Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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Mr. Cassayre,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, pursuant to Human Rights Council resolution 34/18.

In this connection, I would like to bring to the attention of the U.S. Government information I have received concerning the sentencing of Ms. Reality Winner for her disclosure of classified material to a news outlet.

According to the information received:

From December 2010 to December 2016, Ms. Winner was a member of the United States Air Force, where she was granted a security clearance of "Top Secret/Sensitive Compartmented Information".

In February 2017, Ms. Winner began work for Pluribus International Corporation, a private company contracted with the National Security Agency.

On 5 May 2017, Ms. Winner copied a five page top secret document that she took out from her office.

Around 9 May 2017, Ms. Winner sent the document to a news source.

On 30 May 2017, the news source contacted the National Security Agency regarding the documents. The National Security Agency contacted the Federal Bureau of Investigation (FBI) on 1 June 2017.

On 3 June 2017, the U.S. District Court for the Southern District of Georgia issued a search warrant permitting a search of Ms. Winner's home, vehicle and person. That same day, an FBI agent went to her home to question her. During the questioning, Ms. Winner admitted to printing classified intelligence and mailing it to a news source.

On 5 June 2017, the online news publication, *The Intercept,* published the five-page document provided by Ms. Winner. The report detailed three attempts by Russian General Staff Main Intelligence Directorate actors to conduct phishing attacks in an attempt to compromise U.S. voting systems. That same day, the U.S. District Court of Georgia issued the FBI an arrest warrant for Ms. Winner.

On 8 June 2017, Ms. Winner pled not guilty to one count of violating the Espionage Act, specifically 18 U.S.C. § 793 €. The Act states in the relevant part that any person who has "*unauthorized possession of, access to, or control over any document, writing, ... or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation*" and who "*wilfully communicates, delivers, [or] transmits*" those documents "*to any person not entitled to receive it*" *"[s]hall be fined under this title or imprisoned not more than ten years, or both*". There are no defences for the violation of this provision.

On 26 June 2018, Ms. Winner changed her plea to guilty.

The Government submitted a sentencing memorandum in which they recommended a 63 months' imprisonment. In the memorandum, the Government argued, in part, that the terms were appropriate because of Ms. Winner's "*express[ed] contempt for the United States"* and "*mock[ed] compromises of our national security".* Specifically, it offer that Ms. Winner "*said she 'hate[s] America like 3 times a day"* and that "*she was on the 'side' of Wikileaks founder Julian Assange and alleged NSA leaker Edward Snowden".* The Government also claimed a harsh punishment was reasonable because Ms. Winner "*understood the trust the United States places in individuals who receive a security clearance"* and that Ms. Winner "*blatantly violated this trust".* The Government also stated that "*a term of incarceration ... will deter others who are entrusted with [the] country's sensitive national security information and would consider compromising it".*

This constitutes the longest sentence ever hand down for a sole count of violating the Espionage Act. Other individuals that have been convicted solely of unauthorized disclosures of classified information under the Espionage Act have received sentences between 2 months and 20 months. The Government did not provided justification for the heavier sentence when compared to others except to say that it is of "*little utility"* because "*many of the facts underlying those please remain classified".*
On 23 August 2018, the U.S. District Court for the Southern District of Georgia accepted the parties' plea arrangement. The Court sentenced Ms. Winner to 63 months' imprisonment followed by three years of supervised release.

Before addressing concerns raised by these allegations, I wish to stress the US Government's obligation to respect and protect the right to freedom of opinion and expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992.

In particular, Article 19(2) of the ICCPR protects the right to "seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". In General Comment 34, the

Human Rights Committee highlights the importance of the "right of access to information held by public bodies" under Article 19 and States parties' obligations to "proactively put in the public domain Government information of public interest". Additionally, General Comment 34 holds that the importance of "uninhibited expression is particularly high in the circumstances of public debate in a democratic society". Finally, General Comment 34 notes that "[t]he freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote".

Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must meet a three-part test. That is, restrictions must be "provided by law", and necessary for "respect of the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals". The Human Rights Committee has specifically cautioned against the overbroad application of laws restricting Article 19 rights on national security grounds. General Comment 34 specifically states that invoking Article 19(3) to suppress or withhold from the public information of legitimate public interest that does not harm national security is impermissible. When invoking a legitimate ground for restricting expression, the State "must demonstrate in a specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat". When an individual acts as a whistleblower she is not only exercising her individual right to impart information but she is also protecting the public's right to receive it. When States pursue criminal and civil penalties against whistleblowers such penalties must limit "the spill over risk of deterring whistleblowing" consistent with the requirements of necessity and proportionality under Article 19(3) of the ICCPR (A/70/361). In particular, the sentences or fines imposed "must be proportionate to the underlying act, including taking into account the extent to which the whistleblowers disclosure advanced the public interest, even if a court found the harm to national security to outweigh the value of disclosure" (A/70/361).

In assessing whether the disclosure has advanced the public interest, the whistleblower's presumed motives or "good faith" should be immaterial to the assessment. The requirement of "good faith" could be misinterpreted to focus on the motivation of the whistle-blower rather than the veracity and relevance of the information reported. Instead, the application and scope of protection should be based solely on the public interest information underlying the whistleblowing" (A/70/361).

While the Government may have a legitimate objective in preventing unauthorized disclosures of government information for national security reasons, I am concerned that the custodial sentence imposed in this case is unnecessary and disproportionate. I am particularly concerned that the length of the sentence is disproportionate to the underlying act. I am further concerned that the Government has not taken into consideration the significant public interest in Ms. Winner's disclosure, which contains evidence of a threat or harm to the integrity of the country's electoral

processes. I am concerned that the Government's emphasis on Ms. Winner's statements regarding her alleged "contempt for the United States" has distorted its assessment of the public interest in her disclosure. Similarly, both her violation of the Government's trust generally and the Government's explicit goal that this sentence will deter others from similar acts may be unfairly considered. Furthermore, Ms. Winner's sentence seems particularly excessive given that individuals convicted under 18 U.S.C. § 793 (e) for unauthorized disclosures of classified information have generally received custodial sentences between 2 months to 20 months. Finally, I am concerned that an excessive sentence in this case would have a significant chilling effect on whistleblowing and discourage future disclosures that are in the public interest.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and comment you may have on the above-mentioned allegations.

2. Please explain the mitigating factors, if any, that the Government took into account in its decision to impose a sentence of 63 months' imprisonment on Ms. Winner.

3. Please explain whether and how the Government conducted an assessment of the public interest in Ms. Winner's disclosure, and how this assessment was taken into account in the decision to impose the sentence of 63 months' imprisonment.

4. Please explain the legal and administrative protections available to government whistleblowers (including any internal institutional and external oversight mechanisms), and how these protections satisfy the requirements of legality, necessity and proportionality under Article 19(3) of the ICCPR.

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression