

Open Briefing to Member States – 19 August 2019

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Thank you for giving me the floor.

Mr. Chair, honorable delegates, ladies and gentlemen, colleagues, it is my honour to give you some information about the function of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee. My name is Daniel Kipfer, and I was appointed to this role last year in May and I took up my function in mid- July. So, I can look back on one year in office –enough time for understanding the complicated ways things are going forward within the framework of United Nations. With my background as a judge in a national judiciary I had to first learn that I have to fulfill my quasi-judicial function in a political - and highly politized - environment. Before I took up my job, the position of the Ombudsperson was vacant for almost a year. Fortunately, only three cases were pending at the time. These cases could be closed following my appointment, even though there was some delay beyond the timelines set out in the relevant resolution.

The office was founded with the SC resolution from December 2009 and it became functional nine years ago in July 2010. Both of my predecessors, Kimberly Prost and Catherine Marchi-Uhel, developed a reasonable and clear practice based on this and the following relevant resolutions.

Looking back to July 2018 I can state, that I took up my function in a well-established office and functioning environment. Since then I have had a busy and rich time. I had to build rapport with my many interlocutors including the members of the Committee and other relevant states, with representatives of

international organizations and academics. I have learned a lot from the legacy of my predecessors, and I was able to develop on this basis, within the guidelines established by my predecessors, my own practice in several cases already. I will come back to this point.

The Ombudsperson is given the important responsibility of providing an independent review mechanism which delivers an impartial and effective recourse to individuals and entities seeking to be removed from the ISIL (Da'esh) and Al-Qaida sanctions list; individuals and entities targeted by UN sanctions. He is, together with the Committee, responsible for due process and fairness in the ISIL and Al-Qaida sanctions regime. The Ombudsperson's review was created by the SC in the aftermath of a decision of the European Court of Justice in Luxemburg in the so called Kadi I case. The court stated, that the European authorities in the process of implementation of the UN targeted sanction against Mr. Kadi did not respect "the rights of the defence, in particular the right to be heard, and the right to effective judicial review of those rights" (Para. 334).

That's why the Ombudsperson was given, instead of a court, the responsibility of providing an independent and impartial review to individuals and entities seeking to be removed from the ISIL and Al-Qaida sanctions list. In doing so, the Ombudsperson does not only make recommendations to the Committee on whether to grant or deny a delisting request. The Ombudsperson also offers individuals and entities the possibility to know, in as much details as possible, subject to any confidentiality constraints, the information gathered during the initial phase of the process from various sources - so that petitioners are fully aware of the cases against them. It is also an opportunity for the petitioners to

have their side of the story heard by the Ombudsperson and via his Comprehensive Report, by the Committee.

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

Cases

As I said, the SC wanted to create an effective remedy against targeted sanctions. Cumulatively, since the Office was established, 81 cases involving requests from an individual, an entity or a combination of both have been resolved through the Ombudsperson process or through a separate decision of the Committee. In the 77 cases fully completed through the Ombudsperson process, 58 delisting requests have been granted and 19 have been refused. As a result of the 58 petitions that have granted, 53 individuals and 28 entities have been delisted and 1 entity has been removed as an alias of a listed entity. In addition, four individuals were delisted by the Committee before the Ombudsperson process was completed and one petition was withdrawn

following the submission of the comprehensive report. In other words, approximately 75% of the delisting requests have been granted.

Case update

By the time I took up my function, there were three cases pending, all three plus a fourth one have been closed in the meantime, two with a final outcome of retention and two with a delisting decision by the committee. Six cases are formally pending today, in one of these the comprehensive report has been submitted to the committee. One case is in the dialogue phase and four cases in the information gathering phase; the interviews with the petitioners will take place in the coming weeks. A further four inquiries have been received by the office, but the cases have not yet been formally started. What will happen with these cases is currently open. I am currently in the process of verifying whether these cases fulfil all the criteria to be accepted.

Procedure (Chart)

The OMP's review procedure has to guarantee fairness and due process in the UN counterterrorism sanctions system. The most important aspect is the right to be heard, the right to know the case and to comment on it.

You have got a copy of our procedural chart¹, where you can find information about the different phases of the proceeding, its content, timelines and the rules of decision making.

Transparency

Another very important aspect of fairness in the procedure is transparency; regarding to petitioners but also regarding the public. That's why the office has

¹ https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/procedure_chart.pdf

its own website, where all relevant information about the legal basis, requirements, conditions and functioning of the procedure, but also about the applicable standard of review and the reports to SC are published.

This brings me to my next point, that is legacy, and how to ensure consistency of approaches in the practice of the Ombudsperson. The Ombudsperson can only be an institution if there is consistency over time independently of the person on the post. On two important aspects of her approach to her work, my first predecessor issued statements. These concern the standard applicable to the review of delisting requests as well as the treatment of information alleged to have been obtained by torture. My last predecessor drafted a general document about the working methods and the standard of review. These documents are available on the website of the Office and were useful legacy tools for me as the new Ombudsperson. I am currently exploring ways to pursue this legacy and transparency exercise engaged by my predecessors.

Finally, I would like to draw your attention on the document “Historical guide of the Ombudsperson Process through Security Council resolutions and Reports of the Office of the Ombudsperson to the Security Council” in case you are interested about issues and topics discussed in the last ten years. Further on I would like to mention my own reports to the Security Council, the last one from 1 August 2019, where you find my observations about different aspects of my work on single cases and the general circumstances of the office. In my last report, I made observations about legal assistance for petitioners, confidentiality of the proceedings; leaking of comprehensive reports and commitment of Member States in the proceedings of the Ombudsperson (esp. about providing the Ombudsperson with relevant reasons and information about the facts at the basis of listings).

Conclusion

I will end by saying that I feel particularly proud of having been vested with the difficult but fascinating task of providing an independent and impartial review of delisting requests, the *raison d'être* of the Office of the Ombudsperson. Although already robust, this process could be further improved, and this would only enhance the credibility of the ISIL and Al-Qaida sanctions regime and facilitate the implementation of sanctions by the states. I am happy to answer any questions you may have in this regard. Suffice it to say that in many respects I share the views expressed by my predecessors notably in her reports to the Security Council where she addressed some of the remaining challenges. Of particular concern are the lack of transparency of the process and insufficient institutional guarantees of the independence of the Office.

I would like to conclude my intervention by expressing my gratitude for the trust placed in me by the Secretary-General and the ISIL (Da'esh) and Al-Qaida Sanctions Committee. I am also thankful that the United Nations have equipped the Office with motivated staff, who are very competent and dedicated in supporting the work of the office. So, I am very optimistic, that we will be making together a meaningful contribution to fairness and due process in the sanction's context also in the future.

Thank you for your attention.

Addendum during the subsequent discussion regarding the confidentiality of the proceedings, esp. of the comprehensive reports:

I have mentioned the problem of breach of confidentiality in my last report to the Council (Seventeenth report ([S/2019/621](#)) 1 Aug 2019, Para. 29ff.). It's

important to emphasize, that a comprehensive report is not a political document, but a legal one. Making public the content of a CR might have a strong impact on the legal status of a single person. With leaking such reports to the media, you can sabotage the integrity of future proceedings. In one of the cases since I took office, a confidential comprehensive report was leaked to the media. This is problematic because:

- There was no way to correct the inaccuracies reflected in the reporting, since the report itself remained confidential.
- Since I operate separate from national jurisdictions, I cannot offer any protections with respect to self-incrimination. If I want a petitioner to be honest with me about his or her past incriminating activity, I must be able to offer absolute confidentiality.

Please compare the mentioned last report to the Council.

(Report, para. 31: "...The fact that a breach of confidentiality can occur may have a negative impact on future proceedings. As petitions before the Ombudsperson are processed separately from any national jurisdiction, it is not possible to offer petitioners any protection against self-incrimination. For this reason, a petitioner who is cognizant of a potential breach of confidentiality might decline to comment on the substance of the allegations against him or her when being interviewed by the Ombudsperson. If a petitioner admits to certain allegations in the narrative summary and that admission were made public through a leaked comprehensive report, the petitioner might face criminal prosecution. If, however, petitioners decline to comment on the allegations or even lie to protect themselves, this could harm the positions of the petitioners in the proceedings before the Ombudsperson.")

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