report](#), 24 January 2011, S/2011/29

[Second Report](#), 22 July 2011, S/2011/447

[Third Report](#), 20 January 2012, S/2012/49

[Fourth Report](#), 30 July 2012, S/2012/590

[Fifth Report](#), 31 January 2013, S/2013/71

[Sixth Report](#), 31 July 2013, S/2013/452

[Seventh Report](#), 31 January 2014, S/2014/73

[Eighth Report](#), 31 July 2014, S/2014/553

[Ninth Report](#), 2 February 2015, S/2015/80

[Tenth Report](#), 14 July 2015, S/2015/533

[Eleventh Report](#), 2 February 2016, S/2016/96

[Twelfth Report](#), 1 August 2016, S/2016/671

[Thirteenth Report](#), 23 January 2017, S/2017/60

[Fourteenth Report](#), 7 August 2017, S/2017/685

[Update of the Office of the Ombudsperson](#), 8 February 2018, S/2018/120

[Fifteenth Report](#), 8 August 2018, S/2018/579

[Sixteenth Report](#), 6 February 2019, S/2019/112

# Ombudsperson process

## Establishment of the Office of the Ombudsperson and mandate extensions

### [Security Council resolution 1904 \(2009\)](#)

“20. [The Security Council] *Decides* that, when considering delisting requests, the Committee shall be assisted by an Office of the Ombudsperson, to be established for an initial period of 18 months from the date of adoption of this resolution, [...]”

### [First Report](#)

2. The Secretary-General appointed Judge Kimberly Prost Ombudsperson on 3 June 2010. The Ombudsperson formally commenced her functions on 14 July 2010.

### [Security Council resolution 1989 \(2011\)](#)

(Preamble) “*Welcoming* the establishment of the Office of the Ombudsperson pursuant to resolution 1904 (2009) and the role it has performed since its establishment [...]”

“21. *Decides* to extend the mandate of the Office of the Ombudsperson, [...] for a period of 18 months from the date of adoption of this resolution,”

### [Security Council resolution 2083 \(2012\)](#)

“*Welcoming* the establishment of the Office of the Ombudsperson pursuant to resolution 1904 (2009) and the enhancement of the Ombudsperson’s mandate in resolution 1989 (2011),”<sup>2</sup>

“19. *Decides* to extend the mandate of the Office of the Ombudsperson, [...] for a period of thirty months from the date of adoption of this resolution, [...]”

### [Security Council resolution 2161 \(2014\)](#)

“41. *Decides* to extend the mandate of the Office of the Ombudsperson, [...] for a period of thirty months from the date of expiration of the Office of the Ombudsperson’s current mandate in June 2015”

### [Security Council resolution 2253 \(2015\)](#)

“54. *Decides* to extend the mandate of the Office of the Ombudsperson, [...] for a period of twenty four months from the date of expiration of the Office of the Ombudsperson’s current mandate in December 2017”

### [Eleventh report](#)

2. The mandate of Kimberly Prost, the first Ombudsperson, ended on 13 July 2015.

3. The Secretary-General appointed Catherine Marchi-Uhel as Ombudsperson on 13 July 2015 (S/2015/534), and she took up her official duties on 27 July 2015.

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<sup>2</sup> Identical language in subsequent resolutions.

### [Security Council resolution 2368 \(2017\)](#)

“60. *Decides* to extend the mandate of the Office of the Ombudsperson, [...] for a period of 24 months from the date of expiration of the Office of the Ombudsperson’s current mandate in December 2019,”

### [Update of the Office of the Ombudsperson](#)

2. [...] [Catherine Marchi-Uhel] left her position on 7 August 2017. The position remained vacant throughout the reporting period, and no Ombudsperson had been appointed as at 7 February 2018.

### [Fifteenth report](#)

2. [...] The current Ombudsperson was appointed on 24 May 2018 ([S/2018/514](#)). The position remained vacant from 8 August 2017 until the current Ombudsperson took office on 18 July 2018.

## Ombudsperson attributes

### [Security Council resolution 1904 \(2009\)](#)

“20. [...] *requests* the Secretary-General, in close consultation with the Committee, to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson, with the mandate outlined in annex II of this resolution [...].”

## Role and mandate of the Ombudsperson

The full mandate and the current Ombudsperson procedure is described in Annex II to resolution 2368 (2017).

### [Security Council resolution 1904 \(2009\) \(Annex II\)](#)

*[No recommendation power for the Ombudsperson and decision by the Committee under normal decision-making procedures]*

“7. Upon completion of the period of engagement described above, the Ombudsperson, with the help of the Monitoring Team, shall draft and circulate to the Committee a Comprehensive Report that will exclusively:

(a) Summarize and, as appropriate, specify the sources of, all information available to the Ombudsperson that is relevant to the delisting request. The report shall respect confidential elements of Member States’ communications with the Ombudsperson;

(b) Describe the Ombudsperson’s activities with respect to this delisting request, including dialogue with the petitioner; and,



(c) Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's observations, lay out for the Committee the principal arguments concerning the delisting request. "

"10. After the Committee consideration, the Committee shall decide whether to approve the delisting request through its normal decision-making procedures."

[Security Council resolution 1989 \(2011\)](#)

*[introduces the mandate for the Ombudsperson to make recommendations]*

(Preamble) "[...] recalling the Security Council's firm commitment to ensuring that the Office of the Ombudsperson is able to continue to carry out its role effectively, in accordance with its mandate"

"21. [...] *decides* that the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanctions List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting;

22. *Decides* that the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, where the Ombudsperson recommends retaining the listing in the Comprehensive Report of the Ombudsperson on a delisting request pursuant to annex II; <sup>3</sup>

23. *Decides* that the requirement for States to take the measures described in paragraph 1 of this resolution shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with annex II of this resolution, including paragraph 6 (h) thereof, where the Ombudsperson recommends that the Committee consider delisting, unless the Committee decides by consensus before the end of that 60 day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; *provided* that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and *provided further* that, in the event of such a request, the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council"<sup>4</sup>

Annex II, paragraph 7(c): "Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's recommendation, lay out for the Committee the principal arguments concerning the delisting request."

[Security Council resolution 2083 \(2012\)](#)

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<sup>3</sup> Similar language in paragraph 11 of Annex II to the same resolution. Identical language in subsequent resolutions.

<sup>4</sup> Similar language in paragraph 12 of Annex II to the same resolution. Identical language in subsequent resolutions.

Annex II, paragraph 7(c): “Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson’s recommendation, lay out for the Committee the principal arguments concerning the delisting request. The recommendation should state the Ombudsperson’s views with respect to the listing as of the time of the examination of the delisting request.” (*Emphasis added, the underlined sentence is new*).<sup>5</sup>

## Independence of the Office of the Ombudsperson

### [Security Council resolution 1904 \(2009\)](#)

“20. [...] further *decides* that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government;”<sup>6</sup>

### [Security Council resolution 1989 \(2011\)](#)

(Preamble): “[...], recalling the Security Council’s firm commitment to ensuring that the Office of the Ombudsperson is able to continue to carry out its role effectively, in accordance with its mandate”

### [Fifth report](#)

30. [...] [the Ombudsperson] also notes the extension of the term of the Ombudsperson for a 30-month period, which significantly strengthens the structure of the Office in terms of independence and contributes to enhanced efficiency.

### [Sixth report](#)

28. The Office of the Ombudsperson has been operational for three years. It is fair to say that with respect to the Al-Qaida sanctions regime there is a functioning independent mechanism that provides recourse to listed persons and entities and that operates in a manner that is fully consistent with the fundamental principles of a fair process, as detailed below. The regime is subject to strict timelines and, as a result, the cases are dealt with efficiently and there is no backlog. Information gathered in each case is assessed consistently to a known and defined standard, which is based on principles drawn from different legal traditions. As such, the test applied by the Ombudsperson is appropriate to this unique international context and is not premised on any single national or regional legal system or tradition.

### [Seventh report](#)

#### *Assistance from staff members and independence [“Trip reports”]*

69. The Ombudsperson continues to be assisted in her work by a Legal Officer (P-4) and an Administrative Assistant. This assistance has been essential to the proper fulfilment of the mandate of the Ombudsperson, in particular given the caseload and the increasingly complex and challenging issues that have arisen in some instances.

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<sup>5</sup> Identical language in subsequent resolutions.

<sup>6</sup> Identical language in subsequent resolutions.

70. The Secretariat, however, has recently decided that substantive trip reports must be submitted at the conclusion of any official travel undertaken by the staff members assisting the Ombudsperson. While this does not affect the Administrative Assistant, the Legal Officer has, on occasion, accompanied the Ombudsperson on her travels, in particular to assist with petitioner interviews. Despite assurances by the Secretariat that the reports will respect the confidentiality of the work, it is difficult to envisage how the content of any such report will not infringe on that confidentiality. Moreover, in principle, the establishment of a reporting line between the Office of the Ombudsperson and the Secretariat on substantive matters represents a direct and significant incursion into the independence of the Office, both in terms of perception and in practice. To safeguard that independence and to preserve the relationships of trust that underpin the effectiveness of the process, it will no longer be possible for the Legal Officer to participate in any operational travel. That restriction will need to remain in place as long as participation in any such travel triggers an obligation to report on substantive matters. This development is highly regrettable given the valuable assistance provided by the Legal Officer in this context. In addition, in some cases, it is evident that other resources — perhaps in the form of independent consultants — will have to be identified when it is essential for the Ombudsperson to have support during an official trip.

#### [Security Council resolution 2161 \(2014\)](#)

“46. Requests the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, to ensure its continued ability to carry out its mandate in an independent, effective and timely manner;” (*Emphasis added, the underlined word is new*)

#### [Eighth report](#)

49. Over the four-year period of its operation, the Office of the Ombudsperson has functioned independently in fulfilling the mandate accorded to it by the Security Council. The work of the Office has been carried out autonomously and in each of the concluded cases the individual or entity involved has benefited from a fair and impartial process which has included an objective review of the factual basis for the listing.

50. However, in light of the contractual, administrative and staffing arrangements through which the resolution mandate has been implemented, success in safeguarding the independence of the Ombudsperson and her Office has been due to the personal efforts of the Ombudsperson, relevant officials within the Department of Political Affairs and the staff members assigned to the Office. While achieved in practice, in principle, no separate office has been established and the applicable administrative arrangements, particularly for budget, staffing staff management and resource utilization, lack the critical features of autonomy. Further, the contractual arrangements for the Ombudsperson are not consistent with the mandate accorded by the Security Council and contain insufficient safeguards for independence. The need for a framework which reflects the independent nature of the Office has been underscored by the Security Council in resolution 2161 (2014) with the addition of the word “independent” in paragraph 46.<sup>7</sup>

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<sup>7</sup> 10 “The Security Council ... Requests the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as

51. As described in the seventh report, practical challenges have begun to arise from these structural difficulties. With reference to the issue raised in that report, through discussions, arrangements have been put in place to address administrative and logistical issues such that no substantive reports on trips are required from staff assisting the Ombudsperson. However, this issue was merely symptomatic of the wider problem arising directly from the current contractual and administrative arrangements that are in place. Given the welcome extension of the Ombudsperson's mandate for an additional period of 30 months from July 2015, urgent consideration needs to be given to establishing contractual arrangements and a structure that provides for institutional independence for the Ombudsperson and the Office of the Ombudsperson.

#### [Ninth report](#)

51. In resolution 1904 (2009) the Security Council decided that, when considering delisting requests, the Committee shall be assisted by an Office of the Ombudsperson. However, as noted in the eighth report, in the light of the contractual, administrative and staffing arrangements through which the resolution mandate has been implemented, no separate office has ever been established.

52. Further, the Security Council has requested that the capacity of the Office of the Ombudsperson be strengthened to ensure its continued ability to carry out its mandate in an independent, effective and timely manner. Over the four and a half year period of operation, the Office of the Ombudsperson has fulfilled the mandate accorded to it by the Security Council in an independent manner. The work of the Office has been carried out autonomously and in each of the concluded cases the individual or entity involved has benefited from a fair and impartial process, which has included an objective review of the factual basis for the listing. However, this has not been as a result of any structural capacity or protections for independence. On the contrary, the applicable administrative arrangements put in place for the Ombudsperson, particularly for budget, staffing, staff management and resource utilization, lack the critical features of autonomy. Further, the contractual arrangements for the Ombudsperson are not consistent with the mandate accorded by the Security Council and contain insufficient safeguards for independence. Once again during this reporting period tensions have arisen because of a mandatory requirement of the contract which has been chosen for use, which raises the potential for interference with the performance of the mandate by the Ombudsperson. In practice, the personal efforts of the Ombudsperson, relevant officials within the Department of Political Affairs, and the staff members assigned to the Office have protected the independence of the Ombudsperson and the Office. However, this is evidently not what was foreseen by the Security Council in the mandate accorded and it is an extremely fragile basis for ensuring the independence of the Office of the Ombudsperson, particularly when in future it undergoes normal transition.

53. As noted previously, given the extension of the mandate of the Office of the Ombudsperson for an additional period of 30 months from July 2015, urgent consideration needs to be given to establishing contractual arrangements and a structure which implement the Security Council mandate for an Office of the Ombudsperson and which provide for institutional independence for the Ombudsperson and the Office.

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appropriate, to ensure its continued ability to carry out its mandate in an independent, effective and timely manner”.

## Tenth report

### *Implementation of the resolutions*

55. In its resolution 1904 (2009), the Security Council decided that, “when considering delisting requests, the Committee shall be assisted by an Office of the Ombudsperson”.<sup>8</sup> Five and a half years later, no steps have been taken by the Secretariat to establish an independent Office within the structure of the United Nations.

56. In its resolution 2161 (2014), the Security Council emphasized its original intention by requesting the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson to “ensure its continued ability to carry out its mandate in an independent, effective and timely manner”.<sup>9</sup> The addition of “independent” did not prompt any action on the part of the Secretariat to put in place institutional arrangements which support and safeguard independence.

57. Over a two-year period, the Ombudsperson highlighted directly to the Secretariat the issue of independence and deficiencies in the current structural and contractual arrangements. The issue was also addressed in the seventh, eighth and ninth reports to the Security Council.

58. On 17 April 2014, the Group of Like-Minded States on Targeted Sanctions transmitted an input paper to the Security Council noting that the current contractual arrangements fail to fully implement the Security Council resolutions and significantly impair the ability of the Ombudsperson to fulfil the mandate, particularly in terms of independence.<sup>10</sup> It called for the establishment of a permanent office and improvement of the contractual arrangements. On 18 June 2015, the Group reiterated these concerns in a letter to the Security Council, in which it called for the improvement of the institutional independence of the Office.<sup>11</sup> It noted that “the status and privileges of the position should fully reflect the independence required to perform the tasks of the Ombudsperson effectively. Furthermore, the applicable administrative arrangements in place for budgeting, staffing, staff management and resource utilization at the Ombudsperson’s Office lack the critical features of autonomy. In fact, structurally no Office of the Ombudsperson has been created despite the decision in Security Council resolution 1904 (2009)”.

59. However, the Secretariat continues to rely upon a consultancy contract to fulfil the requirements of successive resolutions relating to the Ombudsperson. As far as the Ombudsperson is aware, no consideration has been given by the Security Council Affairs Division of the Department of Political Affairs to adopting another form of contractual arrangement in order to alleviate the problems which have been identified. The only change to terms and conditions came in January 2013, when the application of guidelines developed exclusively for the recruitment and administration of the consultants who serve as experts on groups/panels assisting sanctions Committees was extended to the Ombudsperson.

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<sup>8</sup> 16 See resolution 1904 (2009), para. 20.

<sup>9</sup> 17 See resolution 2161 (2014), para. 46.

<sup>10</sup> 18 S/2014/286, annex.

<sup>11</sup> 19 S/2015/459.

60. These guidelines were made applicable to the Ombudsperson position, along with the resulting contract changes, without notice to, or discussion with, the Ombudsperson. Moreover, the guidelines were applied without consideration as to their appropriateness for the Ombudsperson given the unique role of the position and its fundamental differences from the expert panels in all core respects.

*Terms of contract inconsistent with independence*

61. The terms of the resulting consultancy contract are fundamentally inconsistent with the independent role and functions of the Ombudsperson. Among the most serious concerns is a certification requirement, which is antithetical to independence. The problem is succinctly captured in a memorandum sent to the Ombudsperson by the Secretariat in January 2015. Noting that certification of service is mandatory for all consultancy contracts, including with respect to the Ombudsperson, the memorandum states that certification

“covers both performance and attendance, since the Office of the Ombudsperson was established at United Nations Headquarters in order that it might adequately support the work of the 1267/1989 Committee. Notwithstanding the independence of the Ombudsperson, the Secretary-General must be able to certify that certain conditions of performance have been met if he is expected to authorize monthly payment of fees”.

62. The memorandum adds that the performance of the Ombudsperson is to be certified by the administering office, i.e., the Security Council Affairs Division. Accordingly, the performance of the Ombudsperson is subject to an evaluation with reference to undefined “conditions” by unidentified officials within the division of the United Nations responsible for supporting and assisting the Security Council and the Al-Qaida sanctions Committee, including with respect to the imposition, enforcement and implementation of sanctions. These are the very bodies in relation to which the Ombudsperson must maintain independence. In the absence of certification, the Ombudsperson will not be paid.

63. To date, the certification requirement has not been used in practice to attempt to interfere with the performance of functions by the Ombudsperson. Nonetheless, that does not detract in any way from the fact that this contractual requirement, in principle and in terms of perception, constitutes a significant restriction on the independence of the Ombudsperson.

64. Furthermore, the general terms of consultancy contracts prohibit any participation by the Ombudsperson in management functions with respect to budget, resource and staff issues and even the staff selection process. Therefore, the contract pre-empts the structural establishment of any form of “Office of the Ombudsperson”, independently managed by the Ombudsperson, as foreseen by the Security Council.

65. Instead, all of these functions are carried out by political affairs officers within the Security Council Subsidiary Organs Branch, and these officers are in a position to direct the staff working with the Ombudsperson. Until very recently, the responsibility of supervision and performance appraisal was, in fact, assigned to the Secretary of the Al-Qaida sanctions Committee, further exacerbating the potential for conflict. The structure is not a workable or sustainable one for an independent office. It is also a configuration which places the two staff members assisting the Ombudsperson in a difficult

situation of conflict between de facto and de jure managers. This has created specific challenges identified in the present and previous reports.<sup>12</sup> While the staff has now been placed under the direct supervision of another official within the Branch, this does not alleviate the fundamental structural problem arising from the inability of the Ombudsperson to independently manage the staff.

66. There are similar structural problems with respect to budget and resource management more generally. As the Office of the Ombudsperson does not exist as an independent institution, there is no independent budget for its mandate. Furthermore, the Ombudsperson, as a consultant, is not in a position to directly manage budgetary priorities.

*Practical concerns with respect to independence*

67. There were also other worrying incidents during the reporting period in terms of independence. On one occasion, for reasons entirely unrelated to financial accountability, officials in the Security Council Subsidiary Organs Branch temporarily blocked the travel of the Ombudsperson for a core function, the interview of a petitioner. While the matter was resolved fairly quickly, it illustrates the dangers to independence, even with respect to core functions, when the Office is reliant exclusively on the discretion of individuals, without institutional safeguards. Another situation, which apparently occurred by mistake, highlighted the dangers arising from the fact that the Ombudsperson does not have control over who has access to the electronic drives which containing the general material related to the work of the Office (although no State confidential material). This is glaringly inconsistent with the fundamental architecture of an independent office and jeopardizes the overall confidential nature of the mandate. Finally, without notice to the Ombudsperson, the staff of the Office were recently directed by the Branch to make a substantive change to the website of the Office of the Ombudsperson, which is a stand-alone, independent website. Those instructions, countermanded by the Ombudsperson, again illustrate the fragility of the protection for independence arising from the structure.

*Fundamental restructuring required*

68. During its five years of operation, the “Office of the Ombudsperson” has, in practice, fulfilled in a robustly independent manner the mandate accorded to it by the Security Council. However, this has not been as a result of any structural capacity or protections for independence. To the contrary, as described, the applicable administrative and contractual arrangements in place for the Ombudsperson lack the critical features of autonomy and the structural attributes of an independent Office. It is an achievement attributable only to individual efforts. Evidently, this is not what was foreseen by the Security Council in mandating the creation of an independent Office of the Ombudsperson.

69. For these reasons and those articulated in the seventh, eighth and ninth reports, urgent attention needs to be given to revising the contractual and structural arrangements underpinning the Office of the Ombudsperson. Steps need to be taken to establish an independent Office, within the United Nations structure, as envisaged by the Security Council. The arrangements should be such that the Office of the Ombudsperson is able to function independently and the Ombudsperson is

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<sup>12</sup> 20 See the eighth report (S/2014/553), para. 51; and the seventh report (S/2014/73), paras. 69 and 70.

competent to autonomously manage the staff, budget and other resources of the Office, with normal provisions and protections for financial accountability.

#### *Administration of the Office of the Ombudsperson*

70. The Security Council Affairs Division, within the Department of Political Affairs, currently has administrative responsibility for the Ombudsperson. In terms of perceptions as to independence, it is difficult to envisage a worse placement of these functions than within the branch/division/department which provides direct support on sanctions-related matters to the bodies from which independence is essential. In addition to obvious perception issues, officials within the Division continue to view the role of the Ombudsperson as analogous to that of the panel experts who advise and assist the various sanctions committees. Moreover, as discussed, they consider it essential to apply equally to the Ombudsperson internal guidelines and contractual arrangements developed for administration of the panel experts.

71. Given that the Ombudsperson's role, functions, reporting responsibilities and reasons for independence of the Ombudsperson are profoundly different from those of the experts, this approach poses a significant threat to the independence which is so essential to the effectiveness of the Ombudsperson process. In the case of the Ombudsperson, even a perception of lack of independence, arising from structural defects, can have a direct impact on the credibility of the mechanism and its fitness for purpose. And most significantly, a lack of independence for the Ombudsperson not only affects practice before the Committee and the Council, but also directly infringes on the rights of individuals and entities to an independent review and an effective remedy.

72. In these circumstances, in addition to the broader changes to the contractual and administrative structures, urgent consideration should be given to transferring administrative responsibilities for the Ombudsperson and the related support positions of Administrative Assistant and Legal Officer to another part of the Organization not directly related to the work of the Security Council, sanctions panels or sanctions more generally.

*See also paragraphs 89 to 91 of the [Tenth report](#) below relating to the staff supporting the Office of the Ombudsperson (Section on [Resources](#))*

#### [Security Council resolution 2253 \(2015\)](#)

Preamble: “[...] *recalling the Security Council’s firm commitment to ensuring that the Office of the Ombudsperson is able to continue to carry out its role effectively and independently, in accordance with its mandate,*” *[Emphasis added, the underlined wording is new]*

“59. *Underscores the importance of the Office of the Ombudsperson, and requests the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, 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;*” *[Emphasis added, the underlined wording is new]*



### Eleventh report

44. The previous Ombudsperson highlighted in great detail the deficiencies in the current structural and contractual arrangements and the need to address them in her seventh to tenth reports to the Security Council.

45. In paragraph 46 of its resolution 2161 (2014), the Security Council requested the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson to ensure its continued ability to carry out its mandate in an independent, effective and timely manner.

46. Notwithstanding the earlier request from the Security Council, the deficiencies in question remain. Notably, the Ombudsperson is subject to the same clause of the consultancy contract described in the tenth report as being fundamentally inconsistent with the independent role and functions of the Ombudsperson. Another aspect of the inadequacy of this consultancy contract became apparent during the transition period. The nature of this contract prevented adequate compensation of the former Ombudsperson, who prepared for and presented her comprehensive reports to the Committee in the various cases scheduled on the agenda of the Committee after the completion of her term. Her presence was deemed necessary to comply with the procedural requirement that the Ombudsperson orally present her comprehensive report to the Committee.<sup>13</sup> To maintain fairness to the petitioners and the integrity of the process, it was essential to ensure that the Committee had an opportunity to engage with and pose questions to the author of the comprehensive reports, who had unique knowledge of the case.

47. In addition, based on the contractual arrangement under which the current Ombudsperson was recruited, she was prevented from fully taking part in the recruitment process for a replacement, for the duration of the maternity leave of the only Legal Officer assigned to support the Office. The Ombudsperson was consulted prior to shortlisting the candidates and spoke individually to the few candidates that the recruitment panel ultimately found to be suitable. Her opinion was taken into account before recruitment, but she was denied participation, even as an observer, in the competency-based interviews of candidates shortlisted for the position.

48. In 2015, two documents containing proposals to address the lack of institutional guarantees of independence of the Ombudsperson were prepared. The first document is the Compendium of the High-level Review of United Nations Sanctions (A/69/941-S/2015/432, issued in June 2015). It notably recommends that the Secretary-General propose options for ensuring that the administrative, contractual and other support arrangements for the Ombudsperson be specific to the distinctive role of the Ombudsperson and include institutional protections to allow the Office to actually meet the requirements of an independent office. The second document is a proposal transmitted to the President of the Security Council by the Group of Like-Minded States on Targeted Sanctions (see S/2015/867). The proposal calls for “fair and clear procedures for a more effective United Nations sanctions system”, including a suggestion that the Office of the Ombudsperson

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<sup>13</sup> 5 Paragraph 3 (d) of the Committee Guidelines requires the Chair to invite the Ombudsperson to present his/her comprehensive report on any delisting request.

should be restructured with a view to institutionalizing it through its transformation into a permanent office or a special political mission office within the Secretariat.<sup>14</sup>

49. In paragraph 59 of its 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 Ombudsperson is encouraged by this request and looks forward to the specific actions to be taken to adequately address the above-mentioned deficiencies and to provide institutional safeguards to ensure the independence of the Office.

### Twelfth report

33. Resolution 2253 (2015) specifies that the Ombudsperson shall neither seek nor receive instructions from any government. The independent and impartial review of delisting requests is at the core of the Ombudsperson's mandate. The Ombudsperson must not only act in an independent and impartial manner when conducting reviews of delisting requests, but must also be seen as doing so. The Ombudsperson's role, functions, reporting responsibilities with regard to delisting requests, and reasons for independence are profoundly different from those of the experts.<sup>15</sup> Furthermore, in view of the weight given by the Security Council to the recommendations of the Ombudsperson,<sup>16</sup> the guarantees of and respect for the requirements of independence and fairness on the part of the Ombudsperson mechanism are all the more important for its integrity and credibility.

34. 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 with an update on actions taken in six months.<sup>17</sup>

### *Current deficiencies in the status of the Office of the Ombudsperson*

35. The former and current Ombudspersons identified a number of deficiencies in the current arrangements with the Secretariat. Those deficiencies were highlighted in great detail by the previous Ombudsperson in the seventh to tenth reports to the Security Council and by the current

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<sup>14</sup> 6 The Group of Like-Minded States on Targeted Sanctions had previously brought these concerns to the attention of the Security Council in April 2014 and in June 2015 (S/2014/286 and S/2015/459). They noted in the latter document that "the status and privileges of the position should fully reflect the independence required to perform the tasks of the Ombudsperson effectively. Furthermore, the applicable administrative arrangements in place for budgeting, staffing, staff management and resource utilization at the Office of the Ombudsperson lack the critical features of autonomy. In fact, structurally no Office of the Ombudsperson has been created despite the decision in Security Council resolution 1904 (2009)."

<sup>15</sup> 9 See S/2015/533, para. 71.

<sup>16</sup> 10 Under para. 14 of annex II to resolution 2253 (2015), the Ombudsperson's recommendation to maintain a listing stands unless a Committee member submits a delisting request. Under para. 15 of the same annex, the Ombudsperson's recommendation to delist stands by default unless the Committee decides by consensus before the end of the 60-day period to maintain the listing; or, in cases in which consensus does not exist, the question of the listing is submitted to the Security Council and the Council decides to maintain the listing.

<sup>17</sup> 11 See resolution 2253 (2015), para. 59.

Ombudsperson in the eleventh report. The main aspects of the deficiencies are summarized below for ease of reference.

36. To date, no separate “Office of the Ombudsperson” has been established. As a result, the budget for the operations of the Ombudsperson mechanism is subsumed in the budget for the Analytical Support and Sanctions Monitoring Team. Furthermore, the two successive Ombudspersons have been recruited as consultants. Without certification with respect to both attendance and performance, the Ombudsperson will not be paid. As noted by the former Ombudsperson, the performance of the Ombudsperson is subject to an evaluation with reference to undefined “conditions” by unidentified officials within the division of the United Nations responsible for supporting and assisting the Security Council and the ISIL (Da’esh) and Al-Qaida Sanctions Committee, including with respect to the imposition, enforcement and implementation of sanctions. Those are the very bodies from which the Ombudsperson must maintain independence.<sup>18</sup> The former Ombudsperson recognized that the certification requirement had not been used in practice to attempt to interfere with her performance of functions. Nonetheless, she was of the view that that contractual requirement, in principle and optically, constituted a significant restriction on the independence of the Ombudsperson.<sup>19</sup> Furthermore, the consultancy contract pre-empts the structural establishment of any form of “Office of the Ombudsperson” independently managed by the Ombudsperson, as envisaged by the Security Council.<sup>20</sup> Indeed, as a consultant, the Ombudsperson can be neither a recruiting officer nor a supervisor of the staff members assisting her. The Security Council Subsidiary Organs Branch has recruited and formally supervises the two staff members in question, a Legal Officer (P-4) and an Administrative Assistant. As reported by the Ombudsperson in the eleventh report, she was prevented from fully participating in the recruitment process to replace the Legal Officer during the maternity leave of the Officer.<sup>21</sup> Furthermore, in the past the responsibility of the supervision and performance appraisal of the staff assisting the Ombudsperson was assigned to the Secretary of the Committee, further exacerbating the potential for conflict.<sup>22</sup> Also, while the views of the Ombudsperson as to the performance of the two staff members have been reflected in the evaluation of their performance for the period 2015-2016, there have been past instances in which this was not the case. This demonstrates that guarantees of the independence of the Ombudsperson and her Office cannot be left to the goodwill of individuals in the Secretariat. In addition, the former Ombudsperson has described practical challenges arising from instructions being given by political affairs officers within the Security Council Subsidiary Organs Branch to staff assisting the Ombudsperson, as well as other obstacles to the independent operation of the Office.<sup>23</sup> Finally, in the eleventh report the Ombudsperson described another aspect

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<sup>18</sup> 12 See S/2015/533, para. 62.

<sup>19</sup> 13 Ibid., para. 63.

<sup>20</sup> 14 Ibid., para. 64.

<sup>21</sup> 15 See S/2016/96, para. 47. The Ombudsperson was consulted prior to shortlisting the candidates and spoke individually to the few candidates whom the recruitment panel ultimately found to be suitable. Her opinion was taken into account before recruitment, but she was denied participation, even as an observer, in the competency-based interviews of candidates shortlisted for the position.

<sup>22</sup> 16 See S/2015/533, para. 65.

<sup>23</sup> 17 In the past, the Branch required the Legal Officer to submit substantive trip reports at the conclusion of any official travel undertaken to assist the Ombudsperson, and this led the former Ombudsperson to suspend such assistance until that requirement was ultimately discontinued (see S/2014/73, para. 70, and S/2014/553, para. 51). On another occasion, without notice to the former Ombudsperson, the staff of the Office were directed by the Branch to make a substantive change to the website of the Office. Those instructions were

of the inadequacy of the consultancy contract which had become apparent during the transition period.<sup>24</sup>

37. In its June 2015 Compendium ([A/69/941-S/2015/432](#)), the High-level Review of United Nations Sanctions notably recommended that the Secretary-General propose options for ensuring that the administrative, contractual and other support arrangements for the Ombudsperson were specific to the distinctive role of the Ombudsperson. It also recommended that those arrangements include institutional protections to enable the Office to actually meet the definition of an “independent office”. Furthermore, a proposal transmitted to the President of the Security Council by the Group of Like-Minded States on Targeted Sanctions calls for fair and clear procedures for a more effective United Nations sanctions system, including a suggestion that the Office of the Ombudsperson should be restructured with a view to institutionalizing it through its transformation into a permanent office or a special political mission office within the Secretariat.<sup>25</sup>

*Update to the Committee by the Secretariat under paragraph 59 of resolution 2253 (2015)*

38. During the reporting period, in view of the Security Council’s request to the Secretary-General, in paragraph 59 of resolution 2253 (2015), to provide the Committee with an update on actions taken in six months, the Ombudsperson reviewed several relevant arrangements in place for United Nations officials who carry out functions involving a requirement of independence.<sup>26</sup> Thereafter, the Ombudsperson engaged and had fruitful discussions with the Security Council Affairs Division on ways to include guarantees of independence in future administrative arrangements pertaining to the Ombudsperson and the Office of the Ombudsperson. The Ombudsperson identified priorities for those possible future arrangements. The priorities are based on the comparison between the

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countermanded by the then-Ombudsperson (see S/2015/533, para. 67). At another time, for reasons entirely unrelated to financial accountability, officials in the Security Council Affairs Division temporarily blocked the travel of the Ombudsperson for a core function: interviewing a petitioner. The former Ombudsperson noted that, while the matter had been resolved fairly quickly, it illustrated the dangers posed to independence even with respect to core functions when the Office was reliant exclusively on individual actions, without institutional safeguards. Another situation, which apparently occurred by mistake, highlighted the dangers arising from the fact that the Ombudsperson lacks control over who has access to the electronic drives containing the general material related to the work of the Office (although no State confidential material).

<sup>24</sup> 18 See S/2016/96, para. 46. The nature of the contract prevented adequate compensation of the former Ombudsperson, who, as required, prepared for and presented her comprehensive reports to the Committee in the various cases scheduled on the agenda of the Committee after the completion of her term.

<sup>25</sup> 19 See S/2015/867, annex. The Group of Like-Minded States on Targeted Sanctions had previously brought these concerns to the attention of the Security Council in April 2014 and June 2015, in the annexes to S/2014/286 and S/2015/459, respectively. They noted in the latter document that “the status and privileges of the position should fully reflect the independence required to perform the tasks of the Ombudsperson effectively. Furthermore, the applicable administrative arrangements in place for budgeting, staffing, staff management and resource utilization at the Office of the Ombudsperson lack the critical features of autonomy. In fact, structurally no Office of the Ombudsperson has been created despite the decision in Security Council resolution 1904 (2009)”.

<sup>26</sup> 20 The arrangements reviewed are those in place for officials having the status of either staff members (the Under-Secretary-General for Internal Oversight Services, the Ombudsman (Assistant Secretary-General) or the Executive Director of the Counter-Terrorism Committee Executive Directorate) or officials other than Secretariat officials (permanent and ad litem judges of the International Tribunal for the Former Yugoslavia, judges of the United Nations Dispute Tribunal and international judges of the Extraordinary Chambers in the Courts of Cambodia).

functions and administrative arrangements of the Ombudsperson and those of United Nations officials whose functions require independence.

39. On 17 June 2016, the Security Council Affairs Division briefed the Committee on the current arrangements for the Ombudsperson and her Office and on issues arising from those arrangements; it also presented options for reforming them. The Division stressed that the structures retained for the Office of Internal Oversight Services (OIOS), the Office of the United Nations Ombudsman and Mediation Services and tribunals, which required dedicated administrative support, would be costly and time-consuming to set up for the Office of the Ombudsperson. By contrast, establishing the Office of the Ombudsperson as a stand-alone special political mission would require minor adjustments to the thematic cluster II special political mission framework<sup>27</sup> and would not involve a significant cost increase. The Division highlighted that the Executive Office of the Department of Political Affairs, which would be supporting such a special political mission, was already supporting the Office of the Ombudsperson. In turn, the Office of the Ombudsperson would have to take on some additional administrative work previously carried out by the Division. In terms of possible status and contractual arrangements, the Division presented two options. The first was the status of that of “official other than Secretariat official”. If that option were chosen, the Ombudsperson’s conditions of service would have to be specifically spelled out. The second option was the status and contractual arrangements of a United Nations staff member. That option would require the inclusion of an operational independence clause in the Ombudsperson’s contract and periodic evaluation of the Ombudsperson’s performance by the Secretariat. Following the Division’s presentation of those options, the Chair of the Committee invited the Ombudsperson to share her views on these matters with the Committee.

#### *Options for a new structure and status*

40. The Ombudsperson agrees with the Secretariat’s proposal that the Office of the Ombudsperson be established as a stand-alone special political mission with a dedicated budget. The size of the Office as currently staffed does not justify its having an executive office of its own. There would be no adverse consequences in terms of the independence of the Office in continuing to rely on the Executive Office of the Department of Political Affairs for logistical and administrative support, as it does at present. The Office would also be able to absorb the additional administrative work previously performed by the Security Council Affairs Division, as noted above.

41. While neither the status of official other than Secretariat official nor the status of United Nations staff member is a perfect option for the Ombudsperson, each is fully satisfactory, provided that a few conditions pertaining to it are met. However, in the view of the Ombudsperson, the status of official other than Secretariat official is the better of the two options in terms of the real and perceived independence of the Ombudsperson. This is the status that the United Nations accords to its international judges,<sup>28</sup> and it does not require an evaluation of the Ombudsperson’s performance.

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<sup>27</sup> 21 Cluster II comprises 14 special political missions (sanctions monitoring teams, groups and panels).

<sup>28</sup> 22 Consideration could be given to subjecting the Ombudsperson to procedures applicable in the United Nations in the event of the misconduct of an official. Likewise, the operations of the Office would be subject to the existing oversight mechanism.

42. The status of United Nations staff member would also be acceptable, but there is an important caveat with regard to that option in order to fully guarantee the independence of the Ombudsperson. It concerns the modalities used to evaluate the Ombudsperson's performance. If the option were preferred, it would be critical to ensure that the modalities of evaluation, the reporting lines and the goals employed as part of the evaluation would not encroach on the independence of the Ombudsperson. This is a sensitive issue, but not an unsurmountable one, and there are precedents, for example, the heads of two independent offices (OIOS and the Office of the United Nations Ombudsman and Mediation Services) whose performance is evaluated by the Secretary-General under a "compact".<sup>29</sup> The Ombudsperson is of the view that under this status, the reporting line for the Ombudsperson should be outside the Department of Political Affairs.

43. Unlike the status of United Nations staff member, the choice of the status of official other than Secretariat official would not automatically resolve the managerial aspects arising from the functioning of the Office of the Ombudsperson as an independent office. Under that status, the Ombudsperson could not formally serve as a hiring officer or supervisor. However, unlike that of consultant, the status of official other than Secretariat official is sufficiently flexible to allow for satisfactory arrangements to guarantee the involvement of the Ombudsperson in the recruitment, tasking, substantive direction and performance evaluation of staff members. There are precedents for such arrangements in terms of international judges. Such arrangements are unquestioned in these institutions, so they have not been formalized. But in the light of past practice under the Ombudsperson's consultant status, it would be necessary to formalize such arrangements for the Ombudsperson. This could be done in the conditions of service or the terms of reference, or even in an inter-office memorandum between the Ombudsperson and the office formally tasked with the recruitment and evaluation of the staff of the Office.

44. Finally, the maximum term of five years for the Ombudsperson is a consequence of the Ombudsperson's current status of consultant. The Ombudsperson is of the view that imposing a maximum term of office would not encroach on the independence of the Ombudsperson. It could be considered under either of the two options discussed above. Five or, even better, seven years would be a reasonable term. Also under these options, unlike with a consultancy contract, there would be no implied bar to the Ombudsperson's eligibility for posts in the Secretariat upon the completion of her or his mandate. However, the Ombudsperson is of the view that ineligibility for a set period of time may enhance the appearance of independence on the part of the Ombudsperson.

### *Conclusion*

45. The Ombudsperson commends the efforts made and steps taken by the Secretariat as requested by the Security Council in paragraph 59 of resolution 2253 (2015). The options presented by the Security Council Affairs Division for arrangements that would be necessary to ensure that the Office of the Ombudsperson has the ability to carry out her mandate in an independent and effective manner provide a sound basis for guaranteeing the independence of the Office in the future. The

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<sup>29</sup> 23 In 2006, the United Nations introduced senior managers' compacts. A compact is an annual agreement between the Secretary-General and senior officials clearly outlining the roles and responsibilities of the officials and setting specific objectives and managerial tasks for each year. In 2010, the compact regime was broadened to include heads of peacekeeping missions and special political missions.

Ombudsperson is hopeful that these efforts will not be in vain and that one of these options will materialize, thus increasing the credibility of the Ombudsperson process.

### Thirteenth report

36. The twelfth report described the various options developed and presented by the Security Council Affairs Division, pursuant to paragraph 59 of resolution 2253 (2015),<sup>30</sup> at an informal meeting of the Committee on 17 June 2016. In the view of the Ombudsperson, those options provided a sound basis to remedy current deficiencies in the status of the Office and offered appropriate contractual arrangements to guarantee its independence.<sup>31</sup> However, the Ombudsperson was informed during the reporting period that the Committee was unable to agree to take action on the basis of any of those options. This situation is not surprising given the consensus rule by which the Committee reaches decisions other than those with respect to the merit of delisting requests. It is nonetheless regrettable given the importance of those arrangements for the credibility of the Office. On 4 November, the Committee reminded the Secretariat of the point made by the Security Council Affairs Division at the above-mentioned informal meeting that the Secretariat may be able to explore certain informal arrangements to address some of the concerns regarding the Office. On 27 December, the Secretariat informed the Committee that the following four informal measures had been put in place:

- (a) The views of the Ombudsperson will be taken into account in the performance appraisals of the staff supporting the Office;
- (b) All recruitment processes for the staff supporting the Office will involve the Ombudsperson and her views will be taken into account;
- (c) The Ombudsperson will have access to all material, including electronic drives, relevant to the work of the Office;
- (d) The Ombudsperson will have full editorial control of the Office website.<sup>32</sup>

37. The Ombudsperson welcomes the adoption of these informal arrangements, which will reinforce the independence of the Office. Although the consultancy contract and conditions of service under which the Ombudsperson is recruited do not necessarily reflect the importance of the function, the arrangements appropriately address almost all of the consequences of the contractual status of the Ombudsperson that affect the independence of the Office.<sup>33</sup> However, the lack of an independent Office with its own budget<sup>34</sup> cannot be resolved by way of informal arrangements. Nevertheless, the Ombudsperson is hopeful that further progress can be made by the Secretariat in relation to addressing the requirement for certification of service embedded in consultancy contracts, which

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<sup>30</sup> 14 In paragraph 59 of resolution 2253 (2015), the Security Council requested the Secretary-General to continue to strengthen the capacity of the Office 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.

<sup>31</sup> 15 See S/2016/671, paras. 35 to 36.

<sup>32</sup> 16 S/AC.37/2016/NOTE.214.

<sup>33</sup> 17 The arrangements generalize practices that had been applied unevenly during the terms of the previous and current Ombudspersons.

<sup>34</sup> 18 Currently its budget comes under the special political mission for the Monitoring Team.

covers both performance and attendance and is considered to be fundamentally inconsistent with the independent role and functions of the Ombudsperson.<sup>35</sup> The Ombudsperson is encouraged in this regard by the Secretariat's indication that it will continue to explore additional informal modalities with respect to some of the issues identified by the Secretariat and the Ombudsperson, where possible and in line with the rules and regulations of the Organization, and will keep the Committee apprised accordingly.<sup>36</sup>

#### [Security Council resolution 2368 \(2017\)](#)

"65. *Underscores* the importance of the Office of the Ombudsperson, and *requests* the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, 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 keep the Committee updated on actions in this regard;" [*Emphasis added, the underlined language is new*].

#### [Fourteenth report](#)

##### *Informal arrangements reinforcing the independence of the Office*

48. The thirteenth report described the adoption of some informal arrangements by the Secretariat with a view to reinforcing the independence of the Office of the Ombudsperson.<sup>37</sup> In the same report the hope was expressed that the Secretariat could achieve further progress in relation to addressing the requirement of certification of service embedded in consultancy contracts, which covers both performance and attendance and is considered to be fundamentally inconsistent with the independent role and functions of the Ombudsperson.<sup>38</sup> I am pleased to report that this has been the case. If required, the output evaluation will be submitted only after the Ombudsperson has concluded her period of assignment and will make clear that such evaluation contains no substantive assessment of the Ombudsperson's work. The Ombudsperson understands that the Department of Political Affairs is also exploring the possibility of an additional step, which, if implemented, would remove any possible remaining concern regarding the appearance of independence of the Ombudsperson.

#### [Sixteenth report](#)

##### *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

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<sup>35</sup> 19 See S/2015/533, para. 61.

<sup>36</sup> 20 S/AC.37/2016/NOTE.214.

<sup>37</sup> 13 See S/2017/60, para. 36, referring to four informal measures: The views of the Ombudsperson will be taken into account in the performance appraisals of the staff supporting the Office; all recruitment processes for the staff supporting the Office will involve the Ombudsperson and her views will be taken into account; the Ombudsperson will have access to all material, including electronic drives, relevant to the work of the Office; and the Ombudsperson will have full editorial control of the Office website.

<sup>38</sup> 14 See S/2017/60, para. 37.



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.

#### *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.

### Fair process achievements

#### [Security Council resolution 1904 \(2009\)](#)

(Preamble): “[...] expressing its intent to continue efforts to ensure that procedures are fair and clear,”

#### [Security Council resolution 1989 \(2011\)](#)

(Preamble): “[...] noting the Ombudsperson's important role in improving fairness and transparency, [...]”

### Second Report

42. The cases mentioned above have illustrated clearly the potential for the Office of the Ombudsperson to carry out a fair process. With cooperation from States and through the information-gathering process, the dialogue phase and the comprehensive report, key components of fairness (“knowing the case against you” and “having an opportunity to respond and be heard”) are being met. Moreover, the overall procedure allows the Ombudsperson to review the underlying information on a case and provide the Committee with an independent and objective assessment of whether the information is sufficient to warrant the continued listing of a given individual or entity. Since the adoption of Security Council resolution 1989 (2011), this aspect is now recognized more formally, as the Council mandated the Ombudsperson to provide a recommendation in addition to analysis, observations and an outline of principal arguments.

43. As to the fairness and transparency of the process in terms of deliberation and decision-making, the experience to date is too limited to provide a basis for any significant comment. The one point that can be made, at this early stage, is that Committee members have been carefully considering the comprehensive reports presented and engaging with the Ombudsperson with respect to their contents, a practice that hopefully will continue. In addition, with reference to this final phase of the process, consideration will need to be given to the changes resulting from Security Council resolution 1989 (2011), in particular paragraph 23, which deals with the decision-making process. Ultimately, any assessment will have to await practical implementation of that aspect of the resolution. However, in principle, the fact that a recommendation by the Ombudsperson in favour of de-listing can be disregarded by the Committee only through a consensus determination or by a decision of the Council represents a significant step forward in terms of enhancing the fairness and transparency of the process.

### Third report

42. Despite the challenges with respect to the gathering of information, there continue to be achievements in terms of enhancing the overall fairness and transparency of the process. In accordance with resolution 1989 (2011), the Ombudsperson and the Committee assess cases on the basis of the information made available to the Ombudsperson. Therefore, any lack of detail does not work to the prejudice of the petitioner. The information as gathered by the Ombudsperson, subject to any confidentiality restrictions, forms the case presented to the petitioner for response and is subsequently incorporated into and analysed in the comprehensive report. It also forms the basis for the recommendation of the Ombudsperson, and the Committee decisions taken since the adoption of resolution 1989 (2011) have been consistent with the recommendations made to date. Thus, the experience gained so far demonstrates that the cumulative process allows the petitioner to know and respond to the case and to be heard by the decision maker. Furthermore, the decisions in each case are made after the Committee has received the independent, objective assessment and recommendation of the Ombudsperson, formulated on the basis of a thorough review of the relevant underlying information gathered.

43. There continues to be interaction between the Ombudsperson and the States members of the Committee with respect to the comprehensive reports, which demonstrates the serious and detailed consideration given to each de-listing petition. It is evident that the reports are being examined in

capitals, and there have been exchanges with the Ombudsperson, involving several States, with respect to each case presented before the Committee.

44. Decisions in nine cases<sup>39</sup> have been taken in accordance with the revised procedure, all during the six-month period since the issuance of the second report of the Office. All have resulted in de-listing. To date, according to the information available to the Ombudsperson, no State has requested that a case be referred to the Security Council.

*Effect of resolution 1989 (2011)*

45. Overall, in the light of the application of the new procedures in the limited number of cases to date, it is already clear that the revised process encourages cooperation on the part of States with the Ombudsperson and serves to enhance the fairness and transparency of the decision-making process.

[Fourth report](#)

30. In the cases completed to date, the Ombudsperson process has operated in conformity with the fundamental principles of fair process which it was designed to address. The individual petitioners have been informed of the case against them through the combined effect of the information-gathering and dialogue phases. The information gathered by the Ombudsperson, subject to any confidentiality restrictions, has been presented to the petitioner. Each petitioner has also had an opportunity to respond to that case and be heard by the decision maker through the information imparted to the Ombudsperson in the dialogue phase and subsequently captured in the comprehensive report. In accordance with resolution 1989 (2011), the Ombudsperson and the Committee continue to assess each case on the information made available to the Ombudsperson, and that information also forms the basis for the recommendation of the Ombudsperson. In this reporting period, the Committee's decisions have once again been consistent with those recommendations and to date, no State has requested that a case be referred to the Security Council.

31. The experience with the individual delisting petitions in this reporting period has clearly demonstrated that the Ombudsperson procedure, as currently formulated by the Security Council, is a robust one with significant protections which enshrine the fundamental principles of fairness. Most notably, the detailed nature of the comprehensive report, in combination with the requirement for a consensus decision to overturn a recommendation by the Ombudsperson, has proven to be an essential safeguard for those principles. It ensures that, during the deliberation phase, the focus remains on the underlying information in the case and the reasons for the decision which the Committee will ultimately take.

32. In sum, through the Ombudsperson process so far, each petitioner has been informed and had an opportunity to be heard; the underlying information has been reviewed and assessed by an objective third party culminating in a recommendation; and the decision taken has been premised on the information gathered and the case as disclosed to the petitioner.

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<sup>39</sup> 12 Three individuals and six entities, as identified in footnotes 2 and 3. The six entities formed part of a single de-listing request.

### [Security Council resolution 2083 \(2012\)](#)

(Preamble) “noting the Office of the Ombudsperson’s significant contribution in providing additional fairness and transparency, [...]”<sup>40</sup>

### [Fifth report](#)

28. The practice during the reporting period further showed that the Ombudsperson process operates in compliance with the fundamental principles of fairness. In each of the completed cases, including the single instance in which delisting was denied, the petitioner was made aware of the case underlying the listing, with supporting information being provided to the greatest extent possible. The petitioner had the opportunity to respond factually and detail arguments, and his or her answer was fully presented to the decision maker through the comprehensive report of the Ombudsperson. The decisions made during the reporting period were all in accordance with the recommendation of the Ombudsperson, and no matter was referred to the Security Council. With regard to the case in which delisting was refused, detailed reasons were provided by the Committee and transmitted to the petitioner in accordance with resolution 2083 (2012). Regarding the other cases completed during the reporting period, the reasons for the decision are expected but have yet to be submitted. The cases have also demonstrated the importance of the structure of the process as mandated, in particular the requirement for consensus to overturn the recommendation of the Ombudsperson, in ensuring a fair decision-making process premised solely on the information gathered by the Ombudsperson and relayed to the petitioner.

29. Overall, since the Office of the Ombudsperson became operational, the experience has been consistent in terms of fair process. The petitioner has been notified of the case against him or her and has had an opportunity to respond and be heard by the decision maker. The underlying information is reviewed and assessed by an objective third party and, since the adoption of resolution 1989 (2012), that analysis has resulted in a recommendation that forms the basis for all of the decisions taken. While the possibility of a decision being overturned by consensus or of a case being referred to the Security Council exists, in practice this has never occurred. In addition, the strict timelines imposed by the Council for the consideration of the cases have contributed to the overall fairness of the process.

30. In this light, the Ombudsperson welcomes the extension of the mandate of the Office pursuant to resolution 2083 (2012), by which the Council retained, and in some instances strengthened, those critical components of the Ombudsperson system that safeguard the fairness of the process. [...]

### *Sufficiency of the process (Special Rapporteur<sup>41</sup>)*

52. In September 2012, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism submitted a report ([A/67/396](#)) focusing on fair process in the Al-Qaida sanctions regime with an emphasis on the Office of the Ombudsperson. Some specific aspects of the Ombudsperson process were addressed in detail in his report. The Special Rapporteur commented on several issues that had been addressed previously by the

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<sup>40</sup> Identical language in subsequent resolutions.

<sup>41</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/67/396](#)).

Ombudsperson and for which provisions have been incorporated into resolution 2083 (2012), eliminating the need to discuss those points in any detail.<sup>42</sup>

59. The Special Rapporteur, in the context of his specific mandate, has given an assessment of and his opinion on the overall fairness of the Ombudsperson process and its compatibility with international minimum standards of due process. It is evidently not appropriate for the Ombudsperson to comment on such a broad question, given the nature of the mandate accorded to her. Nevertheless, the Ombudsperson emphasizes the comments in paragraphs 28 and 29 above as to the fair nature of the procedure in the individual cases that have been considered through the Ombudsperson process to date.

#### Sixth report

32. The practice during the reporting period shows that the Ombudsperson process operates in compliance with the fundamental principles of fairness. With one exception, detailed below, in all of the cases completed since the previous report the petitioner was informed of the case underlying the listing. Moreover, in all instances the petitioner had an opportunity to respond to the disclosed case and to be heard by the decision maker through the comprehensive report. The underlying information related to each listing was objectively reviewed and assessed and all the decisions made during the reporting period followed the recommendation of the Ombudsperson. As a result, each petitioner benefited from an effective, independent review of the basis for the listing and the information supporting the same and all decisions taken were consistent with the conclusions reached by the independent reviewer. In no case did the Committee take a decision by consensus that was contrary to the recommendation of the Ombudsperson and no matter was referred to the Security Council. In the case in which the request for delisting was refused, detailed reasons were provided by the Committee and transmitted to the petitioner by the Ombudsperson in accordance with Council resolution 2083 (2012).

33. As noted, on one occasion there were problems with the communication of the case to the petitioner. The difficulties stemmed from the fact that information continued to be gathered well into the dialogue phase and that some of it was obtained at such a late stage that it could not be disclosed to the petitioner before completion of the comprehensive report. The case in question was a very complex one and the regrettable delays in the submission of information were attributable to the intricacy and denseness of the issues and to the challenges faced in gathering material. As a result of those delays, the petitioner was prejudiced as he did not see or have an opportunity to respond to all the relevant material. Moreover, because of the piecemeal way in which the information was communicated, he was not able to submit a comprehensive response to the case as a whole.

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<sup>42</sup> 11 The Special Rapporteur called for the Ombudsperson to be given a role with respect to humanitarian exemptions and bringing them to the attention of the Committee. This was addressed in resolution 2083 (2012) through the focal point, who has been accorded that responsibility. The Special Rapporteur also voiced support for the need for the Ombudsperson to be able to disclose to the petitioner the identity of the designating State(s) and has called for mandatory reasons for delisting and proper resources for translation/interpretation. As discussed above, there are new provisions on these issues in resolution 2083 (2012).

34. In that particular case, the decision was taken to retain the listing; detailed reasons for that determination were transmitted to the petitioner by the Ombudsperson. In addition, to address the fair process concerns, the Ombudsperson sent the petitioner a summary of the information gathered in the case that was as detailed as possible. New information not previously communicated was highlighted in the document. In her communication, the Ombudsperson outlined the concerns about the process to the petitioner. In addition, the petitioner was invited to consider the full summary and to submit any comments he might wish to make on the material, in particular with reference to any additional information not previously communicated. Should he choose to do so, his response will be assessed by the Ombudsperson with a view to deciding whether it meets the threshold for a new petition.

35. While this obviously is not ideal, the Ombudsperson is satisfied that this additional step accords the petitioner with an appropriate recourse for the fair process deficiencies in this particular instance. On this basis, it remains the case that during the reporting period the Ombudsperson process continued to deliver, in the individual cases, a process that was fair overall.

#### [Seventh report](#)

32. The Ombudsperson process continues to operate in compliance with the fundamental principles of fairness highlighted in previous reports.<sup>43</sup> Notably, in all cases completed during the reporting period, the petitioner was informed of the case underlying the listing and had an opportunity to respond and be heard by the decision maker through the Ombudsperson's comprehensive report. All Committee decisions on delisting petitions made during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendation. In no case did the Committee take a decision by consensus contrary to the recommendation of the Ombudsperson and no matter was referred to the Security Council. As a result, each petitioner benefited from an effective, independent review of the basis for the listing and the information supporting it.

33. On one occasion, however, a petitioner's name was placed on the Al-Qaida sanctions list immediately after the Committee's decision to delist, with the result that the petitioner continues to be subject to the same sanctions measures. Given the proximity of the two decisions and the combined effect on the petitioner, the ramifications of this case for the fairness of the Ombudsperson process merit consideration.

34. The decision to relist was the result of a separate and independent decision of the Committee in which the Ombudsperson had no role. However, in a press release, the Committee stated that the decision had been taken on the basis of new information concerning recent support to Al-Qaida by the petitioner. That information was not available to the Ombudsperson when the comprehensive report was delivered to the Committee and was therefore not considered by the Committee when making its decision on the petition.<sup>44</sup>

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<sup>43</sup> 9 See in particular the detailed discussion in paragraphs 28-32 of the sixth report (S/2013/452).

<sup>44</sup> 10 See [www.un.org/News/Press/docs/2014/sc11241.doc.htm](http://www.un.org/News/Press/docs/2014/sc11241.doc.htm).

35. The circumstances surrounding the relisting decision are significant in terms of the fairness of the Ombudsperson process. Although the Committee evidently received new information prior to the delisting, it did not rely on it in assessing and deciding on the petition. This is consistent with a fundamental fairness precept of the Ombudsperson process: that the Committee's decision be premised solely on the information gathered by the Ombudsperson as detailed in the comprehensive report. If the Committee were to rely on additional material not disclosed to the petitioner and scrutinized by the Ombudsperson, it would contravene the principles of fair process in terms of knowing and responding to the case, as well as effective independent review. Given that the new information played no part in the decision on the delisting petition, however, the Ombudsperson process in the specific case remained procedurally fair.

36. Particularly from the perspective of the petitioner, it is unfortunate that the Committee received new information at such a late stage in its consideration of that particular listing. Nonetheless, the possibility of new material surfacing late or even subsequent to delisting has always existed. While the timing is certainly regrettable, relisting on the basis of new information does not constitute an unfair procedure absent any other circumstances indicating to the contrary. Moreover, as the decision to list constitutes a new determination by the Committee, at least with respect to the Al-Qaida sanctions list, the petitioner has an immediate recourse available in that he can seek delisting through the Ombudsperson process. In this case, in accordance with paragraph 18 (b) of annex II to Security Council resolution 2083 (2012), the Ombudsperson has already notified the petitioner of the relisting and the availability of the Ombudsperson process.

37. The Ombudsperson is of the view that an independent decision to relist does not affect the fairness of the Ombudsperson process, in general or in this specific case. Thus, during the reporting period the Ombudsperson process continued to deliver, in the individual cases, a fair process.

#### *Time frames*

38. Another important factor when assessing the fairness of the process is its expeditiousness. Based on the current regime as mandated by the Security Council, the possible time frame for the consideration of a delisting request ranges from approximately 8 to 14 months.<sup>45</sup> Statistics show that in the three and a half years of operation of the Ombudsperson mechanism, the average time between the submission of a delisting request and the Committee's decision on the same has been just more than nine months. This number speaks for itself and is clearly a testament to the fact that there is a focus on making the process as expeditious as possible.

#### [Security Council resolution 2161 \(2014\)](#)

Annex II, paragraph 3: "Where all designating States consulted by the Ombudsperson do not object to the petitioner's delisting, the Ombudsperson may shorten the information gathering period, as appropriate."<sup>46</sup>

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<sup>45</sup> 11 These average numbers do not take account of the timing of the delivery of reasons (see below), as this requirement was adopted too recently with respect to granted delisting requests to be meaningfully assessed at this time.

<sup>46</sup> Identical language in subsequent resolutions.



### [Eighth report](#)

34. The Ombudsperson process continues to operate in compliance with the fundamental principles of fairness highlighted in previous reports.<sup>47</sup> In all cases completed in the reporting period, the petitioner was informed of the case underlying the listing and had an opportunity to respond and to be heard by the decision maker through the Ombudsperson's comprehensive report. While confidential material, which could not be disclosed to the petitioner, was relied on in one of the cases considered in the reporting period, the Ombudsperson was of the view that on the basis of the totality of the disclosed material in that instance, the petitioner did know the substance of the case if not all the details. All the Committee decisions on delisting petitions made during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendation. In no case did the Committee take a decision by consensus contrary to the recommendation and no matter was referred to the Security Council. As a result, each petitioner benefited from an effective, independent review of the basis for the listing and the information supporting it.

35. All of the features of the Ombudsperson process have been retained in resolution 2161 (2014) and the mandate of the Ombudsperson has been extended for an additional 30-month period from 15 July 2015. The essential time frames, which contribute appreciably to the overall fairness of the process, have been maintained with some additional deadlines added to enhance the timeliness of aspects of the procedure.<sup>48</sup> In addition, paragraph 3 of annex II to resolution 2161 (2014) now provides the Ombudsperson with the discretion to shorten the information-gathering period in cases where all the designating States consulted do not object to delisting. This will augment the fairness of the process for petitioners by allowing for a reduced time frame for consideration of the request in appropriate cases.

### [Ninth report](#)

36. As highlighted by the Ombudsperson in her oral briefing to the Security Council in October, while international law in this area continues to evolve, a consistent message comes from the relevant international instruments, authorities and jurisprudence. The imposition of targeted sanctions, which directly affect the rights of individuals and entities, without the availability of an independent review mechanism which can deliver an effective remedy, is a practice inconsistent with fundamental human rights obligations. The Ombudsperson mechanism has been criticized in principle for not going far enough in this regard, in particular as the decisions of the Ombudsperson are not fully binding. However, it has not been disputed that in practice, if the recommendations of the Ombudsperson are followed, as they have been to date, the mechanism can deliver a fair process and independent review, with the availability of an effective remedy for individual petitioners.

37. Through extensive practice over four and a half years of operation, the Ombudsperson mechanism has consistently met these goals with respect to the delisting applications presented, as

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<sup>47</sup> 7 See in particular the detailed discussion in the sixth report (S/2013/452, paras.28-32).

<sup>48</sup> 8 See the discussion below on the time limit for the transmittal of reasons by the Committee to the Ombudsperson.



highlighted in previous reports.<sup>49</sup> Once again in the cases completed in this reporting period, the petitioner was informed of the case underlying the listing, and had an opportunity to respond and to be heard by the decision maker through the Ombudsperson's comprehensive report. All the Committee decisions on delisting petitions made during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendation. In no case did the Committee take a decision by consensus contrary to the recommendation and no matter was referred to the Security Council. As a result, each petitioner benefited from an effective, independent review of the basis for the listing and the information supporting the same.

38. Further, with additional experience, the positive comments made about the robustness of the protections to the fairness of the process,<sup>50</sup> arising from the procedures designed by the Security Council, have only been reinforced. Committee member interaction with the Ombudsperson with regard to the comprehensive reports has increased in scope and thoroughness both at the individual and the collective level. This too has added to the thoroughness and effectiveness of the mechanism. The firm timelines for the process also continue to ensure a strong and effective mechanism for the efficient consideration of delisting petitions.

### Tenth report

#### *Overall assessment*

26. This tenth report marks five years of implementation of the Security Council mandate with respect to the Office of the Ombudsperson. Experience over this period has consistently demonstrated that the mechanism designed by the Council provides for an independent review process that comports with the principles of fairness and is able to deliver an effective remedy. In this regard, the practice with respect to sanctions imposed by the Al-Qaida sanctions Committee comports with fundamental human rights principles and international law as envisaged in Article 1 of the Charter of the United Nations. The mechanism also meets the criteria for the independent review process postulated by former Secretary-General Annan and urged in various forums.<sup>51</sup>

27. The number of applications to date, 64, also shows that the mechanism is needed, and that the design of the process and the approach to implementation by the Ombudsperson have generated confidence in the mechanism.

28. Experience to date has reinforced the critical components of the process, which, individually and in combination, make it robust and effective. There are limited procedural requirements for the

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<sup>49</sup> 8 See in particular the detailed discussion in the sixth report (S/2013/452), paras. 28-32. See also the eighth report (S/2014/553), para. 34; the seventh report (S/2014/73), para. 32; and the fifth report (S/2013/71), paras. 28-30.

<sup>50</sup> 9 See the fourth report (S/2012/590), paras. 30-32.

<sup>51</sup> 3 These principles include the right of a person against whom measures have been taken by the Security Council to be informed of those measures and to know the case against him or her as soon as and to the extent possible; the right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body; and the right to review by an effective review mechanism. (See S/PV.5474 (2006), p. 5, for comments by the Legal Counsel of the United Nations on behalf of the Secretary-General at the 5474th meeting of the Security Council, on 22 June 2006, during which he read from a letter and the non-paper annexed thereto from the Secretary-General to the Security Council setting out his views concerning the listing and delisting of individuals and entities on sanctions lists.)

submission of a delisting request. This has made the mechanism easily accessible, especially for individuals without legal representation, which has been the circumstance with respect to almost half of the cases to date. The dialogue phase and the Security Council's exhortation to the Ombudsperson to meet with petitioners<sup>52</sup> for that exchange have proved to be features which are integral to fairness and essential to effectiveness. It is through this phase that the principles that the petitioner must know the case against him and must have an opportunity to respond to the case are fulfilled. In addition, the face-to-face interaction provides a critical opportunity for the Ombudsperson to assess the validity of the petition and the credibility of the petitioner.

29. As recognized in previous reports,<sup>53</sup> the architecture of the process, in particular the fixed timelines for all of the procedural stages, has been fundamental to success and has contributed considerably to the credibility of the mechanism and the external perception of this quality.

30. The requirement that reasons be given for the decisions taken in both delisting and retention cases has been instrumental in demonstrating that the process is reasonable, as opposed to arbitrary. The provision of reasons also serves as an opportunity to disseminate information beyond the Committee and the Ombudsperson, thereby enhancing the transparency of the process generally. It also allows for the underlying basis of decisions to be communicated to other bodies, such as domestic and regional courts, in particular cases where merited.

31. Finally, the limited circumstances in which a recommendation for delisting by the independent reviewer can be overridden<sup>54</sup> and the fact that the exceptions have not been resorted to in practice remain vital to the categorization of the Ombudsperson process as one which is fair, independent and able to deliver an effective remedy.

#### *Assessment during the reporting period*

32. In each of the cases completed during the reporting period, the petitioner was informed of the case underlying the listing and had an opportunity to respond and to be heard by the decision maker through the Ombudsperson's comprehensive report. While confidential material was considered in two cases, the Ombudsperson remained satisfied that the petitioner was still aware of the substance of the case to be met.

33. All of the decisions made by the Committee on delisting petitions during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendation. In no case did the Committee take a decision by consensus contrary to the recommendation, and no matter was referred to the Security Council. Therefore, all cases met the fundamental requirements of fairness in terms of providing each petitioner with the opportunity to

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<sup>52</sup> 4 Security Council resolution 2161 (2014), annex II, paragraph 7 (c).

<sup>53</sup> 5 See the fourth report (S/2012/590), para. 36; and the ninth report (S/2015/80), para. 38.

<sup>54</sup> 6 Pursuant to Security Council resolution 2161 (2014), annex II, para. 15, listing will be terminated 60 days after the Committee completes consideration of a comprehensive report of the Ombudsperson recommending delisting, unless the Committee decides by consensus before the end of that 60-day period to retain the listing; or the Chair, at the request of a Committee member, submits the question of delisting to the Security Council for a decision within a period of 60 days.

know and respond to the case against him and the availability of an independent review process and an effective remedy.

34. However, during the reporting period, in accordance with administrative guidelines, the Secretariat initiated a process for the replacement of the incumbent Ombudsperson. Unfortunately, for the resulting transition, the Secretariat has elected to rigidly apply the five-year contractual limitation arising from the guidelines, without any regard for the status of the pending cases. In particular, the deadline set did not take account of cases which were at an advanced stage in the Ombudsperson process, such that fairness mandated that they be completed by the incumbent. Furthermore, no respect was shown for the time periods mandated by the Security Council for the completion of those cases. In addition, neither the practical effects that a reduction in those deadlines would have on the fairness of the process nor the ability of the Ombudsperson to complete the necessary work within that time frame was taken into consideration. Appeals for a limited extension to allow for a natural transition date based on the status of the cases went unheeded.

35. As a result of this approach, the process with respect to Case 60 has been rendered unfair. Specifically, as a result of the Secretariat's actions, the time period mandated by the Council for consideration of the petition was overridden and reduced by over two weeks. This meant that the petitioner was not accorded the benefit of the process provided for by the Security Council and available in the context of other delisting petitions that were presented. Critically, the Ombudsperson considered that this case merited a fully extended dialogue phase for complete and proper interaction with the petitioner and the preparation of the comprehensive report. That was not possible because of the shortened deadline. Owing to efforts within the Office of the Ombudsperson, the report relevant to this case was submitted prior to the departure of the incumbent. The Ombudsperson is satisfied that, ultimately, the report was sufficiently comprehensive. It contained adequate information and a complete analysis for the Committee to consider in reaching a decision and, notably, it fully protected the right of the petitioner to be heard by the decision maker. As a result, in the view of the Ombudsperson, the petitioner did not suffer actual prejudice. However, it is highly regrettable that, in principle, this individual did not benefit from a fair and equal process.

36. Two other cases were similarly rushed to completion as a result of shortened time periods, which limited the ability of the Ombudsperson to follow up on particular matters. While that affected the comprehensiveness of the reports in comparison with general practice, it did not, in the view of the Ombudsperson, affect the outcome or render the process unfair in those two cases.

37. At the time of the preparation of reporting, there also remained the potential for the procedure in one other case to be damaged, as discussed below in relation to the transition.

#### [Eleventh report](#)

##### *Assessment during the reporting period*

34. All the Committee decisions on delisting petitions made during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendations.

In no case did the Committee take a decision by consensus contrary to the recommendation, and no matter was referred to the Security Council. While confidential material was considered in two transition cases during the reporting period, the Ombudsperson remained satisfied that the petitioner was still aware of the substance of the case to be met. In terms of knowing and responding to the case and benefiting from an independent review and the availability of an effective remedy, all of the cases met these fundamental requirements of fairness.

#### [Twelfth report](#)

28. All the Committee decisions on delisting petitions made during the reporting period were premised solely on information gathered by the Ombudsperson and followed her recommendations. In no cases did the Committee take a decision by consensus contrary to the recommendation, and no matters were referred to the Security Council. While confidential material was considered in two cases during the reporting period, the Ombudsperson remained satisfied that the petitioner was still aware of the substance of the case to be met. Therefore, in terms of knowing and answering the case and benefiting from an independent review and the availability of an effective remedy, all of the cases met these fundamental requirements of fairness.

#### [Thirteenth report](#)

##### *Access to petitioners*

25. The decision taken by the Committee on a delisting petition during the reporting period was premised solely on information gathered by the Ombudsperson and followed her recommendation.

26. During the reporting period, the Ombudsperson was unable travel to interview two petitioners in person because their countries of residence did not deliver entry visas in time. The Ombudsperson is satisfied that, given the particular circumstances of their cases, the situation did not jeopardize fairness to those petitioners. In the first case, the Ombudsperson had planned to travel to meet the authorities and interview the petitioner in early January 2017. However, in November 2016, she was informed by the Secretariat that, as a result of the consultancy nature of her contract, it could not extend her contract in time to approve travel in early January. In order to avoid imposing undue delay on the petitioner, and with a view to saving on costs, the Ombudsperson decided to prepone her travel in that case and to combine it with other travel. When it became clear that the relevant authorities would be unable to issue an entry visa in time, the Ombudsperson arranged a video conference with the petitioner with the support of a United Nations entity. That was possible only because the petitioner did not require interpretation. The Ombudsperson has nonetheless requested to meet with the Ambassador of the relevant Permanent Mission to the United Nations to explore ways to avoid similar occurrences in the future, and hopes that that discussion will take place soon.

27. In the second case, the Ombudsperson informed the relevant Permanent Mission a month in advance of her plan to visit the authorities<sup>55</sup> and to interview the petitioner in country. However, the Permanent Mission could not deliver a visa because it had not received a letter from its capital

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<sup>55</sup> 7 The State of nationality and residence did not respond to the Ombudsperson's request for information and did not seek an extension of the time in which to do so.

authorizing the visit. The Ombudsperson first postponed her visit by a week to give that State additional time to issue the visa, which would have allowed her to combine that visit with previously arranged travel. However, the limited amount of information that had been gathered in that case minimized the need for an in-person interview. In addition, the petitioner could not be interviewed through videoconferencing because he required interpretation. While not ideal, the Ombudsperson therefore ultimately opted for a written dialogue and considers that doing so did not affect the overall fairness of the process in that particular case. The Ombudsperson subsequently met with the Permanent Representative of the relevant State, who assured her that pertinent information in the case would be provided, if available. The Ombudsperson is satisfied that a suitable procedure is now in place to prevent similar situations from arising in the future.

#### Fourteenth report

##### *Access to petitioners*

23. During the dialogue phase, the Ombudsperson is required to meet with the petitioner, to the extent possible.<sup>56</sup> During the reporting period, the Ombudsperson approached the authorities of one of the designating States in the case of a detained petitioner with a view to exploring the possibility of meeting him in person. An in-person interview is in principle the best way to assess a petitioner's credibility and state of mind. Not only is such an assessment critical to determining whether he or she has engaged in a disassociation process, it is also important in cases where a petitioner has been detained for a significant period of time and no recent information on any activities in support of a listed entity is available.<sup>57</sup> In this particular case, moreover, in the light of the information gathered, an in-person interview would inevitably have generated an extensive number of topics, questions and follow-up questions. In this case there was no other opportunity for the petitioner to be heard.

24. The Ombudsperson had the opportunity to meet with the relevant authorities early in the process and to explain the importance of conducting an in-person interview in this particular case. However, without providing any reason, those authorities informally conveyed to the Ombudsperson that no in-person contact with the petitioner would be authorized in this case. Further, the Ombudsperson received no response to her repeated attempts to explore the possibility of providing the petitioner with an opportunity to be heard through another form of engagement with the Ombudsperson, whether through videoconference or even telephone. This complete lack of cooperation from the State in question with respect to access to the petitioner is all the more surprising as this State usually extends support and cooperation to the Office of the Ombudsperson. As no access to the petitioner was granted to the Ombudsperson, she had no choice but to meet with the petitioner's counsel instead. As a result, the Ombudsperson was unable to engage with the petitioner and directly assess the petitioner's current state of mind. The Ombudsperson based her analysis and recommendation on the information before her and submitted her report to the Committee. However, the petitioner in this case had no opportunity to know the case and respond to the information. As a result, the petitioner was not accorded all the elements of fairness envisaged under resolution 2368 (2017). The Ombudsperson raised her concerns in this respect with the Committee and proposed an exceptional measure to mitigate the

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<sup>56</sup> 4 Resolution 2368 (2017), annex II, para. 7 (c).

<sup>57</sup> 5 See S/2017/60, para. 32.

fact that the petitioner did not get the opportunity to know the case against him. At the date of this report, the case remains pending before the Committee.

### [Update by the Office of the Ombudsperson](#)

#### *Access to petitioners*

24. In her last report to the Security Council, the Ombudsperson described one case in which the petitioner did not have an opportunity to be heard, to know the case and respond to the information as a result of the Ombudsperson's not being granted access to him. The Ombudsperson concluded that the petitioner had not been accorded all the elements of fairness envisaged under resolution 2368 (2017). She indicated that she had raised her concerns in this respect with the Committee and proposed an exceptional measure to mitigate the fact that the petitioner had not had the opportunity to know the case against him. The Committee has since concluded its consideration of the case but rejected the exceptional measure proposed by the former Ombudsperson.

### [Sixteenth report](#)

#### *Access to petitioners*

26. [...] 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.

## Transparency of the process

### [Fourth report](#)

38. In resolution 1989 (2011), the Security Council set out in detail the process by which requests for delisting are to be considered by the Committee with the assistance of the Ombudsperson. This

includes clear timelines and a delineation of the three means by which the ultimate decision with respect to any delisting petition will be taken: by the Committee in accordance with the recommendation of the Ombudsperson, through a consensus decision contrary to the recommendation, or by a Security Council vote. In so doing, the Security Council significantly enhanced the fairness of the process by allowing for a transparent procedure whose component steps and their timing are apparent to the petitioners and to the public.

39. The Ombudsperson further contributes to transparency by disclosing information as far as possible<sup>58</sup> and advising the petitioner and interested States as to the progress of the delisting petition at each stage up to the consideration of the comprehensive report by the Committee. However, under the current mandate the Ombudsperson is constrained in terms of the information which can be disclosed to the petitioner, to an interested State that is not a member of the Committee or to the public. Most notably, the comprehensive report is confidential to the Committee, and this includes even the recommendation made by the Ombudsperson in the report. Moreover, resolution 1989 (2011) provides no basis for the Ombudsperson to update the petitioner and relevant States about the progress of the case once it reaches the Committee for consideration and decision, other than with respect to her own activities.<sup>59</sup> Similarly, once a decision has been taken on a petition, it is not clear whether the Ombudsperson can make any public disclosure as to which of the three options was employed in reaching that conclusion.

40. A case can certainly be made for more open access to the comprehensive reports of the Ombudsperson or portions thereof. The Monitoring Team, for example, has recommended more transparency for these reports and has advanced a well-grounded argument in support of its recommendation.<sup>60</sup> However, the most pressing issue at the moment relates specifically to the inability of the Ombudsperson to disclose the recommendation made, and the next steps taken in the specific case, to the petitioner and to an interested State that is not a Committee member. Further, the absence of full public transparency as to how the options in the resolution are being applied in specific cases is equally problematic.

41. These constraints unnecessarily impair the transparency of the Ombudsperson and Committee processes and detract from their credibility and fairness. Further, the underlying rationale for these restrictions is not clear, as they do not relate to the sensitive issue of information provided or positions taken by individual States on the request. Moreover, confidentiality is somewhat misplaced in this context given that the timelines applicable in accordance with resolution 1989 (2011) will be apparent to the petitioner, interested States and even the general public, for the most part.<sup>61</sup> In most instances, individuals and States will be able to deduce what the recommendation was, whether the “trigger mechanism” applied or a consensus decision to overturn was reached or if

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<sup>58</sup> 11 The Ombudsperson will disclose the information gathered in the case to the petitioner except for any material subject to confidentiality constraints. The Ombudsperson will also generally disclose the description of the petitioner’s case which is to be incorporated into the comprehensive report to ensure that the petitioner is satisfied with it.

<sup>59</sup> 12 The Ombudsperson does advise petitioners and relevant States when she is to appear before the Committee to present a comprehensive report.

<sup>60</sup> 13 See, for example, S/2011/245, para. 38.

<sup>61</sup> 14 It will not be evident when the 30-day time period for consideration will begin since it will not be generally known when translations are delivered.

the matter was referred to the Security Council, simply as a result of the time it takes for the decision.

42. The decision ultimately taken by the Committee or the Security Council with respect to a delisting petition directly affects the rights of the petitioner. It is essential for fairness that he or she be made aware of the particulars of the process in his or her case as it progresses. Similarly, a designating State or State of residence which is not a member of the Committee but has a direct interest in the outcome should have access to the same information and within the same time frame. And for the overall transparency, credibility and fairness of the process, the manner in which the decision was taken in an individual case should be publicly disclosed at the end of the process. Consistent with the important steps taken by the Security Council to make clear the applicable procedure for delisting petitions generally, it would seem reasonable to remove any secrecy as to how that process is applied in individual cases.

43. For all of these reasons, it would be useful if consideration were given to empowering the Ombudsperson to disclose the recommendation made in the comprehensive report to the petitioner and interested States which are not members of the Committee, once the Committee has concluded its consideration of the case. The Ombudsperson should also be mandated to keep the petitioner and States informed of the steps taken subsequently, including the timing of the circulation of the request under the Committee's no-objection procedure<sup>62</sup> and the particular method by which the decision is ultimately made. Further, at the conclusion of the case, the Ombudsperson should be permitted to publicly identify in each individual case whether the decision to retain or delist was based on the recommendation of the Ombudsperson, a consensus decision by the Committee to retain the listing or a Security Council referral and vote.

*See also paragraph 51 of the [Fourth report](#) concerning the lack of transparency arising from the uncertainty around the time when the 30-day period for consideration of the report by the Committee begins (Section on [Translation](#))*

#### [Security Council resolution 2083 \(2012\)](#)

"11. After the Committee has completed its consideration of the Comprehensive Report, the Ombudsperson may notify all relevant States of the recommendation."<sup>63</sup>

"17. The Ombudsperson may notify the petitioner, as well as those States relevant to a case but which are not members of the Committee, of the stage at which the process has reached."<sup>64</sup>

#### [Fifth report](#)

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<sup>62</sup> 15 The fact that the request will be circulated under the no-objection procedure in the case of a recommendation for delisting is publicly known by virtue of paragraph 7 (ee) of the guidelines of the Committee for the conduct of its work, found at [https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/guidelines\\_of\\_the\\_committee\\_for\\_the\\_conduct\\_of\\_its\\_work\\_0.pdf](https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/guidelines_of_the_committee_for_the_conduct_of_its_work_0.pdf).

<sup>63</sup> Identical language in subsequent resolutions.

<sup>64</sup> Identical language in subsequent resolutions.



40. Only marginal progress has been made in resolution 2083 (2012) to enhance the transparency of the Ombudsperson process. The resolution continues to describe the general procedures in detail, and two additions have been made in terms of disclosure of information about the application of the procedure in individual cases. The Ombudsperson is now specifically authorized to notify the petitioner and relevant States that are not members of the Committee of the stage reached in the process. This will be helpful in ensuring that the petitioners and interested States are kept informed of the general progress of the case. Furthermore, at the end of the consideration of the case by the Committee, the Ombudsperson may now advise interested States that are not members of the Committee of the recommendation made, which will be very beneficial to the implicated States and support the overall process by ensuring that States that are asked to cooperate will be given information on the results.

41. However, despite those developments, much of the procedure, including the critical recommendation of the Ombudsperson, remains a subject for pure speculation for the petitioner. As for the public, including such interested bodies as courts and academia, the transparency of the process is not enhanced. This is disappointing, given the importance of general transparency to the credibility of the Ombudsperson regime.

42. In addition, the decision not to provide for the disclosure of any specific information to the petitioner perpetuates inequality between petitioners. As the applicable timelines in accordance with resolution 2083 (2012) and the guidelines of the Committee for the conduct of its work are apparent from a careful review of the same,<sup>65</sup> petitioners or counsel who are fully acquainted with the provisions of the resolution and the guidelines will be able to deduce what the recommendation of the Ombudsperson was and whether the “trigger mechanism” applied, a decision was overturned by consensus or the matter was referred to the Security Council, simply as a result of the time it takes for the decision. On the other hand, petitioners who are less familiar with or who have limited access to the resolution will be left largely in the dark throughout the process.

43. The decision ultimately taken by the Committee or the Security Council with respect to a delisting petition directly affects the rights of the petitioner, and thus it is essential, in the interest of fairness, that he or she be made aware of the particulars of the process in his or her case as it progresses. This should include not only general information on the timing and stages but also the critical decisions made and, for completeness, the reasoning behind the decisions.

44. With regard to the general public, the lack of disclosure of information and the reluctance to do so can only serve to raise suspicions as to the fairness and effectiveness of the Ombudsperson process.

45. Overall, while improvements have been made, the lack of transparency in the process for the petitioner and the general public remains a considerable concern.

[..]

53. The Special Rapporteur has reiterated the position of the Ombudsperson calling for the disclosure of the Ombudsperson’s recommendation to the petitioner. He has also gone further to

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<sup>65</sup> 10 It will not be evident when the 30-day time period for consideration will begin, since in general the date on which translations are delivered will not be known.

recommend the general publication of the comprehensive report, subject to any necessary redactions ([A/67/396](#), para. 50). He has argued forcefully for those steps in support of greater transparency of the process. As discussed above, the Ombudsperson agrees fully with the Special Rapporteur's comments on the deficiencies in the transparency of the process. No measures to address those specific deficits were included in resolution 2083 (2012),<sup>66</sup> and the Ombudsperson joins the Special Rapporteur in recommending that measures be adopted in any future resolution to enhance the procedure in this respect.

### [Sixth report](#)

50. Problems with the lack of transparency in the process have continued to be evident during the reporting period. Security Council resolution 2083 (2012) allows for the Ombudsperson to communicate her recommendation to States that are not members of the Committee. The comprehensive report, however, remains confidential to the Committee; relevant States that are not members of the Committee are not aware of the information gathered, the analysis conducted or the basis for the recommendation made. This limitation not only weakens the transparency and credibility of the process, it also has the potential to have a negative impact on the cooperative relationship between the Ombudsperson and these States. To minimize the damage in that regard, in some instances the Ombudsperson has sought the consent of the Committee to disclose some factual information about the case and to discuss the outcome with the relevant States. Such requests have been granted. Nonetheless, the discussion is still limited by the confidential nature of the overall process. As to the extent of the problem, it is notable that every case during the reporting period involved a non-Committee member as either a designating State or a State of residence.

51. The confidentiality restrictions with reference to States also create a fundamental inequality in terms of access to information between States that objectively have an equal interest in knowing and understanding the basis for the recommendation of the Ombudsperson and the decision taken in the case. In sum, it is not clear why membership in the Committee, whether temporary or permanent, should allow one designating State or State of residence to have more information on a case than another.

52. With reference to the petitioner, as detailed in the previous report, the process remains frustrating in its lack of transparency. The recommendation of the Ombudsperson cannot be disclosed and the petitioner is not advised as to the analysis leading to the same, except to the extent that it is captured in any reasons provided. As for the public — including interested bodies such as courts and academia — only basic information on the overall process and the statistics related to the cases are disclosed. The lack of transparency in the process for the petitioner and the general public detracts from the fairness and credibility of the process as a whole.

### [Seventh report](#)

#### *Mechanism for Disclosing the reasons*

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<sup>66</sup> 12 As discussed in paragraph 40 above, there have been some improvements in terms of disclosure of status information and with respect to information provided to States that are not members of the Committee.

49. There is another important consideration pertaining to the provision of reasons in the Ombudsperson process. As discussed in detail below, there is still limited transparency in the Ombudsperson procedure flowing mostly from the fact that the comprehensive report is not made available to interested States, the petitioner or the public. As a result, the reasoning of the Ombudsperson for arriving at a recommendation is not generally available. The sole exception is the information conveyed through the reasons, which are provided to the petitioner. This is the only mechanism established by the resolution through which it might be possible to disclose some of the factual information and findings in a case beyond the Office of the Ombudsperson and the Committee.

50. Currently, however, no means are specified in the resolution for those reasons to be publicly disclosed or even disseminated to clearly interested parties such as States that are not members of the Committee, courts or national, regional and international bodies that might be implicated in particular cases. This is a significant lacuna in the process, the rationale for which is unclear. As the reasons are disclosed to the petitioner, who is free to disseminate them, there can be no question of confidentiality or protection of information. Moreover, a case-by-case approach is not satisfactory in this context, as the petitioner evidently should know from the beginning of the process how and to whom reasons will be disseminated. To the extent that there are concerns arising from a possible lack of consensus within the Committee, the proposal to mandate the Ombudsperson with the responsibility to prepare and disseminate the reasons for the recommendation made would address those apprehensions.

51. The absence from the resolution of a prescribed mechanism for disclosing reasons is evidently an issue in terms of transparency. It can also have practical ramifications for the effectiveness of the process, however, particularly at a time when there is increasing parallel consideration of individual cases at the national, regional and international levels. In this context, it is in the interest of fairness and the effectiveness of the sanctions measures that information on the decisions taken and the reasons for taking them be shared.

52. For all those reasons, consideration should be given to making public through the Ombudsperson process the reasons for removing or retaining a listing or, at least, to providing for the disclosure of information on those reasons to interested individuals, States or bodies.

#### *Transparency of the process*

55. Lack of transparency in the process continues to present the same challenges, as noted in other reports, with respect to the fairness and the credibility of the process as a whole. While the Security Council, by its resolution 2083 (2012), allows the Ombudsperson to disclose the recommendation to relevant States, the comprehensive report remains confidential, with the result that relevant States that are not members of the Committee are not aware of the information gathered, the analysis conducted or the basis for the recommendation.

56. Provided that there are protections in place for confidential material, it is difficult to rationalize why interested States that are not members of the Committee (in particular designating States or States of residence) are not given access to the comprehensive report. In each case, those States will have been fully implicated in the Ombudsperson process in terms of the provision of information and will be expected to cooperate fully in that regard. Nevertheless, the State will ultimately receive

no substantive information as to the basis for the recommendation made or the decision taken. It also creates obvious problems in terms of the relationship of cooperation between the Ombudsperson and the State. Moreover, in most cases, these are the States that ultimately will feel the effects of the decisions most directly and that will have important implementation responsibilities. In principle, it is evidently a practice that creates a significant inequality between States that are members of the Committee and States that are not, with reference to a sanctions regime in which all States are encouraged to participate. As such, in addition to the issues of lack of transparency and overall fairness, it appears to be counterproductive in terms of the effective implementation of the sanctions regime.

57. In some cases, the Committee's permission to disclose the report or parts thereof has been sought, especially where there could be damage to the Ombudsperson's ongoing relationship with the State. This is not a particularly satisfying solution, however, given that it provides no certainty to the relevant States or the petitioner as regards disclosure of information to such States. For all those reasons, consideration should be given to allowing for the comprehensive report to be disclosed to designating States, States of residence and nationality and any other relevant State.

58. The Ombudsperson cannot disclose the comprehensive report or her recommendation to the petitioner, who is thus left uninformed about the findings and final position of the Ombudsperson and about the analysis leading to that position, except, as discussed, to the extent that it is captured in any reasons provided. The petitioner, whose rights are directly affected by the sanctions measures and who will have been advised of the underlying information in the case, as far as possible, should have the opportunity to review and understand the findings and analysis of the Ombudsperson. Any confidential material in the report can easily be protected through the creation of a redacted version. To enhance the transparency and fairness of the Ombudsperson process, consideration should be given to a mechanism for disclosing the comprehensive report to the petitioner. At the very least, the Ombudsperson should be able to inform the petitioner of her recommendation at the same time as relevant States that are not members of the Committee are informed.

59. As to the public, only basic information on the process and the statistics related to the cases can be released. The overall lack of transparency for the general public undermines the fairness and credibility of the process as a whole. The most effective remedy would be to provide for public disclosure of the reports with proper measures in place to ensure the protection of confidential material.

[Security Council resolution 2161 \(2014\)](#)

"13. Upon the request of a designating State, State of nationality, residence, or incorporation, and with the approval of the Committee, the Ombudsperson may provide a copy of the Comprehensive Report, with any redactions deemed necessary by the Committee, to such States, along with a notification to such States confirming that:

- (a) All decisions to release information from the Ombudsperson's Comprehensive Reports, including the scope of information, are made by the Committee at its discretion and on a case-by-case basis;
- (b) The Comprehensive Report reflects the basis for the Ombudsperson's recommendation and is not attributable to any individual Committee member; and

(c) The Comprehensive Report, and any information contained therein, should be treated as strictly confidential and not shared with the petitioner or any other Member State without the approval of the Committee.”<sup>67</sup>

### [Eighth report](#)

#### *Transparency of the process: interested States/petitioner*

43. Resolution 2161 (2014) brings about some welcome change with respect to the disclosure of information to interested States that are not members of the Security Council. Paragraph 13 of annex II stipulates that, if requested, the Ombudsperson may provide a copy of the comprehensive report to an interested State (designating State, or State of nationality, residence or incorporation), with the approval of the Committee, with any redactions deemed necessary to protect confidential material. Disclosure will be accompanied by a notification to such States emphasizing the discretionary decision to release the report and the need to protect confidentiality, and confirming that the comprehensive report is attributable solely to the Ombudsperson. This is an opportune addition that “codifies” recent practice, enhances transparency and ensures that the petitioner is aware of possible disclosure of the comprehensive report from the beginning of the process.

44. Unfortunately, however, no progress has been made in terms of the transparency of the process from the perspective of the petitioner. The Ombudsperson remains unable to directly divulge the recommendation to the petitioner and there is no provision for disclosure of the comprehensive report.

#### *General transparency of the process: disclosure of the reasons*

45. As discussed in detail in the seventh report ([S/2014/73](#), paras. 49-52), the Ombudsperson process also suffers from limited public transparency. As noted, the comprehensive report, which details the reasoning of the Ombudsperson, is not made available to the petitioner or the public. As a result, the only information about a decision that the petitioner will receive is that conveyed through the reasons, which are provided. This is the sole mechanism prescribed by resolution for possible disclosure of factual information and findings in a case other than the Office of the Ombudsperson, the Committee and now, under resolution 2161 (2014), an interested State. However, there is no provision in the resolution for publication of those reasons by the Ombudsperson, a measure that would enhance the general transparency of the process. Unfortunately, resolution 2161 (2014) does not address disclosure by the Ombudsperson, and an obvious deficiency in transparency therefore remains. This is particularly perplexing given that the petitioner is free to disseminate the reasons —in whole or in part —while the Ombudsperson must continue to keep the information confidential. The benefits of, or reasons for, this non-disclosure requirement are opaque.

### [Ninth report](#)

#### *Interested States*

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<sup>67</sup> Identical language in subsequent resolutions.

39. As discussed in the eighth report, resolution 2161 (2014) introduced an important change in allowing for the release of the comprehensive report to specified interested States, upon request and with the consent of the Committee. As mentioned above, within this reporting period three States have sought the release of a comprehensive report, illustrating interest in the Ombudsperson process and in the individual delisting requests. This enhanced transparency is useful in terms of the relationship between the Office of the Ombudsperson and the States involved and more generally in demonstrating the overall fairness of the Ombudsperson mechanism. Going forward, consideration should be given to allowing for more general access by States to the comprehensive reports of the Ombudsperson. As an initial step, the body of “interested States” could be expanded from the designating States and States of residence/nationality/incorporation to any State from which information was sought or provided in the particular case. These “relevant” States often have a significant interest in the particular case for a variety of reasons and access to the comprehensive report could be of value and assistance to the authorities of the same.

#### *The petitioner and the public*

40. As discussed in the eighth report, no other improvements have been made to the transparency of the process and this remains the most significant fair process lacuna in the context of the Ombudsperson mechanism. The petitioner has no possible access to the comprehensive report. In terms of the general public — including interested legal authorities, judges and academics — disclosure is even more limited. While the petitioner is informed of the basis of the listing through the interview and reasons provided at the end of a case, the only information available to the general public about individual listings is that set out in the narrative summary of reasons on the website of the Al-Qaida sanctions Committee. No information is available as to the substance of the delisting applications, the issues considered and the basis for the decisions to retain the listing or to delist. None of the information gathered in particular delisting cases and no parts of the comprehensive report can be disclosed by the Ombudsperson. These constraints on transparency have no basis in the need to protect confidential information. The comprehensive reports can easily be adjusted to remove any sensitive or confidential material.

41. As a result, the Ombudsperson process remains one which is unnecessarily shrouded in mystery. Regrettably, this means that, while detailed documents exist to demonstrate the reasoned nature of the process, they are not made available. Moreover, despite the aims of the sanctions to prevent terrorist support and activities and to change conduct, information which gives a clear indication of the types of actions targeted by the sanctions regime is not available beyond the Security Council, some interested States and the Ombudsperson.

42. In this reporting period, the problem with a lack of transparency has manifested itself most clearly in the context of reasons for retention and delisting.

*See also paragraphs 46 to 49 of the [Ninth report](#) below with respect to reasons letters (Section on [Reasons Letters](#))*

#### [Tenth report](#)

30. The requirement that reasons be given for the decisions taken in both delisting and retention cases has been instrumental in demonstrating that the process is reasonable, as opposed to

arbitrary. The provision of reasons also serves as an opportunity to disseminate information beyond the Committee and the Ombudsperson, thereby enhancing the transparency of the process generally. It also allows for the underlying basis of decisions to be communicated to other bodies, such as domestic and regional courts, in particular cases where merited.

#### *Interested States*

38. As discussed in the eighth and ninth reports, resolution 2161 (2014) introduced an important change in allowing for the release of the comprehensive report to specified interested States upon request and with the consent of the Committee. As indicated above, during the reporting period, three States sought the release of a comprehensive report, illustrating interest in the Ombudsperson process and in the individual delisting requests. All of those requests were granted by the Committee. As indicated in the ninth report,<sup>68</sup> given the contribution to enhanced transparency to date, consideration should be given to allowing greater general access for States to the comprehensive reports of the Ombudsperson. As an initial step, the body of “interested States” could be expanded from the designating States and States of residence/nationality/incorporation to any State from which information was sought or provided in the case concerned. These “relevant” States often have a significant interest in the case in question for a variety of reasons, and access to the comprehensive report could be of value and assistance to the authorities of those States. Any issues of confidentiality which arise can easily be addressed through redactions.

#### *The petitioner and the public*

39. With respect to this issue, the comments made in the ninth report remain applicable:

“As discussed in the eighth report, no other improvements have been made to the transparency of the process, and this remains the most significant fair process lacuna in the context of the Ombudsperson mechanism. The petitioner has no possible access to the comprehensive report. In terms of the general public — including interested legal authorities, judges and academics — disclosure is even more limited. While the petitioner is informed of the basis of the listing through the interview and reasons provided at the end of a case, the only information available to the general public about individual listings is that set out in the narrative summary of reasons on the website of the Al-Qaida sanctions Committee. No information is available as to the substance of the delisting applications, the issues considered and the basis for the decisions to retain the listing or to delist. None of the information gathered in particular delisting cases and no parts of the comprehensive report can be disclosed by the Ombudsperson. These constraints on transparency have no basis in the need to protect confidential information. The comprehensive reports can easily be adjusted to remove any sensitive or confidential material.”<sup>69</sup>

40. For the moment, the Ombudsperson process remains one which is unnecessarily shrouded in mystery. Regrettably, this means that, while detailed documents exist to demonstrate the reasoned nature of the process, they are not made available. In addition, notwithstanding the aims of the sanctions to prevent terrorist support and activities and to change conduct, information which gives

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<sup>68</sup> 7 See the ninth report (S/2015/80), para. 39.

<sup>69</sup> 8 Ibid., para. 40.

a clear indication of the types of actions targeted by the sanctions regime is not available beyond the Security Council, some interested States and the Ombudsperson.

### [Eleventh report](#)

#### *General information about the process*

36. In her interaction with petitioners and their counsel during the first few months of her term, the Ombudsperson has measured how the absence of publicly available case law, or its equivalent, of the practice of the Ombudsperson affects the ability of petitioners to efficiently present their case. Given that comprehensive reports are not made publicly available, even duly diligent counsel cannot review the past practice of the Ombudsperson to assist their client. The former Ombudsperson issued statements, made available on the website of the Office, with respect to two important aspects of her approach to her work concerning the standard applicable to the review of delisting requests and the assessment of information. The former Ombudsperson published the second document in November 2012 in response to grave concerns expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It was therefore published at a time when only 22 reports had concluded through the Ombudsperson process, almost a third of the cases concluded as at present. In the current situation, comprehensive reports and their contents are strictly confidential. In fairness to petitioners, it is necessary to make publicly available as much information as possible about the Ombudsperson process. To that end, the Ombudsperson has decided to expand and update the second statement to address other aspects of the assessment of information that are not currently covered, including the approaches to inferences and to analysis of association and disassociation. On 27 January 2016, the Ombudsperson informally briefed the Committee on this initiative. She also consulted the Monitoring Team, the Office of Legal Affairs and the Office of the United Nations High Commissioner for Human Rights on the draft document. The document has now been circulated for information to members of the Committee. The Ombudsperson will review any comments received prior to finalizing and placing the document on the website of the Office, within the next few weeks. It is expected that increasing the transparency of the process before the Ombudsperson will be a valuable preparatory tool for petitioners and their counsel. The Ombudsperson also expressed the hope that it would bring more confidence and credibility to the mechanism.

#### *Interested States*

37. As discussed in the eighth, ninth and tenth reports (see S/2014/553; S/2015/80, para. 39; and S/2015/533, para. 38), consideration should be given to allowing for more general access by States to the comprehensive reports of the Ombudsperson. During the reporting period, three interested States sought the release of a comprehensive report, illustrating the continued attention to the process. The Ombudsperson fully seconds the proposal by her predecessor that, as an initial step, the body of interested States could be expanded from the designating States and States of residence/nationality/incorporation to any State from which information was sought or provided in the particular case. These States often have a significant relevant interest in the particular case for a variety of reasons, and access to the comprehensive report could be of value and assistance to the authorities of the State. Any issues of confidentiality which arise can easily be addressed through redactions.



### *The petitioner*

38. The absence of access by petitioners to the comprehensive report in their cases remains of concern and amounts to a lacuna in terms of fairness in the context of the Ombudsperson mechanism (see S/2015/80, para. 40 and S/2015/533, paras. 39-40).

See also paragraphs 39 to 42 of the [Eleventh report](#) below (Section on [Reasons letters](#))

### [Twelfth report](#)

29. As anticipated in the eleventh report, the website of the Office of the Ombudsperson has been updated to provide petitioners and their counsel with information on the practice of the Ombudsperson relating to the use of information and the analysis of association and disassociation. It also addresses in particular the mental element required for the retention of a listing, the use of cumulative information and inferences. It is expected that, in addition to assisting petitioners, the information in question will increase the transparency of the process vis-à-vis a broader interested public. During the above-mentioned seminar on sanctions, representatives of the European Union welcomed the update and indicated that they were making use of the increased transparency of the mechanism in their submissions before the courts of the European Union.

See also paragraphs 30-31 of the [Twelfth report](#) below (Section on [Reasons letters](#)).

## Reasons letters

### [Security Council resolution 1904 \(2009\) \(Annex II\)](#)

“11. If the Committee decides to grant the delisting request, then the Committee shall inform the Ombudsperson of this decision. The Ombudsperson shall then inform the petitioner of this decision and the listing shall be removed from the Consolidated List. *[No reasons provided in delisting cases]*

12. If the Committee decides to reject the delisting request, then the Committee shall convey to the Ombudsperson its decision including, as appropriate, explanatory comments, any further relevant information about the Committee’s decision, and an updated narrative summary of reasons for listing.

13. After the Committee has informed the Ombudsperson that the Committee has rejected a delisting request, then the Ombudsperson shall send to the petitioner, with an advance copy sent to the Committee, within fifteen days a letter that:

- (a) Communicates the Committee’s decision for continued listing;
- (b) Describes, to the extent possible and drawing upon the Ombudsperson’s Comprehensive Report, the process and publicly releasable factual information gathered by the Ombudsperson; and,
- (c) Forwards from the Committee all information about the decision provided to the Ombudsperson pursuant to paragraph 12 above.”<sup>70</sup>

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<sup>70</sup> Identical language in subsequent resolutions.

### First Report

50. Currently, whether in the context of a case considered by the Ombudsperson or not, the Committee is not mandated to provide factual reasons for a de-listing. Even in the early stages of the work of the Ombudsperson, it is evident that such information would be very useful. Information as to the basis for a de-listing in one case may be of importance in assessing other cases. These reasons would also be helpful to the Ombudsperson in developing relevant observations for the Committee and in ensuring consistency in analysis. Further, to the extent that the sanctions process is intended to encourage a change in conduct, a description of facts that led to de-listing could guide the Ombudsperson in the context of dialogue with petitioners and provide examples for listed individuals and entities generally. For these reasons, it would be helpful if consideration were given to providing for reasons to be given by the Committee in cases where de-listing is granted.

### Security Council resolution 1989 (2011) (Annex II)

“13. If the Committee decides to reject the delisting request, then the Committee shall convey to the Ombudsperson its decision, setting out its reasons, and including any further relevant information about the Committee’s decision, and an updated narrative summary of reasons for listing.”<sup>71</sup>

### Second Report

44. A further issue regarding the decision-making process is the question of reasons for the decision. As formal notifications on the cases that have been decided are still pending, no comment on practice is possible at this early stage. However, this principle has been recognized by the Security Council: in its resolution 1989 (2011), the Council requires the Committee to provide reasons for rejecting a de-listing petition.<sup>72</sup> Obviously, this is of critical importance in the case of a refusal to de-list.

45. As outlined in the first report of the Office of the Ombudsperson, providing such reasons is also important in the case of a decision to de-list. In addition to evidencing the reasonableness of the decision-making process, the information is valuable to the Ombudsperson in assessing other cases and ensuring consistency of analysis. Also, in the context of using sanctions to change conduct, the reasons can be used by the Ombudsperson in the course of her dialogue with other petitioners. While appreciating the changes brought about by Security Council resolution 1989 (2011), for the reasons expressed in the first and in the present report, it would be helpful if consideration were given to the possibility of requiring the Committee to provide reasons to the de-listed person or entity, through the Ombudsperson or another channel.

### Third report

46. The fairness of the process has also been strengthened by the Committee’s evident determination to provide reasons for the decision taken in each case. With the exception of the

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<sup>71</sup> Paragraph 14 of Annex II to this resolution is identical to the corresponding paragraph in the previous resolution (paragraph 13 of Annex II to resolution 1904 quoted above).

<sup>72</sup> See paragraph 13 of annex II. A similar requirement is set out in paragraph 33 of the resolution, by which the Security Council directs Committee members to provide their reasons for objecting to de-listing requests.

cases only recently decided,<sup>73</sup> the Committee has provided the Ombudsperson with a notification of its decision in each of the cases, expressing reasons for the same, where de-listing was granted and in the single case where it was refused. The reasons have been communicated to the petitioner by the Ombudsperson. Under the terms of resolution 1989 (2011),<sup>74</sup> the Committee is required to provide reasons for the rejection of a de-listing request.

47. The Committee's efforts in this regard, which go beyond what is mandated, add to the overall reasonableness of the decision-making process, contributing to enhanced fairness and transparency. In addition, the Ombudsperson has been able to use the information provided in the reasons as a guide in subsequent cases, both in terms of dialogue with the petitioner and in assessing the sufficiency of information. In recognition of this, it would be helpful in future if consideration were given to mandating that reasons be given by the Committee to the de-listed person or entity, through the Ombudsperson or otherwise, in case of any decision to de-list.

#### [Fourth report](#)

44. The importance of the Committee providing reasons for the decisions taken cannot be overstated. Such reasons demonstrate the fair and considered nature of the decision-making process and provide guidance to the Ombudsperson for subsequent delisting cases. Moreover, as these reasons are communicated to the petitioner, he or she is made aware of the basis of the decision and thus the transparency of the proceedings is considerably enhanced. This principle has been recognized in resolution 1989 (2011) insofar as it requires that the Committee provide reasons for rejecting a delisting petition.<sup>75</sup> In practice the Committee has also made efforts to provide reasons for its decision when delisting is granted, although a significant period of time can elapse between the decision and the provision of the reasons. Given this existing practice and the importance of reasons to the overall fairness of the process, it would be helpful if consideration were given to extending the current obligation and providing that the Committee give reasons in a timely manner for its decision in all cases.

#### [Security Council resolution 2083 \(2012\)](#)

"14. After the Committee decides to accept or reject the delisting request, the Committee shall convey to the Ombudsperson its decision, setting out its reasons, and including any further relevant information about the Committee's decision, and an updated narrative summary of reasons for listing, where appropriate, for the Ombudsperson to transmit to the petitioner."

#### [Fifth report](#)

39. In its resolution 2083 (2012), the Security Council fully acknowledged the importance of the Committee providing reasons for the decisions taken, whether in favour or against delisting. In

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<sup>73</sup> 13 Relating to Abu Sufian al-Salamabi Muhammed Ahmed Abd al-Razziq, Barakaat North America Inc., Barakat Computer Consulting, Barakat Consulting Group, Barakat Global Telephone Company, Barakat Post Express and Barakat Refreshment Company, with respect to which reasons are expected to be provided in due course.

<sup>74</sup> 14 See para. 13 of annex II. A similar requirement is set out in para. 33 of the resolution, with regard to objections by Committee members to de-listing requests.

<sup>75</sup> 16 Paragraph 13 of annex II. A similar requirement is in paragraph 33, in the case of a Committee member objecting to delisting.

recognition of the existing practice, the Committee is now mandated to give reasons for all its decisions, regardless of the outcome. The requirement will serve to demonstrate the fair and considered nature of the decision-making process and provide guidance to the Ombudsperson for subsequent delisting cases. Moreover, as the reasons will be communicated to the petitioner, he or she will be made aware of the basis of the decision and, thus, the transparency of the proceedings will be enhanced in this context. However, there remains a practical issue as to timing in that under the current practice, which is now provided for in the resolution, there has often been a significant delay before the reasons are provided. Further experience in implementing the provisions of the resolution will be needed to determine if the enhanced mandate will assist in reducing the length of time required for the transmission of the reasons for decisions.

#### [Sixth report](#)

36. Security Council resolution 2083 (2012) included a requirement for reasons to be given for the decisions of the Committee to grant a delisting petition. This solidified the practice of the Committee.

37. The Ombudsperson has consistently highlighted the importance of providing reasons for all decisions on delisting petitions regardless of the outcome. As a result, the decision of the Security Council to extend the mandate and require that reasons be given, also in the case of delisting, was a very welcome development.

38. Unfortunately, the incorporation of that requirement in resolution 2083 (2012) has yet to ameliorate the situation with regard to the significant delays that occur between the rendering of a decision to delist and the delivery of the reasons for that decision by the Committee. In fact, the problem has been particularly serious during the reporting period. Reasons for a decision have yet to be communicated in seven cases, including in instances where the decisions were taken months ago. In a process that is otherwise subject to restrictive time limits, the delay in the provision of reasons is highly noticeable. While delivering reasons, even at a later stage, remains beneficial for the fairness of the process, such delays obviously reduce the effectiveness of such a practice in demonstrating the transparency and reasonableness of the process.

39. Given the structure and context of the Ombudsperson mechanism and the interaction between and roles of the Committee and the Ombudsperson, it is understandable that preparing the reasons for delisting can be a complex and challenging process. However, in the interest of fairness and transparency, consideration needs to be given to ways of improving the process, including by enhancing the role of the Ombudsperson in facilitating the delivery of reasons.

40. In addition, a significant concern with regard to fairness has been identified with regard to the provision of reasons for refusing a request for delisting through the Ombudsperson process. That concern arises from the fact that the recommendation of the Ombudsperson to retain the listing, once reported and discussed with the Committee, ends the consideration of that specific delisting petition.<sup>76</sup> In those circumstances, evidently the assessment of the Ombudsperson forms the basis

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<sup>76</sup> 8 It does not preclude the Committee from reaching a different determination through a subsequent delisting petition presented by a State (see Security Council resolution 2083 (2012), para. 20, and para. 12 of annex II).

for the retention of the listing and, as a result, fairness requires that the reasons given to the petitioner be reflective of the analysis and conclusions of the independent mechanism.

41. At present, however, the process mandates that reasons for the decision be provided by the Committee, not the Ombudsperson. As a result, there exists the potential for a discrepancy between the comprehensive report of the Ombudsperson and the reasons given by the Committee. The existence of such a discrepancy could significantly undermine the fairness of the process and its consistency with fundamental principles in that regard. To date, in the two instances<sup>77</sup> where delisting has been refused, the process has been a fair one in that the reasons given have been consistent with the conclusions of the Ombudsperson. Nonetheless, this situation remains of concern, as it could result in an unfair process in the future.

42. Consideration should be given to making the process for the delivery of reasons consistent with the means by which a decision on refusal is taken. Specifically, this could be done by making the Ombudsperson responsible for providing the reasons.

### [Seventh report](#)

39. In its resolution 2083 (2012), the Security Council recognized the importance of reasons being part of a fair process by requiring such reasons to be provided to a petitioner whether the delisting request is accepted or refused. This represents a further advancement for the Ombudsperson process in terms of transparency and overall fairness.

40. In cases of delisting, however, the value of this improvement — for the petitioner and in terms of the transparency of process — has been diminished significantly by the extensive delays in communicating the reasons by the Committee and the relatively limited factual and analytical references provided. During the reporting period, reasons for the Committee's decision were communicated to petitioners in three cases. As at the time of writing the present report, however, reasons had not been provided in 14 cases. Several of the cases were decided months ago; in one instance, the decision was taken more than a year ago. While delayed delivery and limited content remains preferable to no reasons, the meaningfulness of communicating reasons in terms of the fairness of the process, especially in the perception of the petitioner, is reduced markedly by the passage of time.

41. On a practical level, the Ombudsperson advises the petitioner immediately of the decision to delist and the press release prepared by the Committee can be provided upon request. However, an official notification by the Ombudsperson to the petitioner cannot be sent until a formal communication has been provided by the Committee, with reasons. Delays in communicating the official decision only serve to exacerbate the general problems that petitioners face in obtaining implementation of the decision to delist. In that regard, in several instances delisted individuals have pointed to the absence of an official notification as the basis for difficulties faced in terms of travel or access to assets.

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<sup>77</sup> 9 This refers only to cases in which delisting requests were refused after 17 June 2011, the date of adoption of Security Council resolution 1989 (2011), in which the Council decided that the Ombudsperson should present to the Committee a recommendation on the delisting requests.

42. As mentioned in the sixth report, the problem with respect to reasons is not limited to cases of delisting. In accordance with the procedure set out by the Security Council, if the Ombudsperson recommends retaining the listing, the name of the sanctioned entity or individual will remain on the list, putting an end to further consideration of the delisting petition. While a Committee member disagreeing with the result can put forward a separate delisting request, that action will not affect the decision to reject the petitioner's original request. As a result, the listing is retained on the basis of the comprehensive report and the recommendation of the Ombudsperson. Under the current structure, however, the reasons for the decision are prepared by the Committee and conveyed to the Ombudsperson for transmission to the petitioner. There is therefore a real possibility that the reasons provided will not be consistent with the observations, analysis and findings of the Ombudsperson, introducing a fundamental unfairness into the process.

43. Experience to date supports the view that it is important, in terms of the fairness and transparency of the process, that reasons be provided. At the same time, it is clear that changes are needed to allow for the timely delivery of reasons and to ensure that the reasons are substantive in content and properly take into account the conclusions of the independent reviewer.

44. A partial solution could be to impose time constraints for the delivery of reasons. This would be consistent with the Ombudsperson process in general, which is governed throughout by strict deadlines. Such an approach fails to recognize the complexity of preparing reasons by the Committee, however, and may have the unintended consequence of further reducing the substantive content of the text.

45. A far more preferable and comprehensive solution would be to make the procedure for the provision of reasons consistent with the Ombudsperson process. In cases in which a listing is maintained on the basis of a recommendation by the Ombudsperson, it follows that the Ombudsperson should provide the reasons for that determination to the petitioner, with appropriate safeguards regarding the release of confidential material. This would ensure uniformity between the comprehensive report and the reasons and would be entirely in accord with the decision-making process in such circumstances.

46. Similarly, in delisting cases the Ombudsperson should be mandated to provide reasons based on the comprehensive report. While in such cases there is provision for the Committee to make a decision by consensus or through the application of paragraph 21 of resolution 2083 (2012), the final decision to delist would be in conformity with the recommendation of the Ombudsperson. That recommendation, in turn, would be premised on the information and analysis set out in the comprehensive report. As a result, the Ombudsperson is in the most advantageous position to prepare and provide reasons to the petitioner for the recommendation made, again with protections as regards any confidential material. In this context too, fairness dictates that the reasons provided to the petitioner should be consistent with the findings in the comprehensive report prepared by the independent reviewer. Importantly, given that the reasons can be clearly identified as being those of the Ombudsperson, the challenges that currently exist in relation to preparing the reasons when there is no consensus among Committee members would be overcome.

47. In cases of a Committee reversal or a Security Council decision, responsibility for providing reasons should be left to the Committee and the Council respectively.

48. In the view of the Ombudsperson, according responsibility for the delivery of reasons to the Ombudsperson would significantly enhance the fairness, transparency and efficiency of the process.

See also paragraphs 49 to 52 of the [Seventh report](#) on the non-disclosure of reasons above (Section on [Transparency of the process](#))

#### [Security Council resolution 2161 \(2014\)](#)

“16. Following the conclusion of the process described in paragraphs 42 and 43 of this resolution, the Committee shall convey to the Ombudsperson, within 60 days, whether the measures described in paragraph 1 are to be retained or terminated, setting out reasons and including any further relevant information, and an updated narrative summary of reasons for listing, where appropriate, for the Ombudsperson to transmit to the petitioner. The 60-day deadline applies to outstanding matters before the Ombudsperson or the Committee and will take effect from the adoption of this resolution.” [Emphasis added, the underlined wording is new].

#### [Eighth report](#)

39. The extensive delays in the communication of the reasons by the Committee in delisting cases and the relatively limited factual and analytical references in the reasons were noted in the seventh report ([A/2014/73](#), paras. 40-41). Security Council resolution 2161 (2014) partly addresses the problem by providing for a 60-day deadline for the transmittal of reasons by the Committee to the Ombudsperson. This time limit is especially welcome in that it applies to outstanding cases where reasons have been delayed for an extensive period. However, this change does not address the content of the letters in delisting cases and, as discussed in the seventh report, it could result in further limitations in that respect.

40. The deadline has also been made applicable to retention cases, which will also be helpful. However, resolution 2161 (2014) does not address the most serious concern with respect to reasons in retention cases. Paragraphs 14 and 15 of annex II to resolution 2083 (2012) were amended by the language in paragraphs 16 and 17 of annex II to resolution 2161 (2014) to better reflect the Ombudsperson procedure by providing for the Committee to convey to the Ombudsperson, at the end of the process, whether the sanction measures are to be retained or terminated, rather than communicating a decision. This amendment makes it even more clear that in a case of retention, the listing is maintained on the basis of the recommendation of the Ombudsperson, which has arisen from the analysis contained in the comprehensive report. Nevertheless, paragraph 16 of annex II still provides that the reasons for the refusal of the delisting petition must come from the Committee. As a result, the possibility remains that the reasons provided will be inconsistent with the observations, analysis and findings of the Ombudsperson, rendering the process fundamentally unfair in the particular case.

41. As described previously, the experience to date with the provision of reasons reinforces the importance of the provision of reasons to the fairness and transparency of the process. The addition of a time frame for the delivery of reasons is a positive development, particularly for delisting cases. Nonetheless, further changes are needed to ensure a fair process in each case, with reasons that are substantive in content and consistent with the comprehensive report of the Ombudsperson.

42. As discussed in the seventh report ([S/2014/73](#), paras. 43-48), these problems can best be addressed by making the provision of reasons fully consistent with the process. This can be accomplished by according the responsibility for reasons to the Ombudsperson, in both delisting and retention cases, with appropriate safeguards regarding the release of confidential material. The only exception would be in the case of a Committee reversal or a Security Council decision, where responsibility for reasons would be left to the Committee and the Council respectively. Such a structure would be properly reflective of the process as a whole and would significantly enhance its fairness, transparency and efficiency.

*See also paragraph 35 of the [Eighth report](#) on the non-disclosure of reasons above (Section on [Transparency of the process](#))*

#### [Ninth report](#)

43. From the adoption of resolution 2083 (2012), the Security Council has mandated that decisions to delist or retain made through the Ombudsperson process will be accompanied by reasons. Previous reports have noted that, for delisting cases, there have been extensive delays in the communication of the reasons by the Committee and the letters which were sent had relatively limited factual and analytical references.<sup>78</sup> Security Council resolution 2161 (2014) partially addressed the problem by providing for a 60-day deadline for the transmittal of reasons by the Committee to the Ombudsperson. While ensuring that some form of communication will now be provided within a reasonable time frame, the change has not addressed the problem with the content of the letters in delisting cases. In fact, the imposition of the deadline, at least in application to the backlog, has exacerbated the difficulty with limited factual and analytical references. Specifically, in this reporting period a number of communications from the Committee transmitted by the Ombudsperson to the petitioners in accordance with paragraph 16 of annex II to resolution 2161 (2014) contained no factual or analytical references. In the opinion of the Ombudsperson, these communications did not comply with the requirement for reasons to be provided as mandated by resolution 2161 (2014).

44. This result is disappointing in that the reasons provide the sole opportunity to publically demonstrate to the petitioner, and more broadly, the reasoned nature of the decision-making process which led to delisting. This approach perpetuates an appearance of arbitrariness with respect to a process established by the Security Council which can otherwise be demonstrated to meet the requirements of fairness. As such, this lack of transparency jeopardizes the overall fairness of the procedure and most significantly the perceptions as to its reasonableness.

45. As discussed in the seventh and eighth reports,<sup>79</sup> concerns also remain with respect to reasons in retention cases. As the listing is maintained on the basis of the recommendation of the Ombudsperson, which in turn arises from the analysis in the comprehensive report, it is crucial for the fairness of the process that the reasons provided be consistent with the observations, analysis and findings of the Ombudsperson. The reasons must also reflect the comprehensive nature of the report mandated by the Security Council and the fact that the procedure ensures that the petitioner

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<sup>78</sup> 10 See for example the seventh report ([S/2014/73](#)), paras. 38 and 39.

<sup>79</sup> 11 See the seventh report ([S/2014/73](#)), paras. 43-45; and the eighth report ([S/2014/553](#)), paras. 39-42.



is fully heard by the Ombudsperson and the Committee. To this end, the reasons must respond to the arguments advanced by the petitioner and any information produced in support. Experience indicates that problems with respect to the fullness and accuracy of the retention reasons will continue to persist so long as the current structure — according the responsibility for the reasons to the Committee — is retained.

46. As noted in my eighth report, the serious challenges with respect to reasons can best be addressed by according the responsibility for reasons to the Ombudsperson, in both delisting and retention cases, with appropriate safeguards regarding the release of confidential material. The only exception to this should be in the case of a Committee reversal or a Security Council decision, where responsibility for reasons would appropriately be left to the Committee and the Council respectively. This structure would be properly reflective of the process as a whole and would significantly enhance its fairness, transparency and efficiency.

#### [Tenth report](#)

41. Since the adoption of resolution 2083 (2012), the Security Council has mandated that decisions to delist or retain made through the Ombudsperson process be accompanied by reasons. Security Council resolution 2161 (2014) provided a much-needed enhancement of this requirement by including a 60-day deadline for the transmittal of reasons by the Committee to the Ombudsperson. This has served to ensure that the reasons in each case are delivered within a reasonable time frame. The ninth report detailed significant problems which had been encountered in terms of the substantive content of reasons in delisting cases.<sup>80</sup> During the reporting period, there was some progress in ensuring that the reason letters provide sufficient factual information regarding the basis for the decision. Nonetheless, problems and challenges remain.

42. In this regard, the argument continues to be advanced that in delisting cases the petitioners do not require substantive reasons in that they have already received a fair process through the result. However, a fair process — by its nature and nomenclature — relates not to the result achieved, but to the fairness of the process by which the outcome was attained. To this end, a reasoned explanation for the decision taken is relevant and necessary to fairness in both delisting and retention cases.

43. As discussed in several reports,<sup>81</sup> there are also still concerns which arise with respect to reasons in retention cases. As the listing is maintained on the basis of the recommendation of the Ombudsperson, which in turn is premised on the analysis contained in the comprehensive report, it is crucial for the fairness of the process that the reasons provided be consistent with the observations, analysis and findings of the Ombudsperson. The reasons must also properly convey the comprehensive nature of the report submitted and address all of the arguments advanced by the petitioner in the delisting petition and through the exchanges with the Ombudsperson.

44. As stated in the ninth report, “reasons provide the sole opportunity to publicly demonstrate to the petitioner, and more broadly, the reasoned nature of the decision-making process which led to

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<sup>80</sup> 9 Ibid., para. 43.

<sup>81</sup> 10 See the seventh report (S/2014/73), paras. 43-45; the eighth report (S/2014/553), paras. 39-42; and the ninth report (S/2015/80), paras. 45 and 46.

delisting”.<sup>82</sup> The failure to provide detailed and substantive reasons “perpetuates an appearance of arbitrariness with respect to a process established by the Security Council which can otherwise be demonstrated to meet the requirements of fairness. As such, this lack of transparency jeopardizes the overall fairness of the procedure and, most significantly, the perceptions as to its reasonableness”.

45. The experience of the reporting period reaffirms that challenges to the delivery of full and accurate reasons will continue insofar as the current structure — according to the Committee the responsibility for providing reasons — is retained. As noted in the eighth and ninth reports, given the structure of the Ombudsperson process, responsibility for providing reasons, in both delisting and retention cases, should be entrusted to the Ombudsperson, with appropriate safeguards regarding the release of confidential material.<sup>83</sup> The only exception to this should be in the case of a Committee reversal or a Security Council decision, where the Committee or the Council, respectively, should be accountable for the reasons. This structure would properly reflect the process as a whole and would significantly enhance its fairness, transparency and efficiency.

*See also paragraph 30 of the [Tenth report](#) above (Section on [Transparency of the process](#)).*

#### [Eleventh report](#)

39. Where the Committee follows the recommendation by the Ombudsperson that it maintain the listing or that it consider delisting the name of the petitioner from the Islamic State in Iraq and the Levant (ISIL) (Da’esh) and Al-Qaida Sanctions List, the petitioner receives a letter summarizing the reasons that formed the basis for the Ombudsperson’s recommendation, which is not attributable to the Committee or any individual Committee member.

40. In contrast with the significant problems encountered in terms of the substantive content of communications containing reasons in delisting cases that were detailed in the ninth report (see S/2015/80, para. 43), the tenth report described some limited progress made in ensuring that the letters communicating the reasons with regard to the Committee decision generally provide sufficient factual information as to the basis for the decision (see S/2015/533, para. 41).

41. The situation has continued to improve during the reporting period. Summaries conveying the analysis contained in the comprehensive report addressed most of the arguments advanced by the petitioners in the delisting petitions in question; their arguments were also addressed through exchanges with the Ombudsperson. A summary does not, however, convey the comprehensive nature of the report. Only a transmission of the full report or at least of the totality of the section containing the analysis, observations and principal arguments, subject to redaction, would achieve such a result.

#### [Twelfth report](#)

30. The Committee’s positive trend towards including substantial excerpts from the analysis contained in the comprehensive report in letters summarizing the reasons that formed the basis for

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<sup>82</sup> 11 See the ninth report (S/2015/80), para. 44.

<sup>83</sup> 12 See the eighth report (S/2014/553), para. 42; and the ninth report (S/2015/80), para. 46.

the Ombudsperson's recommendation, in both retention and delisting cases, continued during the reporting period. The Committee's consistency and reliability in transmitting extensive reasons to petitioners are a major step towards making the process more transparent and fair. The Ombudsperson hopes that that trend will continue during the next reporting period.

### Thirteenth report

28. During the reporting period, the Committee discontinued altogether its previous positive practice of providing increasingly substantive reasons letters that included large excerpts from the Ombudsperson's written analysis.<sup>84</sup> Given the importance of those letters to the transparency of the process and its overall fairness (and the perception thereof), it would have been useful for the Committee to maintain the previously established practice.

29. The Ombudsperson is aware that there are differences of views on the extent of the requirement to provide reasons for retention or for the termination of sanctions following the Committee's consideration of the Ombudsperson's recommendation.<sup>85</sup> The opinion has been expressed that the requirement to provide reasons is satisfied by the mere reference to the fact that the Committee has followed the Ombudsperson's recommendation to consider delisting or to retain a name on the list. The Ombudsperson is of view that such an interpretation would defeat the very purpose of the requirement. Where the Committee follows the recommendation of the Ombudsperson, it does not provide its own reasons but rather a summary of the reasons contained in the comprehensive report, specifying that those reasons are not attributable to the Committee as a whole or to any individual Committee member. For such a summary to adequately reflect the reasons, it must at a minimum address the arguments of the petitioner and fully reflect the analysis contained in the Ombudsperson's comprehensive report. As indicated in the eleventh and twelfth reports, the practice of the Committee during the first year of the Ombudsperson's mandate showed that it is possible to do so.

30. The Ombudsperson firmly hopes that this positive trend will resume during the next reporting period. The Committee's consistency and reliability in transmitting extensive reasons to petitioners is a major step towards making the process more transparent and fair. In addition to jeopardizing fairness to the petitioner in specific cases, any setback in that respect would affect the general credibility of the Ombudsperson mechanism. It would also be ironic that such a setback would occur at a time when the perception that regional and domestic courts have of the mechanism is starting to improve. Finally, the practice of transmitting extensive reasons may be beneficial in encouraging and guiding the disassociation process undertaken by certain petitioners (see below).

31. A number of petitioners deny the accuracy of the information that initially led to their designation and that obtained by the Ombudsperson during the information-gathering phase. Others claim that the information does not show their association with the Islamic State in Iraq and the Levant (Da'esh) or Al-Qaida. Certain petitioners admit, however, that they have had such an association. Those petitioners seek to be delisted on the grounds that they have severed their links

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<sup>84</sup> 8 This trend, with respect to both retention and delisting cases, is described in detail in the eleventh report (see para. 41) and the twelfth report (see para. 30) of the Office of the Ombudsperson.

<sup>85</sup> 9 This requirement is set forth in annex II to resolution 2253 (2015).

with and disassociated themselves from those entities.<sup>86</sup> This is the category of petitioners for whom the human dimension embedded in the Ombudsperson mechanism is probably the most useful. This human aspect can complement the disassociation process undertaken by these petitioners.

Disassociation is not an instant process. In a number of cases, the petitioners require support and guidance. Petitioners undeniably perceive the Ombudsperson as having a certain authority.<sup>87</sup> On the basis of that authority and the unique and privileged access she has to petitioners during the dialogue phase, the Ombudsperson is able to include in her analysis messages that acknowledge the efforts made by a petitioner as part of the disassociation process. If need be, she can also guide the petitioner with respect to any additional steps required to fully complete the process.

32. Such guidance is particularly important for petitioners listed by the Committee following or alongside a trial and conviction for conduct that was the same or similar to that which led to his or her listing. In a number of such cases, the disassociation process starts while the petitioner is serving his or her sentence. The Ombudsperson may draw inferences of disassociation from the passage of time since the impugned activities, especially where the period is not minimal. However, when the petitioner is incarcerated, his or her capacity for continued involvement in activities in support of listed entities is limited.<sup>88</sup> In those circumstances, the Ombudsperson searches for specific signs of disassociation during the period of the petitioner's detention or beyond if he or she has been released. Various signs of such disassociation may be observed, even while a petitioner is detained. Those include a genuine engagement in a deradicalization process; the making of efforts to avoid contact with radical elements and/or to discourage approaches made by such elements; and the accepting of responsibility for past conduct, even after having previously denied such responsibility at trial.

33. The Ombudsperson's comprehensive report may provide an acknowledgement of a petitioner's disassociation efforts and contain specific encouragement to pursue such efforts and/or provide guidance on how to do so. It is important that such elements not be omitted by the Committee when it communicates to the petitioner the reasons for the decision to delist or to retain his or her name on the sanctions list. Such elements can also be of use to detention authorities and probation officers who are responsible for the penal situation of certain petitioners.

#### [Security Council resolution 2368 \(2017\)](#)

"16. Following the conclusion of the process described in paragraphs 61 and 62 of this resolution, the Committee shall convey, within 60 days, to the Ombudsperson, whether the measures described in paragraph 1 are to be retained or terminated, and approve an updated narrative summary of reasons for listing, where appropriate. In cases where the Committee informs the Ombudsperson that it has followed his or her recommendation, the Ombudsperson immediately informs the Petitioner of the Committee's decision and submits to the Committee, for its review, a summary of the analysis contained in the Comprehensive Report. The Committee reviews the summary within 30

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<sup>86</sup> 10 A petitioner can make such a claim in support of either an initial request for delisting or a repeat request for delisting. See section 4.1.1 of the Ombudsperson's approach to analysis, assessment and use of information. Available from <https://www.un.org/securitycouncil/ombudsperson/assessment-information>.

<sup>87</sup> 11 The mandate of the Ombudsperson is set by the Security Council. The Ombudsperson is appointed by the Secretary-General and the Committee has, so far, followed her recommendations.

<sup>88</sup> 12 See section 4.1.3 of the Ombudsperson's approach to analysis, assessment and use of information. Available from <https://www.un.org/securitycouncil/ombudsperson/assessment-information>.

days of the decision to retain or terminate the listing, and communicates its views on the summary to the Ombudsperson. The purpose of the Committee's review is to address any security concerns, including to review if any information confidential to the Committee is inadvertently included in the summary. Following the Committee's review, the Ombudsperson transmits the summary to the Petitioner. The summary shall accurately describe the principal reasons for the recommendation of the Ombudsperson, as reflected in the analysis of the Ombudsperson. In his or her communication with the Petitioner, the Ombudsperson will specify that the summary of the analysis does not reflect the views of the Committee or of any of its members. In cases where the listing is retained, the summary of the analysis shall cover all the arguments for delisting by the Petitioner to which the Ombudsperson responded. In cases of delisting, the summary shall include the key points of the analysis of the Ombudsperson. In cases where the Committee informs the Ombudsperson that it has not followed his or her recommendation or that the Chair has submitted the question to the Security Council under paragraph 15 of this Annex, the Committee communicates to the Ombudsperson, within 30 days of its decision or the Council's decision, the reasons for this decision for transmission to the Petitioner. These reasons shall respond to the principal arguments of the Petitioner."

#### Fourteenth Report

25. Pursuant to the successive resolutions, the Ombudsperson is required to treat the content of her comprehensive reports as confidential. In her previous report the Ombudsperson pointed to the fact that the Committee had discontinued altogether its previously positive practice of providing increasingly substantive reasons letters to petitioners which included large excerpts of the Ombudsperson's analysis.<sup>89</sup> In the light of the importance of such letters for the transparency of the process and of its overall fairness (and perception thereof), the Ombudsperson expressed the hope that the Committee would revert to its earlier practice in this respect.<sup>90</sup> This was not the case during the reporting period. However, new language proposed by the Ombudsperson was introduced by the Security Council in paragraph 16 of annex II to resolution 2368 (2017). The Ombudsperson welcomes this change which, it is to be hoped, will put a halt to the recent practice of the Committee described below, and has thus the potential to increase the level of fairness of the review process.

26. According to the new language, in cases where the Committee follows the Ombudsperson's recommendation, the Ombudsperson submits to the Committee, for its review, a summary of the analysis contained in the comprehensive report. This follows the existing practice whereby in such cases, that is in all cases to date, the reasons contained in the Committee's letter were not the reasons of the Committee but rather a summary of the Ombudsperson's analysis contained in her comprehensive report. According to this practice, now formalized in annex II to resolution 2368 (2017), only a summary of the Ombudsperson's analysis, approved by the 15 members of the Committee, is disclosed to the petitioner. This summary is prepared by the Ombudsperson because she has the best understanding of the reasons contained in her own analysis and is thus best placed to assist the Committee with the preparation of its reasons letter.

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<sup>89</sup> 6 Ibid., para. 28.

<sup>90</sup> 7 Ibid., paras. 30 and 41.

27. According to new paragraph 16 of annex II, the purpose of the Committee’s review is to address any security concerns, including to ascertain whether any information which is confidential to the Committee has been inadvertently included in the summary. This specification of the purpose of the Committee’s review is important because of the unhelpful practice adopted by the Committee in the past year and especially during the reporting period. In a recent retention case for which the Ombudsperson’s draft summary was already reduced to half the length of the analysis contained in the comprehensive report, the Ombudsperson was asked to perform further cuts so as not to exceed a set number of pages. The number of pages appeared to have been chosen arbitrarily and was meant to be applied equally in all cases. The process of “cutting for the sake of cutting” such summaries and imposing a maximum page limit was particularly intrusive. The Ombudsperson has no control over the “size” of a case, the amount of information gathered or the number of arguments raised by a petitioner. The Ombudsperson therefore needs to have leeway, in terms of the number of pages used, to capture a sufficient amount of the analysis for the summary to be a fair and transparent representation of the process. Such excessive cuts were contrary to the need for transparency which is at the core of the concept of fairness applied to sanctions. The reductions were problematic because they could lead to omitting responses to key arguments of the petitioner, or affect the logical sequence of reasoning underlying the recommendation, which would encroach on the Ombudsperson’s independence.

28. The new paragraph 16 is in this respect particularly helpful. It recognizes that the summary must accurately describe the principal reasons for the recommendation of the Ombudsperson, as reflected in the analysis of the Ombudsperson. In cases where the listing is retained, the summary of the analysis must cover all of the arguments for delisting put forward by the petitioner to which the Ombudsperson responded. In cases of delisting, it further specifies that the summary must include the key points of the analysis of the Ombudsperson.

29. From the point of view of fairness and transparency, the ideal scenario would be one where the Ombudsperson would be the sole judge of the amount and content of reasons communicated to a petitioner in all cases where her recommendation is followed by the Committee. However, in the light of security interests at stake and of the sensitivity of some of the information shared with the Ombudsperson for inclusion in her comprehensive reports, the new language is a good compromise. The Ombudsperson welcomes the fact that the Security Council seized this opportunity to rectify a practice which was eroding the fragile fairness of the Ombudsperson process.

#### [Update by the Office of the Ombudsperson](#)

25. In her last report, the Ombudsperson welcomed new language on reasons letters introduced by the Security Council in paragraph 16 of annex II to resolution 2368 (2017), noting that the change had the potential to increase the level of fairness of the review process. She noted in particular that the paragraph was helpful in that it recognized that the summary must accurately describe the principal reasons for the recommendation of the Ombudsperson, as reflected in his or her analysis. In cases of delisting, it further specifies that the summary must include the key points of the analysis of the Ombudsperson.

26. The Office of the Ombudsperson is pleased to report that three draft summaries of reasons proposed to the Committee during the reporting period pursuant to the new paragraph of annex II

to the resolution, which had been prepared in consultation with the former Ombudsperson, were approved by the Committee unchanged. As a result, and as required by the resolution, the petitioners in those three cases received summaries accurately describing the principal reasons for the recommendation of the Ombudsperson, as reflected in her analysis. However, in a fourth case, the summary prepared in consultation with the former Ombudsperson was amended to omit a key point of the analysis of the Ombudsperson, and as a result the summary that was transmitted to the petitioner no longer accurately reflected the principal reasons for the recommendation of the Ombudsperson, as required by the resolution. The reasons put forward in support of the deletion of the key point did not include the necessity to address any security concerns or the inadvertent disclosure of confidential information, which is the only purpose for the Committee's review under resolution 2368 (2017).

### Sixteenth report

#### *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.).

### Timing of notification of the Committee's decision

#### Tenth report

46. One further issue relating to the communication of decisions and the delivery of reasons was highlighted through practice during the reporting period. As with any Committee decision to delist, information about the decision will be publicly conveyed by the Secretariat through communications to States and by a press release as soon as possible after the determination. For that reason, since the Office of the Ombudsperson became operational, the practice has been that the Ombudsperson



has advised the petitioner informally, in advance of public notification, of the decision to delist. As this practice serves the interests of the petitioner, the Ombudsperson and the Committee, consideration should be given to referring to it in a resolution to ensure its future continuation.

47. However, in the case of retention, no such practice of notifying the petitioner has been established, as no publicity surrounds a decision to retain a listing. Furthermore, there is a specific formal notification process provided for in resolution 2161 (2014) but it applies only after the 60-day period. The effect of this is that, in retention cases, the petitioner does not receive immediate notification of the result of his application when a decision has been made to retain.<sup>91</sup> Depending on the contentiousness of the reason letter, the delay in communicating the decision can take the full 60 days. In a process with strict and efficient deadlines, this results in a perception to the contrary being conveyed to petitioners. In the interest of fairness to the petitioners and to enhance the perception of efficiency, consideration should be given to a provision empowering the Ombudsperson to advise the petitioner of the decision to retain the listing immediately after the decision is taken, with a note that reasons will follow within the 60-day deadline. Under such an immediacy requirement, the notification could be triggered by the Secretariat advising the Ombudsperson of the result of the Committee's consideration of the matter.

#### [Eleventh report](#)

42. The Ombudsperson reiterates the suggestion made in the tenth report to address the situation resulting from the delay in notifying the petitioner in the event of retention on the list (see S/2015/533, para. 47). The delay is owing to a specific formal notification process provided for within resolution 2253 (2015), which applies only after the Committee has conveyed the reasons for the retention to the Ombudsperson. This may take up to 60 days after the decision is made to retain the listing. In the interest of fairness and efficiency, consideration should be given to empowering the Ombudsperson to advise the petitioner of the decision to retain the listing immediately after the decision is taken, with a note that reasons will follow within the 60-day timeframe.

#### [Twelfth report](#)

31. In the eleventh report, the Ombudsperson reiterated her predecessor's suggestion to address the situation resulting from the delay in notifying the petitioner in the event of retention on the list.<sup>92</sup> Empowering the Ombudsperson to advise the petitioner of the decision to retain the listing immediately after it has been taken, with a note indicating that the reasons will follow within the 60-day deadline, is even more needed in the light of the increased delay in notifying the petitioner in the event of retention. There was previously no need to separate the informal notice of a retention from the formal notification identifying the reasons for it, as such letters were submitted quite quickly after the Committee's decision to retain the listing had been taken (on average, 22 days after the decision). However, since the introduction, in resolution 2161 (2014), of a 60-day deadline for the transmittal of the reasons for retention, it has taken the Committee 52 days on average to transmit them to the Ombudsperson for transmittal to the petitioner.<sup>93</sup> In practice in successful delisting cases, there is already a difference in timing with regard to notifying the petitioner of the

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<sup>91</sup> 13 See resolution 2161 (2014), para. 42 and annex II, paras. 10 and 14.

<sup>92</sup> 6 See S/2015/533, para. 47, and S/2016/96, para. 42.

<sup>93</sup> 7 In one case, the period had started to elapse before the introduction of the 60-day deadline.



outcome of the petition, on the one hand, and notifying him or her of the reasons for the decision, on the other. In these cases, the Ombudsperson informs successful petitioners of their delisting as soon as she has been notified by the Committee of the decision (and before they learn of it through a press release). She does so before receiving from the Committee the letter citing the reasons, which follows within 60 days, pursuant to paragraph 16 of annex II to resolution 2253 (2015). It would be in the interest of fairness and efficiency to treat successful and unsuccessful petitioners alike in this regard; there is no rationale for treating them any differently.

#### Thirteenth report

34. The Ombudsperson reiterates the suggestion included in the tenth, eleventh and twelfth reports that the situation resulting from the delay in notifying the petitioner in the event of retention on the list should be addressed.<sup>94</sup> For the reasons provided in those reports, the Ombudsperson suggests that she should be allowed, in the event of retention on the list, to advise the petitioner of the decision to retain the listing immediately after it has been taken, with a note indicating that the reasons will be provided within the 60-day deadline.

#### Security Council resolution 2368 (2017)

“16. [...] In cases where the Committee informs the Ombudsperson that it has followed his or her recommendation, the Ombudsperson immediately informs the Petitioner of the Committee’s decision [...]

#### Fourteenth Report

30. The Ombudsperson is pleased to note that the new resolution allows her to immediately notify the petitioner when the Committee has followed her recommendation.<sup>95</sup> For reasons exposed in the tenth, eleventh and twelfth reports this was already the practice in delisting cases.<sup>96</sup> The new language formalizes this practice and, as proposed in those reports, extends it to situations of retention on the list. In addition, the deadline for the Committee to review the summary of the analysis contained in the comprehensive report and to convey these reasons to the Ombudsperson for onward transmission to the petitioner has been shortened from 60 to 30 days.

## Disclosure of the identity of Designating States

#### First Report

51. One potential impediment to the delivery of effective due process through the Office of the Ombudsperson is the possibility of confidentiality restrictions that would prevent disclosure of the identity of the designating State to the petitioner and to relevant States involved in the case. At the moment, the identity of the designating State or States is confidential and the Ombudsperson can only disclose the information after seeking and obtaining the consent of the relevant designating State or States. It remains discretionary to those States as to whether to permit disclosure.

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<sup>94</sup> 13 See S/2015/533, para. 47, S/2016/96, para. 42, and S/2016/671, para. 31.

<sup>95</sup> 8 Resolution 2368 (2017), annex II, para. 16.

<sup>96</sup> 9 See S/2015/533, para. 47, S/2016/96, para. 42, and S/2016/671, para. 31.

52. A petitioner may face a significant disadvantage in answering a case without knowing the identity of the State or States that proposed the listing. This is particularly the case since, factually, this could be a point that the petitioner would wish to address in responding to the case against him or her. To the extent that the Ombudsperson is unable to disclose that information and to openly engage with the petitioner about the nature of the case against him or her, it constitutes a potential impediment to due process. In addition, it may also be necessary that other States involved in the case be advised as to the designating State or States in aid of drawing out all the relevant information in the case. For these reasons, which relate to the effectiveness of the procedures and the scope of due process, it is urged that consideration be given to empowering the Ombudsperson to disclose the identity of the designating State or States to the petitioner and to relevant States, as necessary in the specific context of a de-listing application.

#### [Security Council resolution 1989 \(2011\)](#)

“14. *Decides* that Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of this resolution, shall specify whether the Committee, or the Ombudsperson, or the Secretariat or Monitoring Team on the Committee’s behalf, may make known the Member State’s status as a designating State; and *strongly encourages* designating States to respond positively to such a request;”

“29. *Strongly urges* designating States to allow the Ombudsperson to reveal their identities as designating States, to those listed individuals and entities that have submitted delisting petitions to the Ombudsperson;”<sup>97</sup>

#### [Second Report](#)

46. The issue of disclosing the identity of designating States to petitioners remained a concern during the reporting period. Of the initial cases where consent for disclosure was sought, results were mixed with regard to whether the relevant State agreed to the disclosure of the information. In its resolution 1989 (2011), the Security Council addressed the issue by strongly urging States to consent to disclosure (para. 29). The effect of that provision on practice will be assessed in the coming months.

#### [Third report](#)

48. Paragraph 29 of resolution 1989 (2011), in which the Security Council strongly urges relevant States to consent to the disclosure of their identity as designating States, has resulted in a number of positive changes. Since the issuance of the second report of the Office, consent to disclose has ultimately been received in each case in which it has been sought. However, in some instances, considerable follow-up has been required in order to gain the consent of all relevant States. Most notably, in cases involving more than one designating State, there has been understandable reluctance on the part of individual States to agree to the disclosure of one State’s identity, without naming the other designating States. As a result, it has become possible for the refusal of one State to block the disclosure of any designating States in a particular case. While such cases have thus far been resolved in favour of disclosure, the potential problem remains. Moreover, the requirement that consent be sought from each State in each case is both difficult and time- consuming for the

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<sup>97</sup> Identical text in resolutions 2083 (2012), paragraph 28, and resolution 2161 (2014), paragraph 53.

Ombudsperson to meet and adds to the already significant workload that needs to be undertaken with respect to individual de-listing petitions.

49. Therefore, it would be useful if the issue of the disclosure of the identity of designating States could be reconsidered with a view to allowing for such information to be provided where necessary for the fairness of the process, without the requirement that the consent of the relevant States be obtained.

#### Fourth report

45. As indicated in the third report, paragraph 29 of resolution 1989 (2011), by which the Security Council strongly urges relevant States to consent to the disclosure of their identity as designating States, has brought about some positive changes. However, it remains both difficult and time-consuming to meet the requirement that consent be sought.<sup>98</sup> Therefore, it would be useful if the issue of disclosure of the identity of designating States could be reconsidered with a view to allowing for such information to be provided where necessary to the fairness of the process, without the requirement of obtaining the consent of the relevant States.

#### Security Council resolution 2083 (2012)

“12. *Decides* that Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of this resolution, shall specify if the Committee or the Ombudsperson may not make known the Member State’s status as a designating State;” *[emphasis added, the underlined word is new]*<sup>99</sup>

#### Fifth report

31. In paragraph 12 of its resolution 2083 (2012), the Security Council responded to the concerns raised about the disclosure of the identity of the designating State by shifting to the relevant State the onus of specifying whether that information cannot be made known to the petitioner. This change represents noteworthy progress and will particularly assist in cases where, previously, an answer to a request for disclosure was not forthcoming. Its overall effectiveness in terms of fair process can be better assessed once the new provision is put in practice.

52. [...] The Special Rapporteur commented on several issues that had been addressed previously by the Ombudsperson and for which provisions have been incorporated into resolution 2083 (2012), eliminating the need to discuss those points in any detail.<sup>100</sup>

#### Sixth report

43. In paragraph 12 of its resolution 2083 (2012), the Security Council decided that Member States should specify if the Committee or the Ombudsperson may not make known the State’s status as a

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<sup>98</sup> 17 See S/2012/49, paras. 48 and 49.

<sup>99</sup> Identical language in subsequent resolutions.

<sup>100</sup> 11 [...] The Special Rapporteur also voiced support for the need for the Ombudsperson to be able to disclose to the petitioner the identity of the designating State(s) [...]. As discussed above, there are new provisions on these issues in resolution 2083 (2012).

designating State. The Ombudsperson may therefore disclose the identity of the designating State absent a specific objection by that State.

44. The practice to date has underscored the importance of this revision. While some States have notified the Ombudsperson of objections to disclosure, none of them have been implicated as designating States in the cases dealt with in the reporting period since resolution 2083 (2012) was adopted on 17 December 2012. As a result, it has been possible to disclose the identity of the designating State in all cases, an important step forward in terms of ensuring the fairness of the process. In the case of those States that have objected, the Ombudsperson has said she intends to raise the issue again should a specific case arise, to give the relevant State an opportunity to consider whether or not to maintain its general objection with reference to that specific case.

#### [Seventh report](#)

53. In paragraph 12 of its resolution 2083 (2012), the Security Council decided that States proposing names for inclusion in the Al-Qaida sanctions list should be the ones to specify if the Committee or the Ombudsperson may not make known their status as designating States. The Ombudsperson may therefore disclose the identity of the designating State absent a specific objection by that State.

54. During the reporting period, no State objected to the disclosure of its identity as a designating State. The fairness of the process has therefore been enhanced. It remains to be seen whether the absence of objections will continue to be the norm in future cases and what the effect of an objection would be.

### Relevance of the Office of the Ombudsperson

#### [Security Council resolution 1989 \(2011\)](#)

“26. *Requests* that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson;”<sup>101</sup>

#### [Sixth report](#)

31. It is evident from the total number of petitions submitted to date (49) and the number of new requests received during the reporting period (13), that the availability of the mechanism is increasingly becoming known and that there is respect for the credibility of the process. From discussions with States and petitioners, it appears that the website has been an essential means for distributing relevant information about the process, along with material and advice that States have been providing to listed individuals and entities. Furthermore, the pattern of cases in some instances suggests that information is also being communicated through word of mouth. Some cases, in particular those in which the petitioners are represented by counsel, have illustrated the importance of having the Ombudsperson carry out public advocacy with regard to the Office to enhance awareness.

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<sup>101</sup> Identical language in resolutions 2083 (2012), paragraph 24 and 2161 (2014), paragraph 48.

### Thirteenth report

38. As noted above, the judgment of the General Court of the European Union in the case of Mohammed Al-Ghabra v. European Commission<sup>102</sup> contains an interesting pronouncement with respect to the existence of the Ombudsperson as a legal remedy that was available to the applicant in the case at hand. In particular, when determining the merit of his application for annulment, the General Court took into account the fact that the applicant had chosen not to pursue that remedy. Furthermore, the Court accepted that the Commission had applied the same review criteria as that used by the Ombudsperson. Responding to an argument raised by the United Kingdom,<sup>103</sup> the Court found that there was no rational reason for failing to submit a delisting request through the Ombudsperson, in particular since the applicant claimed to have arguments to support the removal of his name from the Committee's list. The Court also found that the applicant's conduct<sup>104</sup> had done nothing to allay the reasonable suspicions that had fallen on him in the light of the information and evidence that had been considered. In response to an argument made by the petitioner relating to the source of information, the Court found that the Commission had correctly applied the same criterion as that used by the Ombudsperson, namely, to first of all seek to ascertain whether there was sufficient information to provide a reasonable and credible basis for the allegation of torture.<sup>105</sup>

39. The failure of applicants to avail themselves of that remedy has no impact on the admissibility of their application to the General Court.<sup>106</sup> However, in the light of the possible adverse inference the Court may draw from the failure to do so, the judgment may motivate individuals and entities that wish to be delisted to first seek delisting through the Ombudsperson's process prior to applying to the Court for annulment, or at least to do so concurrently.

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<sup>102</sup> 6 Judgment of the General Court (Third Chamber), case T-248/13, Mohammed Al-Ghabra v. European Commission, (13 December 2016). Available from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013TJ0248&from=EN>. The case initially arose from the addition of Mohammed Al-Ghabra's ("the applicant") name to the sanctions list by the Committee on 12 December 2006 and its subsequent addition to the list of the European Union on 10 January 2007. The applicant launched two sets of proceedings before organs of the European Union: (1) a request for review by the European Commission of the addition of his name to the list of the European Union; and (2) an application, following the Committee's decision of 6 March 2013 to retain his name on the list, for annulment of (a) Commission Regulation (EC) No. 14/2007, in so far as it concerned him, and (b) Commission Decision Ares (2013) 188023 of 6 March 2013 confirming the inclusion of his name on the list of the European Union.

<sup>103</sup> 21 During the course of its review of the addition of this individual's name to the list of the European Union, the Commission had repeatedly informed the applicant that he had had the opportunity to submit a request to the United Nations Ombudsperson to be removed from the Committee's list.

<sup>104</sup> 22 The applicant's conduct refers both to his failure to request delisting through the Ombudsperson process and to the withdrawal of his claims to the Court.

<sup>105</sup> 23 This finding was made in the context of the applicant's complaint that the Commission had failed to consider whether the allegations made against him by the Committee had been based on information obtained through torture. The General Court ruled that the Commission had correctly found that, in the circumstances of the case, it was reasonable to rely on a general presumption that the Committee did not base its findings on evidence obtained through torture.

<sup>106</sup> 24 Even if successfully delisted by the Committee following the recommendation of the Ombudsperson, an individual or entity can still turn to the Courts of the European Union, which can determine whether they should have been listed in the first place.

40. The judgment reflects a positive assessment of the added value of the Ombudsperson's mechanism. It follows another judgment from the Supreme Court of the United Kingdom<sup>107</sup> and a separate opinion of judges from the European Court of Human Rights,<sup>108</sup> both issued during the first half of 2016, which also demonstrated new interest in the review process of the Ombudsperson. Such views are encouraging and contrast with those expressed previously in several judgments issued by regional courts following the establishment of the Office. Those judgments barely acknowledged the establishment of the Office owing to it not offering guarantees of effective judicial protection.<sup>109</sup>

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<sup>107</sup> 25 Judgment of the Supreme Court of the United Kingdom, *Youssef v. Secretary of State for Foreign and Commonwealth Affairs* (27 January 2016). In this case, the applicant, who had been retained on the sanctions list following the recommendation by the Ombudsperson, was challenging on appeal the domestic implementation of sanctions. In dismissing Mr. Youssef's appeal, the Supreme Court did not rely only on the updated narrative summary of reasons for the listing, which had been posted on the Committee's website after it had decided to retain Mr. Youssef's name on the list. The Supreme Court also referred to some of the information contained in the letter providing reasons and the analysis of the Ombudsperson.

<sup>108</sup> 26 Concurring opinion of Judge Pinto de Albuquerque, joined by Judges Hayiyev, Pechal and Debov in the judgment issued by the Grand Chamber of the European Court of Human Rights in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, Application No. 5809/08 (21 June 2016). In this case, the concurring judges considered that, as a matter of principle, nothing hindered the adoption of adequate substantive and procedural safeguards by the United Nations bodies, in conformity with the Charter of the United Nations and the International Covenant on Civil and Political Rights, when they take binding decisions to impose sanctions on individuals and entities. The judges indicated that the Office was not an insignificant development, which showed that incremental changes in the system were possible, and noted that it could be further strengthened, if the political will were there.

<sup>109</sup> 27 See, for example, the judgment of the Grand Chamber of the Court of Justice of the European Union, *Commission and Others v. Kadi* (Joined Cases C-584/10 P, C-593/10 P and C-595/10 P) (18 July 2013), in which the court stated that effective review by the courts of the European Union was all the more essential in the absence of guarantees of effective judicial protection at the level of the United Nations. See also the judgment of the Grand Chamber of the European Court of Human Rights, *Nada v. Switzerland*, Application No. 10593/08 (12 September 2012).

## Consideration of delisting requests

### Standard and Approach to analysis

#### First Report

25. An essential issue still under consideration is the setting of a standard for analysis by the Ombudsperson. Fair process demands that the information gathered by the Ombudsperson be assessed in relation to a defined standard in order to ensure consistency and objectivity of analysis. Work is ongoing to develop a standard that properly reflects the serious nature and particular context of decisions of the Al-Qaida and Taliban Sanctions Committee and at the same time recognizes the significant effect of the sanctions on listed individuals and entities.

#### Second Report

22. As stated in the first report of the Office of the Ombudsperson, fair process requires that the information gathered by the Ombudsperson be assessed in relation to a defined standard in order to ensure consistency and objectivity of analysis. With that goal in mind, on 28 February 2010 the Ombudsperson sent a separate document to the Chair of the Al-Qaida and Taliban Sanctions Committee entitled “Approach to and standard for analysis, observations and principal arguments” to be applied in the preparation of comprehensive reports, in which the Ombudsperson addressed the issue of whether it is justifiable for an individual or entity to continue to be listed on the basis of the information made available to the Ombudsperson. In other words, is there sufficient information to provide a reasonable and credible basis for the listing? To enhance the transparency of the delisting process, the document has been made available, in the six official languages of the United Nations, on the [website](#) of the Office of the Ombudsperson and in annex III to the present report.

#### Fifth report (Special Rapporteur<sup>110</sup>)

54. The standard employed by the Ombudsperson for the assessment of delisting petitions is whether at present there is sufficient information to provide a reasonable and credible basis for the listing. The Special Rapporteur has noted that this is not a familiar standard, making the approach of the Ombudsperson unclear. He has gone on to provide examples of more recognized tests that fall between the criminal standard and mere suspicion.<sup>111</sup> In the end the Special Rapporteur argues in favour of a balance of probabilities standard in the Ombudsperson process, which, in the common law, is the highest possible standard, short of that applied in criminal matters.<sup>112</sup>

55. The rationale for the standard employed by the Ombudsperson is set out in detail in the document on the approach and standard prepared by the Ombudsperson (see annex II).<sup>[113]</sup> In summary, the standard currently employed is not reflective of existing approaches found in

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<sup>110</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/67/396](#)).

<sup>111</sup> 13 A/67/396, para. 56 (noting that those include reasonable standards for suspicion, reasonable grounds for belief and proof on the balance of probabilities).

<sup>112</sup> 14 A/67/396, para. 57 (recommending to apply the “more likely than not” standard and a proportionality test between the sanctions and the interference with the listed person or entity’s fundamental rights).

<sup>113</sup> Available on the [website](#) of the Office of the Ombudsperson.

domestic or regional law. This was a deliberate choice, given the international nature of the mechanism and the need to avoid the use of a standard drawn from one particular legal system or tradition. Instead, the standard is premised on a review of various approaches employed in different legal systems and reflects fundamental and consistent concepts, notably sufficiency, reasonableness and credibility. Practice indicates that the standard is a workable one, and the Ombudsperson remains satisfied that the test, with these well-recognized benchmarks, provides adequate clarity and consistency to the Ombudsperson process.

56. In addition, in determining an appropriate standard, the Ombudsperson has taken into account the significant rights implicated in terms of both individual rights to property and movement and collective rights to life and security, which the Security Council and the Committee are obligated to safeguard. The Ombudsperson is of the view that the standard adopted properly balances the various rights at issue, offering protections for the individual and at the same time allowing for appropriate preventive measures aimed at protecting against terrorist activity and attacks.

#### *Torture (Special Rapporteur<sup>114</sup>)*

57. The Special Rapporteur has expressed grave concerns as to the Ombudsperson's approach with respect to information that was or may have been obtained by torture and the fact that such information is not excluded from her assessment since she does not consider herself bound by formal rules of evidence ([A/67/396](#), paras. 46-47). In response, the Ombudsperson has clarified her approach to the issue of torture (see annex III). In summary, rather than "admitting" or "excluding" information on any particular ground, the Ombudsperson assesses its relevance, specificity and credibility or reliability. She may, as a result, decide not to rely on any particular piece of information, especially because of its lack of credibility. The Ombudsperson considers information obtained through torture inherently unreliable. Therefore, while the process relied upon by the Ombudsperson does not include an exclusionary provision as is applicable in some domestic legal systems, the result is effectively the same, in that information obtained through torture will not be relied upon in the Ombudsperson process because of the lack of reliability. Moreover, in cases where torture is not established to the applicable standard but concerns exist, the weight of information may be affected. The Ombudsperson is fully satisfied that the process adopted with respect to information obtained by torture is consistent with international standards and norms.

#### [Sixteenth](#) report

##### *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

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<sup>114</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/67/396](#)).



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.

## Cooperation of States and specificity of information

### First report

47. The effectiveness of the work of the Ombudsperson and the ability to provide detailed information and thorough analysis and observations to assist the Committee is heavily dependent on the cooperation of States. To date, States involved in the initial cases have been cooperative in responding to requests and providing information. Any difficulties in that respect have arisen from the complexities of the cases, the type of information which is needed for proper analysis and questions of access to classified material, as opposed to any issue of non-cooperation. It would be useful if the need for continued cooperation with the Office of the Ombudsperson, on the part of all States — not just members of the Committee — could be reinforced and encouraged.

### Second report

39. The work carried out over the past six months has only served to highlight more clearly the critical importance of cooperation by States with the Office of the Ombudsperson. The overall effectiveness of the process is dependent upon States providing the Ombudsperson with all the relevant information used to list an individual or entity in a timely manner.

40. As noted, the Ombudsperson is, almost without exception, receiving replies and in all cases the States with the most relevant information for carrying out an analysis of a given case (usually the designating States and States of residence or location/incorporation) are providing responses. Nonetheless, there have been some key challenges in the information-gathering process with respect to the initial de-listing petitions. Most markedly, in certain cases it has been difficult to obtain the necessary level of detailed information for a proper analysis. In particular instances, there has also been an issue as to the timeliness of the disclosure of information.

*See also paragraph 41 of the [Second Report](#) below (Section on [Access to confidential information](#))*

### Third report

38. The importance of State cooperation has been highlighted above. Since the issuance of the second report of the Office, the very good cooperation by States has been sustained.

39. As noted, the Ombudsperson is receiving replies to requests for information, including from key States holding the most relevant material. Nonetheless, problems identified previously persist. Some of the information submitted continues to lack the detail and specificity necessary for meaningful analysis. This has an impact in terms of the sufficiency of the material to support the case overall, and it limits the effectiveness of the dialogue with the petitioner, as few particulars are available to lend adequate precision to the discussion. In addition, frustration has been experienced in attempting to obtain confirmation or clarification from States concerning information that is in the public domain as a result of press reports or other means. It is evident that many of the challenges

faced in this respect relate to the question of classified/confidential material, again highlighting the importance of reaching agreements with States on access to such material.

40. There also continue to be problems with regard to the timing of some of the responses received from States. The detailed process set out by the Security Council in annex II to resolution 1989 (2011) is time-sensitive. Its effectiveness is therefore dependent on information being provided within the prescribed periods. Late responses reduce the time available to the Ombudsperson to engage in dialogue with a petitioner and to prepare a comprehensive report. Ultimately, this can affect the fairness of the process. Given that the period for information-gathering has been extended and is now quite lengthy, it is important that States meet the deadlines for information-gathering set by the Security Council.

41. However, on the positive side, even at the early stages of implementation of the new procedures mandated under resolution 1989 (2011), it is clear that the Ombudsperson's mandate to provide a recommendation, combined with a "trigger" for de-listing, serves as a strong impetus for States to provide as much information as possible, in a timely manner. The consequences of a failure to do so will have a more direct impact on the decision to be taken in each case. In addition, in discussions with Member States, paragraph 25 of resolution 1989 (2011), in which the Security Council strongly urges Member States to provide all relevant information to the Ombudsperson, has proved useful in encouraging States to cooperate with the Ombudsperson.

#### Fourth report

33. State cooperation remains very strong. However, some of the problems previously identified continue to impede the process. In particular, in the period under review there has been a slight increase in cases of non-response from States, although none has involved a State of residence or designating State. Nonetheless, the absence of responses from some States is a matter of concern.

34. Access to detailed information with sufficient particularity remains a serious problem, to the detriment of the effectiveness of the process in many respects. Notably, the test applied in the Ombudsperson process is whether there is sufficient information to provide a reasonable and credible basis for the listing. In the absence of particulars, it is difficult to assess the sufficiency and reasonableness of the information or even in some instances to accord any weight to it. Also, specificity and detail are key indicia of credibility and are of particular importance in this context given that the original sources of the information, in many instances, cannot be disclosed. The absence of detail also impairs the ability of the Ombudsperson to have a frank dialogue with the petitioner and to properly assess the responses and information provided. It remains the case that many of the challenges faced in this respect relate to the question of classified/confidential material, again highlighting the importance of reaching agreements with States on access to such material. In addition, some States have demonstrated reluctance to respond to specific questions posed or to give access to their operational agencies even when the issue of confidentiality does not arise.

35. The most significant problem, however, which has become more acute in this reporting period, is the timeliness of the responses provided by States, including the key States in individual cases. On several occasions, responses have been submitted well into the dialogue phase and, in some instances, even after the initial two-month deadline for that phase has expired.

36. The effectiveness of the detailed process elaborated by the Security Council in annex II to resolution 1989 (2011) is heavily dependent on the timelines applicable to the various stages of the procedure. Furthermore, experience has demonstrated very clearly that the deadlines fixed by the Security Council — applicable to States, the Ombudsperson and the Committee — are fundamental to the overall fairness of the process. This is especially the case with the periods prescribed for the submission of information by States. Key principles of fairness dictate that the petitioner be informed of the case against him or her and have an opportunity to respond to the same and be heard by the decision maker. When information is submitted outside of the prescribed information-gathering period, it is prejudicial to the petitioner in that the time period for disclosing and discussing the information and for the preparation of a response to it is shortened, sometimes considerably. It also makes it difficult to ensure that the information is properly reflected and analysed in the comprehensive report. Finally, if it is provided at a very late stage, especially after the preparation of the comprehensive report, it has the potential to vitiate the fairness of the overall process. For all these reasons, and given that the period for information-gathering has been extended and is now quite lengthy, it is important that States meet the deadlines for information-gathering set by the Security Council.

37. Given the critical importance of timely cooperation by States, it would be helpful if consideration were given to further emphasizing the importance of State compliance with information-gathering requirements within the established deadlines.

#### [Fifth report](#)

32. State cooperation in terms of responses has been very strong during the reporting period, reversing the slight trend noted in the previous report of an increase in the number of cases of non-response. All designating States and States of residence have replied in the cases completed during the reporting period. The two States that failed to respond were both States of nationality, which were contacted in accordance with the requirements of the resolution and not because of any specific expectation that the State would hold relevant information. In both instances, the petitioners had few or no connections to the State. It is also noted that the two States faced internal circumstances that may well have precluded easy access to information from authorities.

33. In contrast, however, the timeliness of responses remained problematic. Paragraph 23 of resolution 2083 (2012) contains new language that encourages the sharing of information in a timely manner. In addition, the Security Council, in paragraph 4 of annex II to the resolution, has highlighted that any challenges with regard to the gathering of information from States should be brought specifically to the attention of the Committee. These additional provisions should be useful in encouraging the cooperation of States in the Ombudsperson process, although the issue is best left assessed in the next report.

34. The most significant shortcoming with regard to cooperation, and one of the most pressing challenges to the effectiveness of the whole process, remains the lack of specificity in the material submitted by States with respect to individual cases. Of particular concern are States' responses that provide only broad assertions as to purported support activity on the part of petitioners and limited, and in some instances, no substantiating information or detail. As set out in the fourth report, in the

absence of specific information, it is very difficult and in some instances impossible to properly assess the sufficiency, reasonableness and credibility of the underlying information or to have a meaningful dialogue with and receive a specific response from the petitioner. It is clear that the major impediment to the disclosure of detailed information is the confidentiality or classification restrictions applicable to the underlying information. As mentioned in paragraph 10 above, there has been some progress during the reporting period in terms of additional arrangements and agreements, including the entry into force of the formal agreement with Austria. However, more agreements and arrangements are necessary, in particular with States frequently implicated in specific cases, and practical solutions must be found if there is to be any real progress in overcoming the challenge posed by the lack of specific information. Some concerns have also arisen in recent cases as to information favourable to the petitioner's case not being produced by States. Such material is essential to a fair process, and consideration should be given to explicit language on this issue in any future resolution.<sup>115</sup>

*See also paragraph 35 of the [Fifth report](#) below (Section on [Access to confidential information](#))*

#### [Sixth report](#)

45. State cooperation in terms of responses has continued to be strong during the reporting period. All designating States and States of residence have replied in the cases completed since the previous report. In fact, only one State failed to respond to a request for information. While the information that the State could have provided might have been quite relevant to the factual assessment, that State was not among those mandated by the resolution to receive requests for information.

46. Overall, however, there was improvement in the general timeliness of responses, with very few instances of late submission of information. This has had an impact on the overall efficiency of the process, reducing the number of instances in which the information-gathering phase needed to be extended.

47. While these were all encouraging trends, one significant hurdle to effective State cooperation remains: the Ombudsperson continues to receive responses in the form of assertions but not the supporting information or the level of detail necessary to assess the sufficiency, reasonableness and credibility of the underlying information. This failing undermines the effectiveness of the overall process, including the meaningfulness of the dialogue with the petitioner and the ability to conduct a thorough analysis of the underlying information. Moreover, this trend is very worrying in terms of the ability of the Ombudsperson to prepare a comprehensive report that properly reflects the facts of the case and to provide, in all circumstances, an appropriate recommendation.

[...]

49. In sum, the lack of detailed information and substantiation remains the most critical problem in the Ombudsperson process. Progress on this issue is only possible if practical solutions can be found

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<sup>115</sup> 9 Concerns about the non-disclosure of such information were discussed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in paragraph 45 of his report (A/67/396).

to overcoming the access restrictions, especially with States that are frequently implicated in specific cases.

See also paragraph 48 of the [Sixth report](#) below (Section on [Access to confidential information](#))

#### [Seventh report](#)

60. State cooperation in terms of responses remained strong during the reporting period. As in the previous reporting period, all designating States and States of residence replied in the cases that were completed. The three States that did not respond were contacted as relevant States thought potentially to hold pertinent information. Of those States, one had only a remote link to the case and had previously indicated having no information on a related case. The other two faced internal circumstances that may well have precluded easy access to information from the authorities.

61. The reporting period was particularly fruitful in terms of the level of detail and thoroughness of information received in a number of cases, including confidential material in some instances. This allowed the Ombudsperson to fully assess the sufficiency, reasonableness and credibility of the underlying information in those cases. In a significant number of instances, however, the Ombudsperson received responses in the form of assertions lacking any level of detail or supporting information. As noted previously, this failing undermines the effectiveness of the overall process, including the dialogue with the petitioner. Most significantly, it has an impact on the Ombudsperson's ability to conduct a thorough analysis of the underlying information as an independent reviewer, to prepare a comprehensive report that properly reflects the facts of the case and to provide, in all circumstances, an appropriate recommendation.

See also paragraph 62 of the [Seventh report](#) below (Section on [Access to confidential information](#))

#### [Eighth report](#)

36. State cooperation in terms of responses remained strong in the reporting period. All designating States and States of residence have replied in the cases completed. The four States that did not respond were contacted as relevant States which were thought potentially to hold pertinent information. Of those, two had only a technical link to the case and the other two faced internal circumstances that may well have precluded easy access to information from authorities.

37. During the reporting period, there were serious problems in one case with access to the petitioner and significant delays in the submission of a substantive response. However, through the diligent and extraordinary efforts of officials of the State involved, in New York and in the capital, the challenges were ultimately overcome, evidencing once again the strong cooperation of States with the Office of the Ombudsperson.

See also paragraph 38 of the [Eighth report](#) below (Section on [Access to confidential information](#))

#### [Ninth report](#)

47. State cooperation in terms of responses remained strong in this reporting period. All designating States and States of residence/nationality have replied in the cases completed. Moreover, the Ombudsperson has met and engaged with States involved in individual cases and this has resulted in specific action being taken by the States with reference to pending cases. Further, at recent debates

relating to sanctions and counter-terrorism, in the Security Council and other forums, multiple States across regional groupings have expressed support for the work of the Office of the Ombudsperson.<sup>116</sup>

#### Tenth report

48. State cooperation and expressions of support for the Office of the Ombudsperson were particularly strong during the reporting period. Almost all States provided a response to requests for information presented, and all designating States and States of residence/nationality replied in all completed cases. In addition, at recent debates concerning sanctions and counter-terrorism, in the Security Council and other forums, States across regional groupings expressed exceptional support for the work of the Office of the Ombudsperson.<sup>117</sup>

#### Security Council resolution 2253 (2015)

60. *Strongly urges* Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate, *encourages* Member States to provide relevant information, including any detailed and specific information, when available and in a timely manner, [...]; *[Emphasis added, the underlined language is new]*<sup>118</sup>

#### Eleventh report

43. State cooperation and expressions of support for the Office of the Ombudsperson were strong during the reporting period. Almost all States provided a response to requests for information presented, and all designating States and States of residence/nationality replied in all completed cases. In addition, States across regional groupings have expressed strong support for the work of the Office both during bilateral meetings and at recent debates concerning sanctions.<sup>119</sup>

#### Twelfth report

32. State cooperation and expressions of support for the Office of the Ombudsperson remained strong during the reporting period. All but one State provided a response to requests for information presented, and all designating States and States of residence/nationality replied in all completed

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<sup>116</sup> 12 See for example the 7285th meeting of the Security Council, on working methods, held on 23 October 2014; the 7316th meeting, on threats to international peace and security caused by terrorist acts, held on 19 November 2014; and the 7323rd meeting, on general issues relating to sanctions, held on 25 November 2014; the meeting of legal advisers held in New York on 27 October 2014; the report on the high-level review of United Nations sanctions on 31 October 2014 and the fourth review of the United Nations Global Counter-Terrorism Strategy held in New York on 11 June 2014.

<sup>117</sup> 14 See, for example, S/PV.7463; the open briefing of Member States by the Ombudsperson on the work of the Office on behalf of the Security Council Al-Qaida sanctions Committee, held on 24 April 2015; and S/2015/459.

<sup>118</sup> Identical language in subsequent resolution.

<sup>119</sup> 4 See e.g. Open Briefing to United Nations Member States by Catherine Marchi-Uhel, Ombudsperson, Security Council Al-Qaida Sanctions Committee, held on 23 November 2015; Letter dated 4 August 2015 from the representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the Secretary-General.

cases. In addition, States across regional groupings expressed strong support for the work of the Office both at bilateral meetings and at recent debates concerning sanctions.<sup>120</sup>

#### Thirteenth report

35. States that had been generally supportive of the Office continued to express and demonstrate such support during the reporting period. Given that several States failed to respond to requests for information during the same period, the Ombudsperson reiterated the importance of such responses as part of the delisting process during her interactions with those States and, more generally, during briefings provided to Member States. Such responses are important even when States are not in a position to share information relevant to a specific request.

#### Fourteenth report

31. States that are generally supportive of the Office of the Ombudsperson continued to express and demonstrate such support during the reporting period, with the exception of one State, as detailed above. During the previous reporting period, the Ombudsperson had stressed the importance of States responding to requests for information, even when they are not in a position to share relevant information in a specific request. These efforts have proved successful in part, as several States which had failed to respond previously to such requests did so during the reporting period. However, more efforts in this direction are needed.

#### *Rehabilitation programme*

32. During the reporting period, the Ombudsperson engaged in discussions on an initiative by Kuwait aimed at putting in place a one-year rehabilitation programme for listed nationals of that State, under the auspices of a government committee. The aim of the programme is to support the disassociation effort of individuals who admit to their prior actions, with a view to increasing their chances of being delisted from the sanctions list. Interesting features of the programme include a social integration plan, participation in lectures, adherence to certain rules in the use of social media, monthly meetings with representatives of the government committee, the opportunity for therapy and quarterly assessment by the government committee. For those individuals who, either during the course of the programme or following its completion, would request their delisting from the sanctions list via the Ombudsperson, Kuwait would be prepared to share the assessment reports on the progress of the participant with the Ombudsperson and, through him or her, with the Committee. The Ombudsperson welcomes this initiative and the fruitful cooperation with this State on this issue. She is hopeful that the programme will achieve the expected results and trusts that other States will be inspired to offer similar opportunities to their citizens.

#### Sixteenth report

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<sup>120</sup> 8 See, for example, discussions with representatives of the Group of Like-Minded States held on 11 February and 29 June 2016, following up on the adoption of resolution 2253 (2015); the 51st meeting of the Committee of Legal Advisers on Public International Law, held on 4 March 2016; the open briefing to Member States by the Ombudsperson, Security Council ISIL (Da'esh) and Al-Qaida Sanctions Committee, held on 29 March 2016; the European Union/United Nations seminar on sanctions held on 15 April 2016; and the meeting of the Council of the European Union Working Group on Public International Law and Working Party of Foreign Relations Counsellors held on 2 June 2016.



## *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.

See also paragraph 30. of the [Sixteenth report](#) below (Section on [Access to classified information](#))

## Access to confidential or classified information

### [Security Council resolution 1904 \(2009\) \(Annex II\)](#)

"7. [...] the Ombudsperson, [...] shall draft and circulate to the Committee a Comprehensive Report that will exclusively:

(a) Summarize and, as appropriate, specify the sources of, all information available to the Ombudsperson that is relevant to the delisting request. The report shall respect confidential elements of Member States' communications with the Ombudsperson;"<sup>121</sup>

"14. In all communications with the petitioner, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States."<sup>122</sup>

### [Security Council resolution 1989 \(2011\)](#)

"25. *Strongly urges* Member States to provide all relevant information to the Ombudsperson, including providing any relevant confidential information, where appropriate, and *confirms* that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it;"

Annex II, paragraph 6 (g): "In the course of the information gathering and dialogue phases and in the preparation of the report, the Ombudsperson shall not disclose any information shared by a state on a confidential basis, without the express written consent of that state;"<sup>123</sup>

### [Second report](#)

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<sup>121</sup> Identical language in subsequent resolutions.

<sup>122</sup> Identical language in subsequent resolutions.

<sup>123</sup> Identical language in subsequent resolutions.



41. Generally, these challenges are not due to a lack of willingness to cooperate but rather to the overarching problem concerning the disclosure of confidential or classified information. For example, in one case the declassification of material took an extended period of time, resulting in delays in presenting the information to the Ombudsperson. In another case, the information provided lacked essential details that could not be disclosed because of the classified nature of the underlying material. In those particular cases, solutions were proposed<sup>124</sup> and ways to address the situation were found, but the underlying issue remains a concern. The Security Council, in paragraph 25 of its resolution 1989 (2011), strongly urged Member States to provide all relevant information to the Ombudsperson, including confidential information, which should prove helpful in encouraging States to continue cooperating, including with respect to confidential information. In that same paragraph, the Council confirmed that the Ombudsperson must comply with any confidentiality restrictions placed on such information by the Member States providing it, which should be useful in advancing the negotiation of agreements and arrangements for the disclosure of classified or confidential information.

#### [Security Council resolution 2083 \(2012\)](#)

“23. *Strongly urges* Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate, *encourages* Member States to provide relevant information in a timely manner, *welcomes* those national arrangements entered into by Member States with the Office of the Ombudsperson to facilitate the sharing of confidential information, *encourages* Member States’ further cooperation in this regard, and *confirms* that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it”

#### [Fifth report](#)

35. With additional resources now in place in the Office of the Ombudsperson, renewed efforts will be made to encourage the adoption of agreements and arrangements and to pursue the provision of more specific material of relevance to the individual listings. In this regard, the provisions of paragraph 23 of resolution 2083 (2012), by which the Council specifically urged Member States to provide all relevant information and encouraged them to enter into such arrangements or agreements, should prove helpful.

#### [Sixth report](#)

30. As indicated, there is already a firmly established practice of State cooperation with the Office of the Ombudsperson that encompasses all of the key States pertinent to any delisting petition, including designating States and States of residence. While significant challenges remain in terms of enhancing access to confidential or classified information, the limited and focused nature of the mandate of the Office of the Ombudsperson makes the Office well suited on a practical level to the sharing of such material. This is demonstrated by the fact that several States have already entered into agreements or arrangements with the Office and, most significantly, that confidential information has been provided in some instances. Furthermore, the structure and procedures of the

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<sup>124</sup> 7 The case involving the delay has not been completed.

Office make it possible to accord strong protections to any information that is shared and to restrict access to the information to the Ombudsperson only.

[...]

48. The major impediment to the disclosure of detailed information remains the question of confidential or classified material. While some confidential material was used during the reporting period,<sup>125</sup> no progress was made in terms of increasing the number of arrangements or agreements for accessing such material. While discussions are ongoing with several States, the significant number of new delisting requests received during the reporting period means that the time and resources available to follow up on these agreements with individual States are limited.

#### [Seventh report](#)

62. The major impediment to the disclosure of detailed information remains the question of confidential or classified material despite some limited progress in individual cases. While no progress was made in terms of increasing the number of arrangements or agreements for gaining access to such material, discussions are ongoing with several States. Further progress on this issue is possible only if practical solutions can be found to overcome national access restrictions, especially with States that are frequently implicated in specific cases.

#### [Security Council resolution 2161 \(2014\)](#)

*“47. [...identical text to previous resolution paragraph 23], encourages Member States’ further cooperation in this regard, including by concluding arrangements with the Office of the Ombudsperson for the sharing of such information, and confirms that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it;” [Emphasis added, the underlined sentence is new].<sup>126</sup>*

#### [Eighth report](#)

38. The major challenge to cooperation remains access to confidential/classified material. In the reporting period there were practical achievements of importance in some individual cases and two new arrangements were agreed. However, efforts continue to increase the number of arrangements/agreements in particular with States that are frequently called upon to provide information in delisting cases.

#### [Ninth report](#)

48. As previously, the major challenge in cooperation and the most significant limitation to the effectiveness of the Ombudsperson process remains access to confidential or classified material. Recent delisting petitions considered through the Ombudsperson process have demonstrated the increasingly acute need for the Ombudsperson to be able to review confidential material. Such

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<sup>125</sup> 10 Where this occurred, the information that was kept confidential, though relevant, was not of such a nature as to preclude the disclosure of the substance of the case to the petitioner(s). The fact that some confidential information had been obtained was made known to the petitioner(s).

<sup>126</sup> Similar language on confidentiality in subsequent resolutions.

information is critical to a comprehensive and accurate assessment of the listing and imperative to a full analysis of the petition presented.

49. Despite renewed efforts in this reporting period, only one new arrangement was agreed, bringing the number of agreements/arrangements for access to such information to 15. In order to ensure that the Ombudsperson process properly balances all of the interests underlying the sanctions process, more agreements/ arrangements are urgently needed — particularly with States which often hold key information for the listings. Efforts in this regard continue.

#### [Tenth report](#)

49. The Ombudsperson continues to face challenges in accessing confidential and classified material relevant to the basis for listings. However, some significant progress was made in addressing this problem during the reporting period. One access-to-information agreement/arrangement has been entered into with Denmark. In addition, some States have confirmed to the Ombudsperson a willingness and ability to consider and provide confidential material, on a case-by-case basis, without a formalized process. In discussions, these States have revealed that insurmountable legal and policy constraints preclude entering into a written agreement or arrangement with the Ombudsperson on this matter but do not preclude ad hoc assistance. In fact, one State indicated that the adoption of any arrangement would probably limit, as oppose to advance, the opportunities for access to classified or confidential material in particular cases. This confirmation from several States as to the availability of ad hoc assistance is an important addition to the existing network for access to such material. It is also notable that, during the reporting period, confidential information of assistance and relevance in specific cases was provided despite the absence of an agreement or arrangement. In addition, there was considerable progress in the negotiation of further agreements/arrangements, which will, it is hoped, come to fruition in the very near future. While this issue continues to require attention and effort, it is encouraging to see progress being made. A comparison of the circumstances which the Ombudsperson faced in July 2010 with the current state of affairs serves to confirm that considerable advancement has been made in accessing confidential and classified material for the Ombudsperson process.

#### [Sixteenth report](#)

##### *Access to classified information*

30. Considering the above [paragraph 29, sixteenth report], 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.

### Concerns regarding disclosure of confidential documents by external actors

#### [Fourteenth report](#)

44. In one case which concluded during the reporting period, the State of nationality, which is not a member of the Committee, obtained the watermarked version of a confidential comprehensive report of the Ombudsperson before the Committee had concluded its consideration of the same. As

noted above, paragraph 13 of annex II to resolution 2368 (2017)<sup>127</sup> allows the Ombudsperson to provide a copy of that document, with any redactions deemed necessary by the Committee, to the designating State, or State of nationality, residence or incorporation. In the Ombudsperson's understanding, she may seek the Committee's approval to share a comprehensive report with those States, upon request, only after the Committee has completed its consideration of the same.<sup>128</sup> In this particular case, the State obtained a copy of the report before that time, and even before the Ombudsperson had sought the approval of the Committee to make it available to that State. The confidential report was thus shared without the Committee's approval, in violation of the resolution. After having obtained the comprehensive report without the approval of the Committee, the State of nationality in this case shared the unredacted version of report with counsel for the petitioner.

45. Such a practice raises concern and is unhelpful. It gives rise to concern because it suggests that the confidentiality attached to the documents is treated lightly. As a result, information which the Ombudsperson meant only for the Committee may end up with States outside the Committee or, as in this case, with petitioners. This raises an obvious security concern. In addition, the timing of the disclosure of the Ombudsperson's comprehensive report to States outside the Committee is important. As noted above, in the Ombudsperson's understanding, the reports are meant to remain internal until the Committee has concluded its consideration of the matter. This provides a protection against interference in the Committee's work in instances in which certain actors may dislike the Ombudsperson's recommendation. Practices like the ones observed in the reporting period invite interference from States that should not be part of the decision-making process.

46. These practices are also unhelpful, because information providers share information based on an understanding or agreement with the Ombudsperson as to the addressees of this information. Until now, the Ombudsperson has been involved in the Committee's decision-making process with respect to the final destination of the information contained in her comprehensive reports by suggesting redactions of the same to the Committee. To date, the Committee has always implemented redactions proposed by the Ombudsperson. If the Ombudsperson is deprived of the opportunity to meaningfully participate in this process because unredacted versions of the report are leaked, she may no longer be able to guarantee the confidentiality of information to providers who request it. Alternatively, the Ombudsperson may lose the trust of those providers, who may become cautious or unwilling to share information with the Ombudsperson. As the Ombudsperson's work depends hugely on the ability to gather information, this is a very worrying prospect.

47. It is obvious from this example and the one mentioned in the previous section that some States consider that the Ombudsperson's comprehensive reports and recommendations should be shared outside the Committee. The Ombudsperson supports an approach which would provide more transparency to the process. Perhaps this occurrence could be used as a starting point for discussions on disclosing the comprehensive report of the Ombudsperson, with appropriate redactions, to interested States other than the ones listed in paragraph 13 to annex II of the

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<sup>127</sup> 11 This is the same text as paragraph 13 of annex II to resolution 2253 (2015).

<sup>128</sup> 12 This understanding is based on the placement of paragraph 13 in annex II to resolution 2253 (2015), under "Committee discussion" and after paragraph 11, concerning the completion of the Committee's consideration of the comprehensive report, and paragraph 12, by which the Ombudsperson is required to notify all relevant States of the recommendation after the Committee has completed its consideration of the comprehensive report.

resolution, the petitioner, and even the public, at the appropriate time. This would be a giant step towards a much-needed increase of transparency in this process. If the Ombudsperson were authorized to do this, she or he could prepare two versions of the comprehensive report. The Committee would receive a full version, while other States and the petitioners would ultimately receive a redacted version. Redactions would remove the names of sources such as the identity of States having provided information (unless the source agreed to its disclosure) and address any other security concerns which the information provider or the Committee may have. Redacted versions would be prepared by the Ombudsperson in consultation with the Chair and would have to be approved by the Committee.

#### [Update by the Office of the Ombudsperson](#)

27. During the reporting period, counsel for the petitioner in a pending case drew the attention of the Office of the Ombudsperson to the fact that the media had obtained a copy of the delisting request presented on behalf of his client and had published passages thereof. The Office of the Ombudsperson shares delisting requests only with the Committee when initiating the information-gathering period and with relevant States when requesting information pertaining to a particular petition. The Office otherwise treats the content and existence of delisting requests as confidential. The Office has taken measures to avoid similar occurrences in the future, including a clear mention in the letter sent to relevant States that delisting requests are confidential and a new practice of watermarking petitions.

### Requirement of independence and impartiality and consideration of States' opinions

#### [Security Council resolution 1904 \(2009\)](#)

Annex II paragraph 2: "The Ombudsperson may engage in dialogue with these States to determine: (a) These States' opinions on whether the delisting request should be granted;"<sup>129</sup>

#### [Security Council resolution 1989 \(2011\)](#)

Annex II paragraph 6 (h): "During the dialogue phase, the Ombudsperson shall give serious consideration to the opinions of designating states, as well as other Member States that come forward with relevant information, in particular those Member States most affected by acts or associations that led to the original designation."<sup>130</sup>

#### [Fourteenth Report](#)

33. During the reporting period, several States expressed their perception and concern that the Ombudsperson may not be giving full consideration to the opinions expressed by States on particular delisting requests. These expressions of anxiety seem to reveal a recurring concern and a misunderstanding of the role and independence of the Ombudsperson. In fact, one State had

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<sup>129</sup> NB. In paragraph 25, in the general context of delisting requests submitted by States, the Council "Encourages the Committee to give due consideration to the opinions of designating State(s), and State(s) of residence, nationality or incorporation when considering delisting requests". This could be read to apply equally to delisting requests submitted through the Office of the Ombudsperson.

<sup>130</sup> Similar language in subsequent resolutions.

highlighted this concern at the beginning of the Ombudsperson's tenure, before she had even issued her first comprehensive report. The dissatisfaction seems to emanate from cases where one or more States have expressed their opinion that the name of the petitioner should be retained on the sanctions list but where, on the basis of her assessment of the information gathered in the light of the applicable standard, the Ombudsperson ultimately recommended that the Committee consider delisting the name of the petitioner. States expressing such concerns and dissatisfaction were both members and non-members of the Committee. Some of those States submitted information relevant to the particular delisting request. In one case, the information did not support the position of the State. In other cases, States opposing a delisting request did not even submit information in support of their position.

34. Reviewing delisting requests is a very sensitive matter, involving security interests and human rights considerations. It is therefore to be expected that in a given case some States may disagree with the Ombudsperson's recommendation. The Ombudsperson is fully aware of her obligation to give serious consideration to the opinions of designating States and of other Member States that come forward with relevant information, in particular those Member States that are the most affected by the acts or associations that led to the original listing. The Ombudsperson has taken this requirement very seriously in each case where one or more States elected to offer an opinion on the merits of a delisting request.

35. However, those perceptions clearly reveal a lack of understanding of the way in which this requirement accords with the overall obligation of independence and impartiality which are at the core of the Ombudsperson process.

36. The Ombudsperson may not ignore the opinions of designating States, or those of other Member States that come forward with relevant information, in particular those Member States most affected by acts or associations that led to the original listing. The obligation to give serious consideration to those opinions is mandated in annex II to resolution 2368 (2017). The resolution makes equally clear that, in reviewing delisting requests, the Ombudsperson must act in an independent and impartial manner and neither seek nor receive instructions from any Government. These simultaneous requirements are fully compatible with each other and equally guide the Ombudsperson's approach in reviewing delisting requests.

37. The requirement to give serious consideration to the opinions expressed by States does not imply that the Ombudsperson should unconditionally follow such opinions. Such an interpretation would not only be unsustainable in the relatively frequent cases where the States which have expressed their opinion to the Ombudsperson about the delisting request diverge as to whether the listing should be maintained or terminated. It would also be incompatible with the requirement of independence and impartiality imposed on the Ombudsperson. The extent to which in a given case the Ombudsperson can follow the opinion expressed by a State depends on whether the opinion in question is sustained by the application of the standard to the totality of the information gathered in that case, and only to such information.

38. There are inevitably instances in which the Ombudsperson and one or more States choosing to express their opinion may diverge as to the merits of a delisting request. This is, first, because the Ombudsperson and the States in question do not necessarily have access to the same information. States do not always share with the Ombudsperson the information based on which they form their

opinion, or the totality of it. The Ombudsperson may base her recommendation only on information before her and it would be improper for her to speculate on the existence and content of information which a State has chosen not to share with her. Even when States make available the totality of the information based on which they have formed their opinion, they may not have access to the totality of the information gathered by the Ombudsperson. Through privileged dialogue with the petitioner, the Ombudsperson receives a unique perspective on the case. In addition, the Ombudsperson may receive confidential information from States or other sources, with a request not to share it with petitioners, States or even the Committee. In such cases, the Committee will not have access to information which may be determinative in recommending a delisting.

39. A difference of views on whether the delisting request should be granted may even exist in cases in which States and the Ombudsperson have had access to the same information. The Ombudsperson assesses whether there is sufficient information to constitute a reasonable and credible basis to maintain the listing at the time of review. Interaction with States, including Committee members, in the context of gathering information shows that when they form their opinion some States rely on their domestic standard, which may differ from the standard applied by the Ombudsperson. Other States do not rely on any standard at all and form their opinion based on considerations other than the present existence of an association with ISIL or Al-Qaida, the criterion for listing. Other divergences may arise from the fact that a State considers that sanctions should be punitive, rather than preventative, the purpose stated in Security Council resolutions. It may also stem from a State's particular understanding of the listing criteria and the notion of "association" and "disassociation". This interpretation does not always accord with the legal framework applicable to the sanctions regime.

40. The above divergences may lead one or more States to believe in a given case that the Ombudsperson has not sufficiently taken into account their opinion. To mitigate such a risk, the only tool at the disposal of the Ombudsperson is the care she applies in reasoning her recommendation in each case. The analysis and observations contained in the comprehensive report in principle contain sufficient explanations to inform the Committee why the Ombudsperson has not followed the opinion expressed by one or more States. However, owing to confidentiality constraints imposed by information providers, including States expressing an opinion, the Ombudsperson must omit from the comprehensive report information and analysis of the same which might otherwise be needed to fully disclose her reasoning. In addition, only a limited number of States that are not members of the Committee may, upon request and with the consent of the Committee, be provided with a copy of the comprehensive report.<sup>131</sup> Beyond that limited circle, States having expressed an opinion have no access to the comprehensive report even if they have provided relevant information to the Ombudsperson. Those States will therefore not have access to the Ombudsperson's reasoning.

## Procedure and practices related to States' disagreement with recommendations

### Fourteenth Report

41. Resolution 2368 (2017) clearly lays down the procedure for handling the disagreement of one or more members of the Committee with a delisting recommendation by the Ombudsperson. Such a

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<sup>131</sup> 10 According to resolution 2368 (2017), annex II, para. 13, these are a designating State, or State of nationality, residence or incorporation.

disagreement may materialize following one or more objections during the non-objection procedure envisaged by the Committee guidelines. The freeze of assets, travel ban and arms embargo will terminate with respect to the petitioner after 60 days, unless one of the two scenarios envisaged by paragraph 62 of the resolution occurs, namely, a reverse consensus or referral of the matter to the Security Council for its decision.

42. Resolution 2368 (2017) gives standing to States consulted by the Ombudsperson as relevant States to express their opinion to the Ombudsperson on whether the delisting request should be granted. Such standing is not limited to States that are members of the Committee. The resolution does not however give standing to States that are not members of the Committee to intervene in the latter's consideration of a delisting request. The Ombudsperson is authorized to inform the designating State(s), State(s) of residence, nationality or incorporation and any other relevant States of the recommendation only after the Committee has completed its consideration of the comprehensive report. Furthermore, it is only after such consideration that the Ombudsperson may, upon request by a designating State, or State of nationality, residence or incorporation, and with the approval of the Committee, provide a copy of the comprehensive report, with any redactions deemed necessary, to the requesting State.

43. Practice observed during the reporting period shows however, that some States find other ways than those authorized by the Security Council to be informed of the recommendation before the Committee has completed its consideration of the recommendation and to attempt to interfere in the process. It is not for the Ombudsperson to comment on the political and diplomatic character of the listing and delisting processes initiated by States, or on the practice of bilateral diplomatic negotiations and selective disclosure of intelligence among States which sometimes takes place in this context. Since the establishment of the Office of the Ombudsperson, the Security Council has repeatedly stated its commitment to continue to improve the fairness and transparency of sanctions procedures. It is the Ombudsperson's view that, in the context of a pending delisting request following a recommendation by the Ombudsperson, such practices are neither conducive to the fairness and transparency of the delisting process nor even compatible with it.



## Administrative issues

### Resources

#### [First Report](#)

53. The newly created Office of the Ombudsperson was originally mandated for an 18-month term. If that mandate is to be renewed, consideration should be given to providing the Office with appropriate resources, commensurate with its responsibilities and case load. Currently the Ombudsperson is ably assisted in her tasks by staff members of the Department of Political Affairs United Nations Secretariat, to the extent feasible given the independence of her functions and the competing demands on Secretariat staff. This help is invaluable but limited. The proper consideration of each petition requires considerable time and resources. The existing cases are already taxing the resources to the maximum and it is anticipated that this case load will continue to grow. In addition, there are the other significant responsibilities and activities outlined in the present report that are important to the advancement of the Office and the enhancement of the fairness and clarity of the Al-Qaida and Taliban sanctions process. In the view of the Ombudsperson, there is urgent need at this stage for a dedicated administrative assistant and a senior-level legal professional to assist with the legal research and analysis central to the work of the Office.

54. In addition to human resources, while travel requirements are not extensive, sufficient travel funds are essential for outreach work and, more importantly, for operational activities such as petitioner interviews or accessing and reviewing case information. Thus, a reasonable travel budget independently administered by the Ombudsperson is imperative to the effective operation of the Office.

55. Further, it is fundamental to the fairness of the process that individuals and entities included in the Consolidated List are able to communicate with the Ombudsperson and, through her, with the Committee in a language which they understand. Thus, provision must be made for resources to translate essential material received or to be sent into languages other than the official languages of the United Nations.

#### [Security Council resolution 1989 \(2011\)](#)

“24. *Requests* the Secretary General to strengthen the capacity of the Office of the Ombudsperson to ensure its continued ability to carry out its mandate in an effective and timely manner;”

#### [Second Report](#)

50. As the mandate of the Office of the Ombudsperson has been renewed for an additional 18-month period and the caseload has increased, the need for the resources identified in the first report of the Office has become more pressing. While the Department of Political Affairs continues to skilfully assist the Office, dedicated resources are needed for the Ombudsperson to be able to fulfil the mandate accorded by the Security Council. This need has clearly been recognized by the Council in its resolution 1989 (2011) (para. 24).

51. To sustain the work of the Office, a dedicated administrative officer and a senior legal professional are essential. In addition, resources sufficient to support travel, particularly for operational matters such as examining sensitive information or meeting with a petitioner, are necessary. It is to be noted, in this regard, that in its resolution 1989 (2011) the Security Council indicated that the Ombudsperson should meet with the petitioner, to the extent possible (annex II, para. 6 (c)).

52. Furthermore, practice in the first cases has demonstrated very noticeably the imperative need for translation services, which have proved critical to ensuring that petitioners understand the case and that any response provided is properly and clearly presented to the Committee. Thus, it is apparent that adequate resources for translation are also necessary for the proper functioning of the Office of the Ombudsperson.

### [Third report](#)

58. Resource needs identified in the previous reports of the Ombudsperson and recognized by the Security Council in resolution 1989 (2011)<sup>132</sup> have been addressed. In line with the request of the Secretary-General, the General Assembly has approved the establishment of two dedicated positions to strengthen the Office of the Ombudsperson: a Professional Officer (P-4) and an Administrative Assistant. Steps are being taken to fill those positions as quickly as possible. Furthermore, additional funds have been allocated to cover the translation of material received from or to be transmitted to petitioners or of relevant material in specific cases that is not submitted in one of the six official languages of the Organization. The Department of Political Affairs provided assistance in spearheading the request for resources through the budgetary process.

59. Experience gained during the reporting period further demonstrated the importance of establishing these dedicated positions at this stage in the development of the Office of the Ombudsperson. While the Department of Political Affairs continued its efforts to provide support, the challenges posed, particularly by the increased caseload, highlighted the need for a more definitive and structural solution.

60. Despite these challenges, by prioritizing its core functions, the Office managed to continue to fulfil its central mandate of assisting the Committee with respect to de-listing petitions during the reporting period. However, related urgent tasks such as work on agreements on access to confidential/classified information and outreach activities were curtailed. The addition of committed resources will, it is hoped, allow for enhanced efforts with respect to these issues, in addition to increased efficiency in carrying out the work related to the core functions of the Office. Overall, the additional resources will be of significant assistance in ensuring that the Office of the Ombudsperson can continue to fully meet the mandate entrusted to it by the Security Council.

### [Fourth report](#)

53. Resource needs identified in the previous reports of the Ombudsperson, and recognized by the Security Council in paragraph 24 of resolution 1989 (2011), have been partially addressed. In line with the request of the Secretary-General, the General Assembly has approved the establishment of

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<sup>132</sup> 16 See para. 24.

two dedicated positions to strengthen the Office of the Ombudsperson: a professional officer (P-4) and an administrative assistant. The administrative assistant position has been filled. While the competition process for the staffing of the P-4 post is ongoing, absent unexpected developments, it should be completed shortly. This is of critical importance since, without the deployment of this additional resource, it will not be possible for the Ombudsperson to continue to fully meet the mandate accorded to her by the Security Council.

54. The issue of funds for translation of material received from or to be transmitted to petitioners, or material submitted by States, which is not in one of the six official languages of the United Nations remains a pressing problem. There have been several instances in this reporting period where material for transmission to or sent by a petitioner, or critical to a proper understanding of the case, has required translation.

55. A related problem has arisen because of the need for interpretation in the course of the dialogue phase. As discussed previously, the Security Council encourages the Ombudsperson to meet with petitioners to the extent possible. In the current reporting period, six interviews have been conducted with petitioners and this “face-to-face” process has proven to be extremely helpful to the petitioner and important for the comprehensiveness of the report. Members of the Committee continue to comment on the necessity for such interviews. However, the interviews can only be effective if conducted in a language understood by the petitioner, which in several instances meant that interpretation assistance was needed.

56. To date, no specific funds have been sought or allocated for either of these purposes, creating significant challenges to the effective implementation of the Ombudsperson process.<sup>133</sup> While informal solutions have been found to address the problem on a case-by-case basis, this approach is not sustainable in the long term. Efforts are being made to secure funding for translation/interpretation for the next budget cycle. Absent such resources, there is a danger that the overall fairness and efficacy of the process will be negatively affected.

#### [Security Council resolution 2083 \(2012\)](#)

“22. *Requests* the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, to ensure its continued ability to carry out its mandate in an effective and timely manner”

#### [Fifth report](#)

51. Human resource needs identified in the previous reports of the Ombudsperson have now been addressed. The Office is fully staffed with a P-4 Legal Officer and a full-time assistant. During the reporting period, the critical need for translation and interpretation resources was again clearly demonstrated. This was recognized by the Security Council in paragraph 22 of its resolution 2083 (2012), in which it requested the provision of resources for that purpose. The Secretariat has advised that funds have been specifically allotted in the most current budget for translation and interpretation assistance for the Office of the Ombudsperson.

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<sup>133</sup> 21 In the third report there was reference to funds having been allocated for this purpose in the 2012 budget, but this was subsequently determined to be incorrect information.

[Security Council resolution 2161 \(2014\)](#)

“46. Requests the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation services, as appropriate, to ensure its continued ability to carry out its mandate in an independent, effective and timely manner;” [Emphasis added, the underlined word is new]

[Tenth report](#)

85. In the first and second reports of the Ombudsperson, the need for dedicated resources to support the Ombudsperson was detailed. The following was stated in the first report:

“The newly created Office of the Ombudsperson was originally mandated for an 18-month term. If that mandate is to be renewed, consideration should be given to providing the Office with appropriate resources, commensurate with its responsibilities and case load. Currently the Ombudsperson is ably assisted in her tasks by staff members of the Department of Political Affairs of the United Nations Secretariat, to the extent feasible given the independence of her functions and the competing demands on Secretariat staff. This help is invaluable but limited. The proper consideration of each petition requires considerable time and resources. The existing cases are already taxing the resources to the maximum and it is anticipated that this case load will continue to grow. In addition, there are the other significant responsibilities and activities outlined in the present report that are important to the advancement of the Office and the enhancement of the fairness and clarity of the Al-Qaida and Taliban sanctions process. In the view of the Ombudsperson, there is urgent need at this stage for a dedicated administrative assistant and a senior-level legal professional to assist with the legal research and analysis central to the work of the Office.”<sup>134</sup>

86. Similar comments were reflected in the second report, submitted in July 2011.<sup>135</sup>

87. As stated in the third report, of 20 January 2012,<sup>136</sup> the General Assembly had approved the establishment of two dedicated positions to strengthen the Office of the Ombudsperson: an administrative assistant and a professional legal officer at the P-4 level. As of October 2012, both positions had been filled.

88. The original assessment of resource requirements remains appropriate, especially given the current overall constraints in that respect. The Office of the Ombudsperson has been able to fully engage with petitioners, consistently deliver comprehensive reports of high quality and ensure a fair process, at current resource levels, by working effectively as a team. While the workload can be significant, depending on the number of pending cases, this is a reality of the resource limitations faced across the United Nations more broadly. The resource requirements are stretched but adequate at this time. However, given the limited resources involved, any decrease, even for a

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<sup>134</sup> 25 See the first report (S/2011/29), para. 53.

<sup>135</sup> 26 See the second report (S/2011/447), para. 51.

<sup>136</sup> 27 See the third report (S/2012/49), para. 58.

limited period, would disproportionately affect the ability of the Office to perform its functions and would significantly impair its effectiveness at this stage of development.

89. Furthermore, this assessment of adequacy is entirely dependent on the continuous availability of resources as dedicated resources, consistent with the purpose for which the posts were provided. While initially the practice within the Security Council Subsidiary Organs Branch and the Security Council Affairs Division respected the committed nature of the positions, that approach has significantly changed over the past 20 months. It is evident, from both statements made and actions taken, that these resources are now viewed by management as Branch resources used to assist the Ombudsperson.

90. To illustrate, without consultation with the Ombudsperson, the administrative assistant is often directed to carry out work not related to the core functions of the Office of the Ombudsperson. In addition, as discussed above, the directions to the staff, in some instances, create a conflict in terms of the independence of the Office, which in turn has an impact on the effectiveness of the resources.<sup>137</sup> Furthermore, and perhaps most worrying, the recent performance appraisals for both staff members have been centred on the work carried out for the Branch, with minimal reference to the main function of the posts, to support the Ombudsperson. Moreover, none of the detailed specific comments made by the Ombudsperson are reflected in the appraisal documentation.

91. These actions and this general view are not consistent with the submissions made to obtain these resources or with the purpose for which they were provided by the General Assembly: to have dedicated staff for the Office of the Ombudsperson. It is important to note that this requirement for dedicated staff arises not only from workload demands but also, and even more important, as a result of the independent nature of the mandate. Therefore, it is imperative not only that the resources of the Office remain fully engaged in support of the Ombudsperson, but also that the staff continue to be viewed within the Security Council Subsidiary Organs Branch, and the Security Council Affairs Division more generally, as dedicated resources carrying out independent functions.

92. In practical terms, given the resource challenges for the organization as a whole, it is clearly appropriate that, in the absence of any conflict arising from its independent role, staff of the Office of the Ombudsperson may volunteer for, or be asked to assist with, other work. However, any such arrangements have to be subject to fulfilment of their priority responsibilities within the Office of the Ombudsperson and need to be discussed with the Ombudsperson in advance.

93. Furthermore, the functions of the Professional Officer within the Office of the Ombudsperson, as set out in the job description for the position,<sup>138</sup> need to be respected. The core functions of the Professional Officer, as directed by the Ombudsperson, are legal in nature and need to be performed by a Legal Officer with appropriate expertise. Finally, it is essential, given the dedicated nature of the

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<sup>137</sup> 28 See the seventh report (S/2014/73), para. 70.

<sup>138</sup> 29 "This position is located in the Office of the Ombudsperson, which falls within a special political mission administered and supported by the Department of Political Affairs. Administratively, the incumbent reports to the Chief of the Security Council Subsidiary Organs Branch, while substantively, the incumbent works under the direction of, and reports to, the Ombudsperson appointed pursuant to Security Council resolution 1989 (2011)." The job description makes no provision for the performance of other duties as required.

posts, that the performance of the Administrative Assistant and the Legal Officer be assessed with reference to their work in support of the Ombudsperson and that the Ombudsperson's comments in that regard be given prominence in the appraisal process. Given the current structure, whereby the Ombudsperson is precluded from any formal management functions, respect for the aforementioned arrangements is essential to fairness to the staff and is also critical to the continued success of the Office in delivering effectively on its mandate with limited resources.

## Translation

### Third report

53. As noted previously, annex II to resolution 1989 (2011) sets strict timelines for the work of the Ombudsperson and for the Committee's consideration of and decisions on petitions. Those timelines are an essential component of the fairness of the process, ensuring that the requests will be reviewed within a reasonable and finite period.

54. In accordance with resolution 1989 (2011), the 30-day time period for the Committee's consideration of a de-listing request commences 15 days after the comprehensive report has been submitted to the Committee in all official languages of the United Nations. During the reporting period, owing to resource constraints, difficulties were encountered in some cases in obtaining translations of comprehensive reports in a timely manner, delaying the Committee's consideration of the reports. In a time-sensitive procedure, this can obviously have an impact on the overall fairness of the process.

55. In addition, the general guidelines concerning word limits for translation, applicable to parliamentary documents in the United Nations system, are being applied to the comprehensive reports of the Ombudsperson. In combination, full translation as a prerequisite for the consideration of a report by the Committee and word limits as to what can be translated create a practical limitation on the content of the Ombudsperson's comprehensive reports, potentially encumbering the independence of the Office. Given that the comprehensive reports serve as a critical mechanism for fair process, this raises a serious concern.

56. Within this context, and given resource constraints and the time needed to translate lengthy documents, the problem was raised with relevant Secretariat officials. Consultations were undertaken in order to manage and mitigate any adverse effects on the process of the Office of the Ombudsperson. A compromise was agreed that should allow for timely translation and a degree of flexibility with respect to word limits. However, the matter remains an issue of concern and will need to be monitored.

57. It is clear that the translation of the comprehensive reports into all official languages of the United Nations is an important component of fair process, aimed at ensuring that States have an opportunity to fully and properly review the material, and as reflected in resolution 1989 (2011). However, in some circumstances, balancing the competing interests involved may require the prioritization of some parts of the reports for immediate translation or other, similar measures to ensure that a case can be considered by the Committee on a timely basis. For this reason, it would

be useful if the responsibility for such matters rested solely with the Committee, the body best placed to make such determinations. To that end, it would be helpful if consideration were given to amending annex II so as to give the Committee the flexibility to determine when the requirements for translation have been met sufficiently to allow for the consideration of the de-listing petition and the comprehensive report by the Committee.

#### Fourth report

50. As discussed in the third report (see S/2012/49, paras. 53-57), the general guidelines concerning word limits for translation, applicable to parliamentary documents in the United Nations system, are being applied to the comprehensive reports of the Ombudsperson. As a matter of principle, this limitation infringes on the independence of the Ombudsperson. The problem is further exacerbated by the fact that translation is a prerequisite for consideration of the comprehensive reports by the Committee, and thus these word limits impose a very real restriction on the content of the reports. Given that the comprehensive reports are fundamental to the fairness of the Ombudsperson process, this raises a serious concern. While efforts are made to limit the length of the comprehensive reports as much as possible, in some instances the underlying material and case issues are such that this is not feasible.

51. As previously noted (see S/2012/49, para. 54), resolution 1989 (2011) mandates that the 30-day time period for the Committee's consideration of the delisting request commences 15 days after the comprehensive report has been submitted to the Committee in all official languages of the United Nations. While this 30-day time constraint contributes significantly to the expeditiousness and fairness of the process, significant delays are still possible in the decision-making phase owing to the difficulties of obtaining translations in a timely manner. In addition, in terms of the transparency of the process, this formulation means that it is not clear even to the petitioner when the 30-day period for consideration of the report by the Committee begins. Given the strict and clear deadlines applicable to all other components of the process and with respect to the participants — petitioner, Ombudsperson, States and the Committee — this uncertainty, and the potential for lengthy delays arising from circumstances outside the control of the Committee, is a regrettable obstacle to the overall fairness and efficacy of the procedure.

52. At the same time, as reflected in resolution 1989 (2011), it is evident that translation of the comprehensive reports into all of the official languages is an important component of fair process to ensure that States have an opportunity to fully and properly review the material. However, in some circumstances, the balancing of the competing interests involved may require the prioritization of some parts of the reports for immediate translation or some other similar measures to ensure that a case can still be considered by the Committee on a timely basis. For this reason, it would be useful if control over these issues rested solely with the Committee, the body best placed to make determinations on these questions. To that end, without altering the important 30-day time limit, it would be helpful if consideration were given to amending annex II so as to give the Committee the flexibility to determine when the requirements for translation have been met sufficiently to allow for consideration of the delisting petition and the comprehensive report by the Committee.

### [Fifth report](#)

50. As discussed in previous reports (see *S/2012/590*, para. 50; and *S/2012/49*, paras. 55-56), the general guidelines concerning word limits for translation, applicable to parliamentary documents in the United Nations system, are being applied to the comprehensive reports of the Ombudsperson. Significant problems were encountered again during the reporting period in a case in which the limits were exceeded because of the nature and complexity of the case. While a practical solution was finally found, it is not one that may be available in future cases. As a result, the word limits, when combined with the fact that translation is a prerequisite to the consideration of the report, pose a serious threat to the independence of the Ombudsperson and the effectiveness of the critical comprehensive reports.

### [Sixth report](#)

56. As discussed in previous reports (see *S/2013/71*, para. 50; *S/2012/590*, para. 50; and *S/2012/49*, paras. 55 and 56), the general guidelines concerning word limits for translation applicable to parliamentary documents in the United Nations system are being applied to the comprehensive reports of the Ombudsperson. Significant problems were encountered once more during the reporting period in a case in which the limits were exceeded because of the nature and complexity of the report. While a waiver was ultimately obtained for that case, attempts to obtain a general exemption from the word limits for the reports of the Ombudsperson were ultimately unsuccessful. As a result, an individual request for an exemption has to be sought in each case and is subject to the discretion of relevant officials within the Secretariat. Given that translation is a prerequisite for consideration of the comprehensive report, evidently this arrangement poses a serious and direct threat to the independence of the Ombudsperson.

## Legal representation

### [Fifth report](#) (*Special Rapporteur*<sup>139</sup>)

58. The Special Rapporteur has called for the establishment of a fund for the provision of legal assistance to petitioners seeking delisting under the Al-Qaida sanctions regime through the Ombudsperson process. While providing no comment on the substance of that recommendation, the Ombudsperson notes that in the cases considered to date, the process has been applied in an equal manner regardless of whether the petitioner has been represented by counsel or not.<sup>140</sup> Furthermore, given the nature of the Ombudsperson procedure, there has been no instance in which a petitioner has been prejudiced by the absence of representation.

### [Sixth report](#)

29. Efforts have been made to disseminate information about the Office and to ensure that the application process is simple and easily accessible. Almost half of the applications are brought forward by individuals without legal counsel and steps are taken by the Ombudsperson to ensure that no petitioner is prejudiced because he or she does not have legal representation.

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<sup>139</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism ([A/67/396](#)).

<sup>140</sup> 15 See, however, the comments in paragraph 42 above with respect to inequality arising from the lack of disclosure of the Ombudsperson's recommendations.



## Transition

### Tenth Report

73. The guidelines developed for the experts serving on panels impose a five-year contractual limitation<sup>141</sup> which has been retroactively applied to the Ombudsperson. As discussed, on this basis, during the reporting period, the Secretariat initiated a process for the replacement of the Ombudsperson. In accordance with resolution 1904 (2009), responsibility for the appointment of the Ombudsperson, in fulfilment of the Security Council mandate, rests with the Secretary-General, in close consultation with the Committee.<sup>142</sup>

74. Throughout the selection procedure and into the transition phase, officials within the Security Council Affairs Division have expressly and repeatedly prioritized above all other considerations the rigid application of the five-year contract limit and the consistency of contractual arrangements between the Ombudsperson and the panel experts. Precedence has explicitly been given to these administrative arrangements over ensuring the rights of individual petitioners, preserving the fairness of the Ombudsperson process, protecting the security interests of the regime and safeguarding the credibility of the Security Council mechanism.

75. In April and May 2015, the Ombudsperson twice presented to the Security Council Affairs Division a transition plan which, with a minimal two-week extension of the incumbent to 1 August 2015, would have ensured that no pending cases would have been prejudiced by the transition and that there would have been no damage to the fairness, effectiveness or credibility of the regime. The sole reply cited procedural issues. No substantive response was ever received to that proposal or to the fairness issues identified.

76. At the briefing given on 16 June 2015 by the Chairs of the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), the Committee established pursuant to resolution 1373 (2001) and the Committee established pursuant to resolution 1540 (2004), members of the Security Council noted their concerns about the succession process and the need for smooth transition. On 18 June 2015, the Like-Minded Group of States on Targeted Sanctions sent a letter to the Security Council expressing concern about the risk of a gap in the occupation of the Office of the Ombudsperson and calling for the swift appointment of the new Ombudsperson to avoid such a gap. The Group noted in particular that “it is indisputable that such a transition has to be accomplished in an orderly and timely fashion that neither leaves the office a single day unoccupied, nor may render an unfinished delisting case vulnerable to claims of lack of due process”. It therefore suggested that, in case the successor could not assume office in a timely fashion, the incumbent Ombudsperson be requested to stay in office until the handover to the successor was duly completed.<sup>143</sup>

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<sup>141</sup> 21 While this is a lengthier term than that applicable in standard consultancies, the Ombudsperson contract is subject to a fixed-term limitation of any duration only because the Secretariat has elected to use a consultancy contract to fill the post.

<sup>142</sup> 22 See resolution 1904 (2009), para. 20.

<sup>143</sup> 23 See S/2015/459.

77. At the time of reporting, on 13 July 2015, the final day of the incumbent's contract, to the knowledge of the Ombudsperson, no replacement had been appointed by the Secretary-General, no extension had been granted and no alternative transition plan had been put in place.

78. The effect is such that, unless as at 14 July 2015 a replacement has been both appointed and engaged pursuant to a contractual arrangement, so as to be able to carry out the official functions of the Ombudsperson, the Security Council fair process mechanism will be rendered non-functional for an unknown period. The potential damage to pending cases will be dependent on the timing.

79. There is, however, one case of particular concern. On the basis of the Secretariat's circulation to the Committee of the translations of the comprehensive report on the case, the 15-day interval set by the Security Council for the Committee to consider the delisting request will end on 27 July 2015.<sup>144</sup> In the absence of an extension, that left the incumbent with only one day to present the report. Given the shortened time periods in other cases, in which fairness mandated that the comprehensive reports be prepared by the incumbent, priority was given to those matters to avoid real and immediate prejudice to petitioners. Furthermore, a rushed preparation and presentation of the comprehensive report in the case in question, in a one-day time frame, would have been prejudicial both to the interests of the Committee and the Council and to those of the petitioner. Relying on the confidence repeatedly expressed by the Security Council Affairs Division that there would be only a minimal, if any, gap between operational Ombudspersons, this matter was left to be presented by the new Ombudsperson, with the participation of the incumbent, as discussed below.

80. As noted, however, as at the time of reporting, it was not clear whether the new Ombudsperson would have taken up official functions by 27 July 2015. As a result, there is a risk that the deadlines set by the Security Council for the presentation and consideration of the case will not be met, and the process for the petition will be rendered unfair. Other consequences arising from that breach would need to be assessed by the incoming Ombudsperson.

81. In addition to these existing case issues, it is evident that, during the period in which the mechanism is non-functional, no action can be taken on any potential delisting petitions presented until the arrival of the new Ombudsperson. Whether or not that circumstance arises, it is a concern in principle.

82. Finally, the fact that the transition has been carried out without consideration of pending cases and the possibility of a gap in functionality affects the credibility of the mechanism as a sustainable independent review mechanism. In particular, it raises issues as to its autonomy if it can be rendered non-functional by actions of the Secretariat in circumstances where that result was foreseeable and preventable.

83. There is one additional transition issue which remains unresolved at this stage, although it is hoped that it will be a manageable one. Notably, the presentation of the comprehensive reports by the Ombudsperson before the Committee forms an integral part of the fairness of the process. It is the combination of the written and oral presentations, including the opportunity for Committee

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<sup>144</sup> Pursuant to paragraphs 8 and 10 of annex II to resolution 2083 (2014), the case shall be considered by the Committee between 15 and 30 days after the comprehensive report of the Ombudsperson has been circulated to the Committee in all official languages. In this case, the translations were circulated to the Committee on 27 June 2015.

members to question the report writer and raise issues, which fulfils the fundamental right of the petitioner to be heard by the decision maker. It is also an essential part of the process to ensure that the Committee has a comprehensive understanding of the delisting petition and the report of the Ombudsperson. Evidently, the report presentation is of little added value, in terms of fairness or the understanding of the Committee, if the author of the specific comprehensive report does not participate in its presentation. In the view of the incumbent, while resolution 2161 (2014) mandates that the Ombudsperson present the report to the Committee, fairness requires that the prior post holder, who authored the report, also participate in the process, at the invitation of the serving Ombudsperson. If the incoming Ombudsperson concurs with this assessment, logistical arrangements will need to be put in place for this participation, whether live or virtual, to ensure fairness in the four pending cases in which the reports were prepared by the incumbent but have yet to be presented to the Committee.

84. Finally, whether ultimately a gap occurs or actual prejudice results in pending cases, the transition process has clearly shown what little protection the current structural arrangements provide for the Ombudsperson mechanism. In addition to bolstering the case for contractual/administrative change, it has revealed the need for the institutional arrangements to address the procedure for the replacement of the post holder. Policy considerations may well support a fixed-term appointment. Nonetheless, in the case of an operational mechanism which involves fundamental rights and functions in accordance with fixed deadlines, there must be a flexible approach to transition which prioritizes safeguarding rights and protecting the fairness of the process. The manner in which this replacement has been managed illustrates unambiguously that those essential priorities will be at risk if the process is left to the discretion of officials, without institutional safeguards.

#### [Eleventh report](#)

30. The present report marks the transition between the former and the current Ombudsperson, after five years of the implementation of the mandate of the Office of the Ombudsperson.

31. When the mandate of the former Ombudsperson ended on 13 July 2015, eight cases remained pending at different stages of the process. Of these, four cases were at a stage where they required the substantive involvement of both the former and the current Ombudsperson. In those cases, the former Ombudsperson had submitted the comprehensive reports but the cases were scheduled for oral presentation only after completion of her tenure.

32. The Ombudsperson agreed with her predecessor that the latter should be associated with the oral presentation of these transition cases to the Committee, in fairness to the petitioners. These cases were presented to the Committee on 27 July and 24 August 2015. The current Ombudsperson formally introduced each case and, in compliance with procedural requirements,<sup>145</sup> her predecessor presented the comprehensive reports that she had submitted on the delisting requests and made herself available to answer questions from Committee members. All of these cases were therefore presented to the Committee within the timelines prescribed by the Security Council. This includes

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<sup>145</sup> 3 Paragraph 3 (d) of the Committee Guidelines requires the Chair to invite the Ombudsperson to present his/her comprehensive report on any delisting request.

the case specifically mentioned by the former Ombudsperson in her last report to the Security Council (see S/2015/533). All of these cases have now been disposed of by the Committee, following the review by and recommendations of the Ombudsperson. One individual was delisted on 18 August 2015, within the prescribed timeline. The three remaining cases were unaffected by the transition because of their stages at the time of transition.

33. The transition between mandate holders and the 13-day gap between their tenures therefore did not affect the fairness in any of the pending cases during the transition. However, the Ombudsperson stresses the importance of making timely arrangements in future to avoid any serious impact the next transition could have on the fairness to petitioners.

#### *Consistency of approach*

35. During the transition, the Ombudsperson familiarized herself with the eight cases pending at the time and had extensive exchanges with her predecessor in this context. In addition, the Ombudsperson reviewed the facts and analysis contained in the comprehensive reports prepared by her predecessor in the 58 cases already disposed of by the Committee. This review aimed at ensuring a consistency of approach. If the Ombudsperson were at any stage to even slightly depart from a previous approach, it would have to be with full knowledge of the case and with cogent reasons to do so, not as a result of a lack thereof. While conducting this review, the Ombudsperson identified relevant excerpts and organized them by keywords and themes in such a way that can be updated as cases progress. It can also be used as an internal database and a legacy tool for future Ombudspersons and staff of the Office.

#### *Fourteenth Report*

49. On 3 July 2017, the Secretary-General appointed the incumbent of the Ombudsperson position as Head of the Mechanism relating to the Syrian Arab Republic. In order to allow for her prompt transition into her new function, the Ombudsperson immediately prepared a plan containing transitional measures to safeguard the rights of the petitioners who currently have a pending delisting request before the Ombudsperson, or who submit such a request before the incoming Ombudsperson has taken up his or her duties. The Ombudsperson proposed these transitional measures to the Committee on 5 July 2017. One of the proposals was to include language in the new resolution to facilitate the transition process, including on the presentation of cases to the Committee by the Ombudsperson having prepared the comprehensive report in those cases. Another proposal would have allowed the extension of resolution deadlines in pending cases as a transitional measure. The Ombudsperson immediately engaged with Committee members to develop satisfactory resolution language, in the hope that the Security Council would see the value of the proposals and would adopt them. However, neither the proposals nor alternative transitional measures were adopted in the new resolution. It is hoped that in these circumstances the Committee will adapt its earlier practice developed in the context of the previous transition to allow the Ombudsperson to present her comprehensive reports to the Committee after the end of her mandate, even if the incoming Ombudsperson has yet to take office. There will also be a need for the Committee to adapt its practice to ensure that timelines are extended as needed in pending cases until the incoming Ombudsperson is in office. The Ombudsperson has left detailed instructions for the staff members supporting the Office of the Ombudsperson to ensure that the Office remains

operational during the transition period. She hopes and trusts that the Committee and the Secretariat will extend their full cooperation and support to them so that they can maintain a functional office and prevent any undue delays in the consideration of delisting requests by the incoming Ombudsperson.

### [Fifteenth Report](#)

#### *Delays caused by the prolonged absence of an Ombudsperson*

25. Owing to the de facto vacancy of the position of the Ombudsperson for 11 months and 10 days, the three pending cases have suffered from different levels of delay. As at 7 August 2018, case 79 had been in the information-gathering period for 1 year, 4 months and 12 days. Although this period will come to a close at the end of the month and the case will subsequently follow the regular timelines specified in resolution 2368 (2017), the overall duration of the case has already surpassed the maximum time frame specified by that resolution. Given the absence of an Ombudsperson, the formal timelines for case 80 could start only after the current Ombudsperson assumed his duties, despite the case having been received by the Office 7 months and 21 days before the official acceptance of the case could take place. With regard to case 81, the delay is less significant, as the case was formally accepted 1 month and 18 days after having been received.

26. Those delays, in particular the delay in case 79, have had a negative impact on the petitioners' access to due process. While the Ombudsperson cannot yet make an assessment as to whether the delay might have an impact on the outcome of the delisting requests, the delay creates a situation for petitioners in which they cannot enjoy their right to an independent and impartial review within the time frame prescribed by resolution 2368 (2017). The Ombudsperson therefore recommends that the Security Council or its Committee create an optional acting Ombudsperson mechanism, which could be activated temporarily in the case of an unforeseen absence of an Ombudsperson.

### [Sixteenth Report](#)

#### *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.

## Proposals to expand the mandate of the Ombudsperson

### Delisting Notifications

#### First Report

49. As discussed above, the Ombudsperson is mandated to send a notification to individuals or entities added to the Consolidated List by the Al-Qaida and Taliban Sanctions Committee. Further, in the context of a successful de-listing application considered by the Committee with the assistance of the Ombudsperson, there is a similar mandate for the Ombudsperson to notify the petitioner of the de-listing. The only instance of listing or de-listing where the Ombudsperson does not send any independent notification is those cases where the Committee decides on a de-listing without the Ombudsperson having been involved. Given the intent to ensure that individuals and entities receive notifications of Committee decisions which affect them, it would seem logical that the Ombudsperson also be mandated to send a separate notification to an individual or entity in all cases of de-listing.

### Mandate for Follow-up to Delisting

#### First Report

48. Some of the cases brought to the attention of the Ombudsperson have involved matters directly related to the operation of the Al-Qaida and Taliban sanctions regime, but, strictly speaking, outside the defined mandate of the Ombudsperson. In particular, cases have been raised where individuals who have been de-listed by the Committee continue to face financial and travel restrictions, ostensibly on the basis of their listing by the Al-Qaida and Taliban Sanctions Committee. Similarly, cases of individuals with similar names to those included on the Consolidated List, who are clearly not the listed person yet face resulting impediments, have also been identified. While these matters can be addressed domestically or on a bilateral basis, it seems a natural extension of the powers of the Office to specifically authorize the Ombudsperson to monitor and follow up on such cases to ensure that Al-Qaida and Taliban sanctions measures are not relied upon, in error, to support restrictions on the rights of individuals or entities.

#### Second Report

47. The practice to date has demonstrated that the Office of the Ombudsperson has the potential to play a role in following up on cases of de-listed persons or entities that continue to encounter difficulties with respect to financial or travel restrictions. Moreover, individuals and entities with names similar to those of listed individuals and entities continue to face financial and travel restrictions. The fairness concerns for individuals and entities facing unjustified restrictions are obvious. While other possible solutions could be found through the Committee or bilaterally, the Ombudsperson is well placed to facilitate a satisfactory resolution in such situations in an expeditious manner.

49. For the reasons set out above and in the first report of the Office, it would be helpful if consideration were given to extending the mandate of the Office of the Ombudsperson so that it could follow up on cases to ensure that sanctions measures are not improperly applied [...].

### Third report

50. Further practice has served only to highlight once again the importance of empowering the Office of the Ombudsperson to follow up on cases relating to de-listed persons or entities who continue to face restrictions with respect to the movement of or access to funds or in relation to travel. In three of the five cases relating to individuals de-listed by the Committee through the Ombudsperson process, the de-listed person has subsequently contacted the Ombudsperson, claiming the continued application of sanctions measures after the de-listing. To date, it has been possible to address and respond to such concerns only in the context of purely informal discussions with States. The implications in terms of fairness for individuals and entities facing such unjustified restrictions are obvious. A far more effective response to such situations would be possible if the Ombudsperson were specifically mandated to follow up on such cases with relevant States or otherwise, as might be necessary.

52. For these reasons and those set out in previous reports, it would be helpful if consideration were given to mandating the Office of the Ombudsperson to follow up on claims of the continued application of sanctions measures despite de-listing [...].

### Fourth report

46. Practice has once again clearly highlighted the importance of empowering the Office of the Ombudsperson to follow up on cases of delisted persons or entities who continue to face restrictions with respect to the movement of or access to funds or in relation to travel. In several cases in this reporting period, individuals delisted by the Committee through the Ombudsperson process have reverted to the Ombudsperson subsequently with claims of continued application of sanctions measures after the delisting. To date, it has been possible to address and respond to such concerns only on the basis of purely informal discussions with States. The implications in terms of fairness for individuals and entities facing such unjustified restrictions are obvious. A far more effective response to such situations would be possible if the Ombudsperson were specifically mandated to follow up on these cases with relevant States or otherwise, as might be necessary.

[...]

48. For these reasons, and those expressed in previous reports,<sup>146</sup> it would be helpful if consideration were given to mandating the Office of the Ombudsperson to follow up on claims of continued application of sanctions measures despite delisting [...].

### Fifth report

46. There has been no progress on the serious issue of continued restrictions once individuals and entities have been delisted.

47. During the reporting period, four individuals raised circumstances potentially involving the continued application of sanctions measures after their delisting, despite the Committee's decision to the contrary. All four cases, of which three related to travel restrictions and one involved seized

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<sup>146</sup> 19 See S/2012/49, paras. 50-52, and S/2011/447, paras. 47-49.

assets, were sufficiently detailed to merit specific follow-up. However, no mandate has been given, restricting any steps that the Ombudsperson can take in relation to such situations.

48. This issue has been the subject of comment in all of the reports of the Ombudsperson to the Security Council since the Office started its operations. The principles of fairness implicated are obvious and significant. In each situation, fundamental rights — to property and to movement — are being restricted, and there is a good possibility that this is due to the improper continuation of Council sanctions measures. It may well be that the complaints are not factually supported or that the measures being imposed flow from domestic law. However, this can be determined only in the presence of a proper mechanism through which the facts can be examined. Under the current structure, no such mechanism exists, and the individuals and entities are left with limited recourse, if any.

49. These situations, if verified to be correct, represent a general problem in terms of the implementation of the Committee's decisions and have the potential to impede the credibility and effectiveness of the Al-Qaida sanctions regime. For these reasons and those expressed in the previous reports of the Ombudsperson (see S/2012/590, para. 46; S/2012/49, para. 50; and S/2011/447, para. 47), consideration should be given to mandating the Office of the Ombudsperson to follow up on claims of continued application of sanctions measures despite delisting.

#### [Sixth report](#)

53. Individuals and entities continue to inform the Ombudsperson of problems encountered in terms of continued restrictions following their delisting by the Committee.

54. During the reporting period, four former petitioners complained of circumstances that might have involved the continued application of sanctions measures despite the Committee's decision that such measures be lifted. In some cases, the same individual faced multiple problems with different States. All four cases were sufficiently detailed to merit specific follow-up. Most of the complaints related to travel restrictions and one involved a question of access to assets.

55. This issue has been the subject of comment in all of the reports of the Ombudsperson to the Security Council since the Office started its operations. The principles of fairness implicated are obvious and significant. In each situation, fundamental rights — to property and to movement — are being restricted, and there is a good possibility that this is due to the improper continuation of Council sanctions measures. It may well be that the complaints are not factually supported or that the measures being imposed flow from domestic law. However, this can be determined only in the presence of a proper mechanism through which the facts can be examined. Under the current structure, no such mechanism exists, and the individuals and entities are left with limited recourse, if any. These situations, if verified to be correct, represent a general problem in terms of the implementation of the Committee's decisions and have the potential to impede the credibility and effectiveness of the Al-Qaida sanctions regime. For these reasons and those expressed in the previous reports of the Ombudsperson (see S/2013/71, paras. 48 and 49; S/2012/590, para. 46; S/2012/49, para. 50; and S/2011/447, para. 47), consideration should be given to mandating the Office of the Ombudsperson with following up on claims of continued application of sanction measures despite delisting.



### Seventh report

63. Individuals and entities continue to inform the Ombudsperson of problems encountered in terms of continued restrictions following their delisting by the Committee, especially when they have not received formal notification of their delisting. Such follow-up requests fall outside the mandate of the Ombudsperson.

64. As noted in all previous reports, this presents a major threat to the principles of fairness and more generally to the credibility and effectiveness of the Al-Qaida sanctions regime. The improper, continued application of Security Council sanctions measures restricts fundamental rights to property and movement without any legal basis or justification. The current mechanism does not provide for any recourse in such cases. For these reasons and those expressed in the previous reports of the Ombudsperson (see S/2013/452, para. 55; S/2013/71, paras. 48-49; S/2012/590, para. 46; S/2012/49, para. 50; and S/2011/447, para. 47), consideration should be given to including in the mandate of the Ombudsperson the task of following up on claims of continued application of sanctions measures despite delisting.

### Security Council resolution 2161 (2014)

“63. *Decides* that the Focal Point may receive, and transmit to the Committee for its consideration, communications from:

(a) individuals who have been removed from the Al-Qaida Sanctions List; [...]”

### Eighth report

46. Previous reports<sup>147</sup> have discussed the problem of delisted persons who face the apparent continued application of the sanctions measures, as well as individuals who, because of similarity of names and identifiers, are mistakenly categorized as listed persons.

47. This issue is addressed in resolution 2161 (2014) by enabling the Focal Point to receive and transmit to the Committee communications from delisted persons or those claiming false, mistaken or confused identification as listed persons and to communicate the Committee response. The inclusion of some form of measure to address these cases, within a 60-day time constraint, is a welcome development.

## Humanitarian exemptions

### Second Report

48. On a related point, recently there have been instances in which individuals have approached the Ombudsperson seeking assistance in receiving humanitarian or travel exemptions from the Committee. Given the limits of the mandate, only basic information can be provided currently in response to such requests. However, particularly for individuals residing in States with limited resources and capacity, it is unlikely that such exemptions will be granted. It would seem appropriate, therefore, to provide the Ombudsperson with the mandate to bring such cases to the attention of the Committee. Doing so would be consistent with the Security Council’s intention,

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<sup>147</sup> 9 See, for example, the seventh report (S/2014/73, paras. 63-64); the sixth report (S/2013/452, paras. 53-55); and the fifth report (S/2013/71, paras. 48-49).

expressed most recently in its resolution 1989 (2011), that appropriate use be made of the provisions regarding exemptions and that the exemptions be granted in an expeditious and transparent manner.

49. For the reasons set out above and in the first report of the Office, it would be helpful if consideration were given to extending the mandate of the Office of the Ombudsperson [...] to assist with the process of exemptions by bringing relevant cases to the attention of the Committee.

### Third report

51. Even more pressing is the question of the access of individuals and entities to the exemptions to the sanctions measures, which have been prescribed by the Security Council.<sup>148</sup> In four of the delisting cases addressed during the reporting period, petitioners sought assistance from the Ombudsperson in presenting requests for exemptions to the Committee. Under the current mandate, the Ombudsperson has no ability even to facilitate the presentation of such a request by an individual or entity to the Committee. This proved problematic in the specific cases dealt with during the reporting period. Furthermore, in general, no recourse is available for an individual or entity to pursue such an exemption from the Committee other than through a State. Particularly for individuals residing in States with limited resources and capacity, this can mean that there is little potential for such exemptions to be realized, since such individuals are unable to have the matter presented before the Committee for consideration.

52. For these reasons and those set out in previous reports, it would be helpful if consideration were given to mandating the Office of the Ombudsperson [...] to directly transmit exemption requests from individuals and entities to the Committee for its consideration.

### Fourth report

47. Even more pressing is the question of the access of individuals and entities to the exemptions that the Security Council has prescribed in the context of the sanction measures.<sup>149</sup> During the reporting period, some petitioners have sought assistance from the Ombudsperson in seeking exemptions from the Committee; however, such assistance is not possible under the existing mandate. As was the case historically with delisting requests, there is no recourse available for an individual or entity to pursue such an exemption from the Committee, other than through a State. The practical effect is that many individuals, particularly those located in States with limited resources or unfamiliar with the Committee process, have no access to the humanitarian exemptions since they are unable to present their claims to the Committee for consideration.

48. For these reasons, and those expressed in previous reports,<sup>150</sup> it would be helpful if consideration were given to mandating the Office of the Ombudsperson [...] to directly transmit exemption requests from individuals and entities to the Committee for its consideration.

49. During the period under review, one additional issue has arisen with respect to requests for exemptions. In two instances, consideration had to be given to conducting the petitioner interview

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<sup>148</sup> 15 See para. 1 of resolution 1452 (2002) and para. 1 (b) of resolution 1989 (2011).

<sup>149</sup> 18 See paragraph 1 of resolution 1452 (2002) and paragraph 1 (b) of resolution 1989 (2011).

<sup>150</sup> 19 See S/2012/49, paras. 50-52, and S/2011/447, paras. 47-49.

in a location other than the State of residence, either because of logistical challenges<sup>151</sup> or security concerns. In such instances, it would significantly facilitate the process if the Ombudsperson were able to make a request to the Committee for the travel exemption without the need for a State to present it. While of course the relevant States would still need to provide consent and the ultimate decision on the waiver would be solely for the Committee, considerable time and effort could be saved if the request could be made directly by the Ombudsperson. Therefore, it would be useful if consideration were given to allowing the Ombudsperson to present a request for a travel exemption in order to facilitate the dialogue phase of the process.

#### [Security Council resolution 2083 \(2012\)](#)

“36. *Decides* that, in cases in which the Ombudsperson is unable to interview a petitioner in his or her state of residence, the Ombudsperson may request, with the agreement of the petitioner, that the Committee consider granting an exemption to the restriction on travel in paragraph 1 (b) of this resolution for the sole purpose of allowing the petitioner to travel to another State to be interviewed by the Ombudsperson for a period no longer than necessary to participate in this interview, provided that all States of transit and destination do not object to such travel, and further *directs* the Committee to notify the Ombudsperson of the Committee’s decision;”

“37. *Decides* that the Focal Point mechanism established in resolution 1730 (2006) may:

(a) Receive requests from listed individuals, groups, undertakings, and entities for exemptions to the measures outlined in paragraph 1 (a) of this resolution, as defined in resolution 1452 (2002) provided that the request has first been submitted for the consideration of the State of residence, and *decides* further that the Focal Point shall transmit such requests to the Committee for a decision, *directs* the Committee to consider such requests, including in consultation with the State of residence and any other relevant States, and *further directs* the Committee, through the Focal Point, to notify such individuals, groups, undertaking or entities of the Committee’s decision;

(b) Receive requests from listed individuals for exemptions to the measures outlined in paragraph 1 (b) of this resolution and transmit these to the Committee to determine, on a case-by-case basis, whether entry or transit is justified, *directs* the Committee to consider such requests in consultation with States of transit and destination and any other relevant States, and *decides further* that the Committee shall only agree to exemptions to the measures in paragraph 1 (b) of this resolution with the agreement of the States of transit and destination, and *further directs* the Committee, through the Focal Point, to notify such individuals of the Committee’s decision”<sup>152</sup>

#### [Fifth report](#)

36. The fourth report highlighted problems that had arisen in some cases with regard to conducting the interview of a petitioner in the State of residence. During the reporting period, the same problem was encountered as a result of security concerns. The Security Council, in paragraph 36 of its resolution 2083 (2012), has addressed the issue, according the Ombudsperson the ability to seek an exemption from the restriction on travel for a petitioner directly from the Committee for the

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<sup>151</sup> 20 In one case the substantial documentation of relevance to the case and needed for the interview was not easily accessible in the State of residence.

<sup>152</sup> Identical text in resolution 2161 (2014), paragraph 62.

purpose of conducting an interview in the dialogue phase outside the State of residence of the individual. This will facilitate an important component of the Ombudsperson process that has proven to be of significant value in terms of fairness and efficiency.

37. Similarly, the Security Council, by its resolution 2083 (2012), has responded to the concerns raised in several previous reports about the inability of some individuals to obtain access to humanitarian exemptions when assistance was not easily available from the State of residence. The resolution provides that the focal point mechanism established in resolution 1730 (2006) may be used by listed individuals or entities to seek humanitarian exemptions directly as prescribed by the Council (see resolution 1452 (2002), para. 1; resolution 1989 (2011), para. 1 (b); and resolution 2083 (2012), para. 37). This is an important improvement that will allow the Committee to give consideration to requests for exemptions in cases where the listed individual or entity is unable to secure the assistance of a State in presenting such a request.

[...]

52. [...] The Special Rapporteur commented on several issues that had been addressed previously by the Ombudsperson and for which provisions have been incorporated into resolution 2083 (2012), eliminating the need to discuss those points in any detail.<sup>153</sup>

#### [Security Council resolution 2161 \(2014\)](#)

"9. [...] *confirms* that exemptions to the travel ban must be submitted by Member States, individuals or the Ombudsperson, as appropriate, including when listed individuals travel for the purpose of fulfilling religious obligations, and *notes* that the Focal Point mechanism established in resolution [1730 \(2006\)](#) may receive exemption requests submitted by, or on behalf of, an individual, group, undertaking or entity on the Al-Qaida Sanctions List, or by the legal representative or estate of such individual, group, undertaking or entity, for Committee consideration, as described in paragraph 62 below;"<sup>154</sup>

"61. *Reaffirms* that, in cases in which the Ombudsperson is unable to interview a petitioner in his or her state of residence, the Ombudsperson may request, with the agreement of the petitioner, that the Committee consider granting exemptions to the restrictions on assets and travel in paragraphs 1 (a) and (b) of this resolution for the sole purpose of allowing the petitioner to meet travel expenses and travel to another State to be interviewed by the Ombudsperson for a period no longer than necessary to participate in this interview, provided that all States of transit and destination do not object to such travel, and further directs the Committee to notify the Ombudsperson of the Committee's decision;"<sup>155</sup>

#### [Eighth report](#)

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<sup>153</sup> 11 The Special Rapporteur called for the Ombudsperson to be given a role with respect to humanitarian exemptions and bringing them to the attention of the Committee. This was addressed in resolution 2083 (2012) through the focal point, who has been accorded that responsibility. [...] As discussed above, there are new provisions on these issues in resolution 2083 (2012).

<sup>154</sup> Identical language in subsequent resolutions.

<sup>155</sup> Identical language in subsequent resolutions.

48. Nonetheless, the limited experience to date with humanitarian exemption requests assigned to the Focal Point under resolution 2083 (2012) suggests that practical challenges can arise from the introduction of separate mechanisms for different types of requests under one sanctions regime. To date, the requests for humanitarian exemptions have arisen in cases already being dealt with by the Ombudsperson. As a result, the process has been quite confusing for the person seeking the exemption. In addition there has been unnecessary delay and unavoidable duplication of effort on the part of the Focal Point and the Ombudsperson, in these cases. It is possible that similar problems will arise in the context of follow-up requests and cases involving misidentification. However, as indicated, there has been only minimal practice with exemption requests to date and more time is needed to consider the overall effectiveness of that mechanism, as well as the additional process set out in paragraphs 63 and 64 of resolution 2161 (2014).

#### [Ninth report](#)

50. Experience in this reporting period has reinforced the views expressed in the eighth report that responsibility for conveying requests for humanitarian exemptions within the Al-Qaida regime should be assigned to the Ombudsperson. Further, interaction with petitioners during this reporting period supports the statement that the process of having a different authority and procedures to deal with a request related to the same listing is very confusing and does not generate confidence in either procedure. To date, it has only served to deter individuals from pursuing what may be well motivated and justified requests for humanitarian exemptions. While access to the Focal Point for this purpose in other regimes, for which the Ombudsperson is not mandated, would be evidently beneficial to listed individuals and entities, in the context of the Al-Qaida regime it does not serve the intended purpose of encouraging use of the exemptions provided for by the Security Council.

#### [Tenth report](#)

50. Experience during the reporting period has further fortified the comments made in the eighth and ninth reports that responsibility for conveying requests for humanitarian exemptions within the Al-Qaida sanctions regime should be assigned to the Ombudsperson.<sup>156</sup>

51. As a starting point, the Committee's procedures for considering requests for humanitarian exemptions are complex in nature. Despite the diligent efforts of the Focal Point in providing detailed explanations, the process is confusing for an individual who has no exposure to the working methods of the Security Council. In these circumstances, it seems counterproductive to further complicate the scenario by having two different authorities within the regime addressing various requests which relate to the same listing. As mentioned previously, it does not generate confidence in either procedure.

52. There was further activity with respect to humanitarian exemption requests during the reporting period. Since the Focal Point was mandated to receive exemption requests, the Ombudsperson has referred a total of five exemption requests to the mechanism. Only two of those five cases resulted in actual requests being presented. One petitioner in the Ombudsperson process was also pursuing a

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<sup>156</sup> 15 See the eighth report (S/2014/553), para. 48; and the ninth report (S/2015/80), para. 50.

humanitarian request in parallel. Another petitioner enquired about the exemption request process but did not pursue it.

53. Once again, there has been duplication of time and effort, with the Ombudsperson providing a general outline of the process to guide the petitioners to the Focal Point and the Focal Point then engaging with the petitioners regarding the exemptions. In the above-mentioned case, the delisting and exemption requests were being considered through the applicable procedures at essentially the same time, which only serves to heighten the complexity for the petitioner and presents opportunities for miscommunication. It is also relevant that, as before, the only request for humanitarian exemptions which was pursued during the reporting period was referred by the Ombudsperson to the Focal Point, with the result that an additional unnecessary step was required to pursue the request.

54. It is unquestionable that access to the Focal Point for the purpose of humanitarian exemptions in other regimes, for which the Ombudsperson does not have a mandate, is urgently needed. In fact, the central argument advanced for reintroduction of the Focal Point into the Al-Qaida sanctions regime for the purpose of humanitarian exemptions was that it would allow for easy and consistent expansion to other regimes. However, this power was accorded to the Focal Point for the Al-Qaida sanctions regime in resolution 2083 (2012). Two and a half years later, it has not been extended to any other sanctions regime. While that extension is much needed, it appears pointless to continue the dualistic approach with reference to the Al-Qaida sanctions regime.

## Requests from individuals mistaken for a listed person under another regime

### [Security Council resolution 2161 \(2014\)](#)

“63. *Decides* that the Focal Point may receive, and transmit to the Committee for its consideration, communications from:

[...]

(b) individuals claiming to have been subjected to the measures outlined in paragraph 1 above as a result of false or mistaken identification or confusion with individuals included on the Al-Qaida Sanctions List;”

### [Twelfth report](#)

46. During the reporting period, the Ombudsperson received a request from an individual whose particulars were similar to those of a person included in the list established and maintained by the ISIL (Da’esh) and Al-Qaida Sanctions Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida. He claimed to have been subjected to sanctions measures under that regime as a result of confusion with an individual included on the list. Under the ISIL (Da’esh) and Al-Qaida sanctions regime, individuals experiencing problems as a result of mistaken identification or confusion with individuals included on the sanctions list may have recourse to the Focal Point.<sup>157</sup> However, the mandate of the Focal Point under other regimes does

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<sup>157</sup> 24 See resolution 2253 (2015), para. 77 (b).

not extend to cases of mistaken identification or confusion with an individual listed under another regime. As a result, individuals experiencing such problems as a result of mistaken identification or confusion with individuals listed under another regime have no recourse or depend on their State of nationality of residence to bring the matter to the attention of the relevant committee. This is a question that falls outside the mandate of the Ombudsperson. However, as such requests are sent to the Ombudsperson, it was deemed important that it be highlighted in the present report. It would be beneficial for such individuals to have recourse to the Focal Point, as is the case under the ISIL (Da'esh) and Al-Qaida sanctions regime.

## Referral of cases to the Ombudsperson by the Committee

### Seventh report

65. Currently, the Ombudsperson process is designed to address only those cases where an individual or entity or an appropriate representative brings an application for delisting. In cases in which a listing may no longer be appropriate, the Security Council, by its resolution 1822 (2008), mandated the Committee to conduct an annual review of all listings that had not been examined in three or more years. In this triennial review process, the Committee will endeavour to obtain the views of all relevant States in order to determine whether the listing remains appropriate. The States consulted may propose that the listing be maintained on the basis of information supporting the view that the criteria for listing continue to be met or bring an application for delisting after reviewing the case. Not all cases will fall into one of those two categories, however, because States may not take a clear position one way or the other and/or the information provided may be insufficient or conflicting.

66. In its thirteenth and fourteenth reports to the Committee, the Monitoring Team recommended that the triennial review process be improved in that regard and that steps be taken to ensure that the Committee can take action in such circumstances. Specifically, it recommended that the Committee should proceed as if the designating State had requested delisting pursuant to paragraph 27 of resolution 1989 (2011),<sup>158</sup> unless the designating State argued for retention and provided detailed reasons in support (see S/2012/968, para. 24, and S/2013/467, para. 24).

67. As a complement to the proposal of the Monitoring Team, the Security Council could also consider the option of having the Committee refer the matter to the Office of the Ombudsperson in these circumstances. Thus, where no State objects or presents a delisting request or where the information submitted is insufficient or conflicting, the matter could be referred to the Office. The availability of referral to the Ombudsperson, which would entail an in-depth information-gathering process, might be particularly valuable in cases in which the Committee considers that it lacks the information necessary to make an informed decision.

68. The granting of such referral power to the Committee would have the effect of strengthening the effectiveness of the review process and enhancing the tools available to the Committee to assess the continued appropriateness of listings.

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<sup>158</sup> 12 Paragraph 27 of resolution 1989 (2011) is reflected in paragraph 26 of resolution 2083 (2012).