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

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Mr. Chairman, distinguished delegates

This is my fourth appearance before the General Assembly as Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

During the year that has passed since my previous appearance and as the 60th anniversary of the adoption of the Universal Declaration of Human Rights approaches, progress has been made in the inclusion of human rights into the framework of United Nations' action against terrorism. There is wide consensus that any sustainable strategy for the effective combat of terrorism must include promotion and protection of human rights as an essential element – both as a pillar of its own and as an ingredient of all other pillars, to use a metaphor.

The review of the Global Counter-Terrorism Strategy, leading to the adoption of General Assembly Resolution 62/272 of 5 September 2008, bears witness of that commitment. It also contains a new formulation concerning the duty of all States to comply with international law, including human rights law, when combating terrorism. Importantly, that formulation also refers to the United Nations Charter, hence dismissing speculations about Charter obligations in the field of counter-terrorism possibly trumping States' human rights obligations. Furthermore, the same clause in the resolution addresses not only implementing measures by individual States but also the action by the United Nations itself, recognizing that international cooperation to counter terrorism must fully comply with international law, including human rights law, refugee law and international humanitarian law.

As my mandate is one of the entities participating in the Counter-Terrorism Implementation Task Force, I am pleased to report that the Task Force has moved from planning to action. One important dimension of its work in the coming months will be to demonstrate through the development of practical tools for the use by Member States, that terrorism can be effectively fought in full compliance with human rights.

Mr Chairman,

Since my last appearance before the Third Committee, and as highlighted in the brief activities section of my report, there have been two important visits undertaken by my mandate.

In December 2007 I visited Guantánamo Bay for the purpose of observing Military Commission hearings. While I regret that the United States retained its

policy of not allowing United Nations Special Rapporteurs to visit persons detained of their liberty without any form of monitoring, I do thank the Government of the United States for their cooperation in facilitating the trial observation mission. As I have previously reported to the Human Rights Council, the visit confirmed my misgivings concerning the operation of the Military Commissions and I find it highly unlikely that they would be able to provide a trial that meets the standards of international human rights law concerning the right to a fair trial. My current report before you provides several examples of the problems in question. As you will note in paragraph 44 of my report, one of my concerns was confirmed by the United States Supreme Court which in *Boumediene v. Bush* found the Military Commissions Act unconstitutional for its denial of habeas corpus to Guantánamo detainees.

In May 2008 I conducted an official mission to Spain that included private interviews with domestic and foreign terrorist suspects and a visit to the Basque country. I wish to express my gratitude to the Spanish Government for its cooperation, and my regrets for the fact that for reasons beyond my control the mission report is not yet in the public domain. In the press statement issued at the end of the mission, I identified a number of areas of best practice in Spain's counter-terrorism efforts and commended Spain for its positive role in promoting a human rights conform response to terrorism on the international level. Nevertheless, I also identified matters of concern. Among the latter, the continued use of *incommunicado* detention for terrorism suspects, despite recommendations to the contrary by a number of human rights bodies, is to be mentioned separately. In my press statement I called for the complete eradication of the institution of *incommunicado* detention, not the least because it would strengthen the credibility of counter-terrorism measures by the law enforcement bodies as a whole and would at the same time further assure that those falsely accused of ill-treatment of terrorism suspects could be cleared.

A number of requests for country visits remain pending, including those communicated to Algeria, Egypt, Malaysia, Pakistan and the Philippines. I welcome the invitation extended by the Government of Tunisia in June 2008. I have suggested a time frame for this official country visit and look forward to receiving a reply from the Government so that this mission can be undertaken in the near future.

Mr Chairman,

The report in front of you focuses on one thematic area, challenges to the right to a fair trial in the fight against terrorism. In various parts of the world, governments have been tempted to deviate from internationally or

constitutionally defined due process standards in the name of fighting against terrorism. However, any sustainable strategy against terrorism must contain respect for human rights as an essential element and, as both the General Assembly and the Security Council have rightly pointed out, Member States must counter terrorism in full compliance with international law, including human rights law. My report reiterates that principle, by reflecting upon experiences from 35 countries identified by name and some 50 cases from international, regional and national jurisdictions. I identify nine concrete areas of best practice on how the right to a fair trial and due process can best be secured also when States are engaged in combating terrorism.

As presented in greater detail in paragraph 45 of the report, those nine areas are:

- a) secure access to court for persons subjected to counter-terrorism measures;
- b) secure the independence and impartiality of courts dealing with counter-terrorism issues;
- c) retain the public nature of trials also in terrorism cases;
- d) secure respect for the prohibitions against torture, other forms of ill-treatment, self-incrimination and otherwise unlawful methods of obtaining evidence, as any compromising of these prohibitions will render the trial unfair;
- e) apply the principle of normalcy by relying as far as possible on ordinary courts and always respecting the right to equality before the courts;
- f) disclose to the defence all evidence relied upon by the prosecution, and all exculpatory evidence in the possession of the authorities, even if they choose not to present it to the court;
- g) secure the right of effective representation, even when there are compelling reasons for requiring security classified or court-appointed counsel, or for restricting the means of communication between counsel and defendant;
- h) apply criminal law standards, or a hybrid standard of proof if severe sanctions or consequences such as control orders or the freezing of assets are attached to other than criminal procedures; and
- i) countries that have not yet abolished capital punishment generally or for terrorist crimes must apply the most rigorous standards of fair trial whenever the death penalty is applicable.

Mr Chairman,

On Monday I had the privilege of briefing both the Counter-Terrorism Committee and the 1267 Sanctions Committee of the Security Council about action taken pursuant to my mandate. As an issue that in my view deserves attention also by the General Assembly, I want to refer to the question of due process guarantees in the listing of terrorist suspects by the Security Council. My position is expressed in paragraphs 16 and 45 (a) of the report in front of you: "... so long as there is no independent review of listings at the United Nations level, there must be access to domestic judicial review of any implementing measure. A person subject to such measures must be informed of the measures taken and to know the case against him or her, and be able to be heard within a reasonable time by the relevant decision-making body."

I believe this position reflects a trend that is gaining more and more support not only in human rights circles but also among judges of national or other courts. Simply put, the listing of Taliban and Al-Qaeda terrorists that was established under Chapter VII of the Charter as a kind of emergency measure through Security Council Resolution 1267 and later extended and refined, has been in place for several years and has resulted in hundreds of individuals or entities having their assets frozen and other fundamental rights restricted, without a proper procedure for being heard or for having their case reviewed by an independent body.

On 3 September 2008, subsequent to my report being submitted to the editors, the European Court of Justice issued its judgments in the cases of *Kadi and Al Barakaat* (joined cases C-402/05 P and C-415/05 P). These judicial rulings are based exactly on the same principles as are expressed in my report. The Court distinguishes between the imposition of the sanctions by the 1267 Committee and the implementation of the sanctions by national, or in this case EU level, authorities. It holds that the latter are bound by fundamental rights when implementing the sanctions, and that therefore they must see to it that the persons affected have the right to be informed of the reasons for their listing as terrorists and the right to contest those reasons before an independent body. The European Court of Justice granted a mercy period of three months during which time the EU Council has to remedy the shortcomings of the listing mechanism or the EU Regulation implementing the UN listing will become null and void.

These rulings by the EU Court are not the only challenge to the 1267 listing regime arising from regional, international or national judicial or quasi-judicial bodies. They are reflective of a general trend which, in my assessment, requires

rapid and decisive measures from the side of the United Nations. In fact, the Security Council has already recognized the challenges it faces and taken steps in the direction of securing fair and clear procedures at the UN level, notably through Security Council Resolution 1822 which, inter alia, finally sets a two-year time line for a review of all entries on the consolidated list. Nevertheless, I am afraid that Resolution 1822 is insufficient for meeting the fairly demanding standards spelled out in paragraphs 323-325 of the *Kadi* judgment by the European Court of Justice.

In my briefing to the 1267 Committee of the Security Council, I outlined some options regarding how to address these challenges. I believe that the various available options fall into four categories:

1) Providing to the Council of the European Union, and to Governments concerned, sufficient information on the grounds for listing individuals or entities, so that the person or entity may be informed of those reasons and will be able to contest the implementation of the listing before national courts and the EU court

2) Leaving things as they are at the UN level and allowing the EU Regulation implementing the 1267 regime become null and void and passing the ball also in Europe to national authorities for the implementation of sanctions imposed by the Security Council. In my view this is the least preferred option, as it would result in a wave of litigation and the credibility of the overall United Nations counter-terrorism framework would be at risk.

3) Introducing a mechanism of independent review at the United Nations level, as a last phase in the Security Council's decision-making about the listing. Paragraph 16 of my report spells out the requirements for such a review as follows:

“At a minimum, the standards required to ensure a fair hearing must include the right of an individual to be informed of the measures taken and to know the case against him or her as soon as, and to the extent, possible, without thwarting the purpose of the sanctions regimes; the right to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to an effective remedy.”

In my assessment, the establishment of a quasi-judicial review body composed of security classified experts serving in their independent capacity would be likely to be recognized by national courts, the EU court and regional human

rights courts as sufficient analogous protection of due process, so that courts would exercise deference in respect of the outcome.

4) Abolishing the 1267 Committee and its terrorist listing. Security Council Resolution 1373 would consequently constitute a legal basis for national terrorist listing procedures, also in respect of Taliban and Al Qaeda terrorists, and in conformity with due process. The United Nations Secretariat would still provide information collection, expertise and assistance for the listing by national authorities.

Mr. Chairman, I look forward to a constructive dialogue with the Delegates.