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SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM

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Honourable President, Excellencies, ladies and gentlemen,

I am today presenting my second report to the General Assembly which evaluates the mandate and working methods of the Office of the Ombudsperson to the Al Qaida Sanctions Committee, as established by Security Council resolution 1904 (2009) and subsequently strengthened by resolution 1989 (2011). The report evaluates the mandate of the Ombudsperson against minimum international standards, assesses its impact on the due process deficits inherent in the Al Qaida sanctions regime, and makes recommendations for amending the mandate to bring it into full conformity with international human rights norms.

As delegates are aware the mandate of the Al Qaida regime is due for reconsideration and renewal in December. It is no secret that there is a range of views among States as to whether the regime requires further amendment, and if so, what amendments are required. The report I am presenting today aims to provide assistance to States in formulating their position on these contentious questions.

In preparing the report I consulted widely among the relevant stakeholders, interacting over a period of months with the Chair of the Sanctions Committee, the Committee itself, the Sanctions Monitoring Team, the Office of the Ombudsperson and many of the lawyers acting for listed individuals. I have also met with the like-minded group of States (Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland) as well as consulting on a confidential bilateral basis with other States.

I have been given authorised access by certain stakeholders to relevant material and information on conditions of confidentiality, and I have been able to see for myself how the present listing and de-listing mechanisms operate. I am satisfied that the description I give in the report of the due process shortcomings of the regime, as it presently operates, is accurate. I am reassured in this assessment by the helpful comments that were provided to me by the Monitoring Team and by the Ombudsperson herself when the report was in draft form. I have incorporated almost all of those comments and observations in the report in one way or another. I therefore feel able to say with some confidence that the strengths and the weaknesses of the present regime are accurately laid out in the report in a manner which enables States to consider the position from a fully informed perspective.

My starting point is the hopefully uncontroversial proposition that for a regime of targeted sanctions to be effective, it must be universally applied. If it is differentially or inconsistently applied among Member States then it obviously cannot achieve its purpose.

The Security Council has determined that international terrorism perpetrated by Al Qaida, and the entities and individuals associated with Al Qaida, represents a threat to international peace and security. It has also determined that an effective sanctions regime is necessary to address that threat. It is therefore essential that this regime should be capable of effective enforcement.

In its current form the regime requires all States to impose a range of measures, including asset freezes, international travel bans, and arms embargoes on individuals and entities designated by its own sanctions committee as being associated with Al Qaida.

These sanctions typically result in a denial of access by listed individuals to their own property, a refusal of social security benefits, limitations on their ability to work, and restrictions on their ability to move around domestically or travel abroad. It affects every area of their daily lives and led the Supreme Court of one permanent member of the Security Council to describe designated individuals as effectively prisoners of the state.

The adoption of a measure which enables the Security Council to make listing decisions without any *ex ante* independent review, and without any effective and binding judicial review of applications for the de-listing of individuals and entities on the consolidated list has been seen by many as a ready means by which individual States can make executive decisions with far reaching consequences for

their own citizens unconstrained by domestic judicial review or the human rights treaties by which they are bound.

It has also raised concerns that the system is open to abuse by individual States who have, in the past, nominated individuals and entities for inclusion in the Consolidated List as a means of suppressing political dissent. I have found evidence in the course of my review that supports this suggestion.

Predictably therefore the regime has come under sustained and strongly worded criticism over the years, including from the High Commissioner for Human Rights, from my predecessor as Special Rapporteur Martin Scheinin, as well as a wide range of national and regional courts and tribunals, as described in my report.

The concerns of the international community were summed up in 2009 by the Eminent Jurists Panel of the ICJ. Referring to the virtually uniform criticism of the regime as it then stood, the Panel concluded that it violated fundamental principles of human rights and the rule of law, and agreed with the Parliamentary Assembly of the Council of Europe that it was unworthy of an international institution.

The question I have set out to answer in this morning's report is whether the introduction of the Office of the Ombudsperson is sufficient to address those concerns. Whilst welcoming the significant due process improvements that have been brought about by Security Council resolutions 1904 (2009) and 1989 (2011), and by the dedicated work of Kimberly Prost, the present Ombudsperson, I have concluded, for the reasons set out in detail in the report, that further changes are necessary to bring the procedure into line with international minimum standards of due process.

Since the Security Council lacks enforcement machinery of its own, it is dependent upon Member States to give effect to its decisions. States are bound by Article 25 of the Charter to implement the sanctions regime adopted under Article 39. But the ability of States to comply with this international obligation, owed to the international community as a whole, has been severely compromised by the absence of adequate due process mechanisms within the regime.

Prior to the introduction of the Office of the Ombudsperson national and regional courts, particularly in Europe, but also in parts of North America, have declined to give effect to the implementing measures adopted by national Governments and regional organisations such as the Commission of the European Union. A series of judgments have found that States acted unlawfully in implementing the regime because the implementing measures involved a violation of fundamental rights protected under constitutional law, or international human rights law.

The most recent decision in this line of cases is a judgment of the European Court of Human Rights issued less than two months ago, which has the widest geographical application of any of the decisions thus far. The judgment of the Grand Chamber in *Nada v Switzerland*, delivered on 10 September of this year, is binding on all 47 Member States of the Council of Europe, including three permanent Members of the Security Council.

The effect of the decision is that, in the absence of independent judicial review of listings at the UN level, States that are signatories to the European Convention on Human Rights are required to provide an effective domestic review of implementing decisions in order to meet their obligation under Article 13 of the Convention to provide an effective remedy under national law for measures that interfere with fundamental rights.

The *Kadi* case, which raises the due process issue once again, was argued before the Court of Justice of the European Union last month. The case went ahead despite the fact that the Committee made an 11th hour decision to de-list Mr. Kadi, just three days before the hearing.

It is likely to be some time before the judgment is handed down. I would anticipate though that the Court of Justice will take account of all the relevant material including both the reports of the

Ombudsperson and the Monitoring Team, as well as the conclusions in the report I am presenting this morning. It will certainly take account of the decision of the Security Council in December as to the future shape of the regime and the future powers of the Ombudsperson. Indeed, I am told that one of the questions put to the parties during the hearing of that case was whether the UN currently has any plans to implement a system of effective judicial review.

This series of adverse judicial rulings has undermined both the perceived legitimacy of the regime and its effective enforcement. If the measures cannot be lawfully implemented at the national and regional level then the logic of universal sanctions falls away, raising the spectre that targeted funds could begin migrating towards those jurisdictions that cannot implement the regime consistently with their domestic and international legal obligations. It is therefore imperative that the Security Council now finds a solution that is compatible with the human rights standards binding on Member States.

In the report I am presenting this morning I conclude that the Council's powers under Chapter VII of the Charter are broad enough to enable it to enhance the effectiveness of the regime by establishing an independent adjudicator at UN level with jurisdiction to review and overturn a designation by the Committee.

This would not require any radical procedural departures from the present regime. It would simply require the Security Council to undertake to abide by the recommendations of the Ombudsperson. If this simple step were taken, together with a series of consequential procedural amendments, the regime would pass muster under constitutional and international human rights review. But if these measures are not taken then it will, in my view, continue to encounter insurmountable obstacles to effective enforcement in Europe and elsewhere.

Taking this relatively simple step would promote international peace and security by strengthening the regime's enforcement, whilst harmonizing the imperatives in Article 1(1) and Article 1(3) of the Charter, as envisaged by the General Assembly. It would at the same time resolve the conflict of international norms currently impeding implementation and it would honour the purposive synthesis outlined by the Security Council itself in the preamble to resolution 1989 (2011).

For the Security Council to take this step would not entail any impermissible delegation of Chapter VII powers. This is because it would require the adoption by the Council of a resolution in which the Council itself would voluntarily undertake to abide by the conclusions of an independent adjudicator. The Council could of course, at any time, revoke or amend the relevant resolution. And in any event, review by an independent adjudicator would not be directed to decisions of the Council itself. It would be directed primarily to the decisions of a subordinate body exercising delegated executive powers.

I therefore conclude in today's report that there is no sustainable legal objection to the establishment of a mechanism of independent judicial review. I acknowledge and welcome the decisions of the Security Council to introduce an Ombudsperson with power to make non-binding recommendations to the Committee for the de-listing of individuals, and subsequently to strengthen her mandate to give it added traction. But the ultimate decision-making power still rests with the Committee which is, on any view, a purely executive body that is not subject to binding judicial review on the merits. The Committee continues to act as judge in its own cause, and lacks the rudimentary safeguards necessary to secure a fair hearing by an independent and impartial tribunal.

I have therefore made a series of detailed recommendations in today's report which, if implemented in full, would bring the regime into conformity with the requirements of international human rights law and, at the same time, secure its effective and universal implementation. If the UN is to take the implementation of targeted sanctions seriously it is now imperative that it should move to make the system compatible with the international law norms that are binding on Member States.
