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Letter dated 12 November 2015 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

We, the undersigned representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland (the Group of Like-Minded States on Targeted Sanctions), are writing to you on the issue of Security Council sanctions. Our group is strongly committed to the effective implementation of the Council's sanctions regimes and we closely follow developments with regard to the Al-Qaida and other sanctions regimes of the Security Council and developments regarding United Nations sanctions at the level of national and regional courts. As long as national and regional courts consider United Nations sanctions to fall short of the minimum standards of due process, national authorities may find themselves legally unable to implement them fully at the national level. In the light of that, we would like to submit to the Security Council the attached paper on fair and clear procedures for a more effective United Nations sanctions system.

We hope that the Council members will find our paper of interest, in particular in the context of the upcoming consultations in preparation for the adoption of a follow-up resolution to Security Council resolution 2161 (2014). We look forward to continuing and deepening the dialogue on this important matter with all stakeholders.

We should be grateful if you would have this letter and its annex circulated as a document of the Security Council.

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Annex to the letter dated 12 November 2015 from the Permanent Representatives of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland to the United Nations addressed to the President of the Security Council

Proposal by the Group of Like-Minded States on Targeted Sanctions for fair and clear procedures for a more effective United Nations sanctions system

Summary

The Group of Like-Minded States on Targeted Sanctions reiterates that as long as national and regional courts consider that United Nations sanctions imposed on individuals fall short of minimum standards of due process, national authorities may find themselves legally unable to implement those sanctions fully at the national level. In the light of that, the group submits the following proposals to further improve due process and targeted sanctions:

(a) With regard to the Al-Qaida sanctions regime:

(i) Enable the Ombudsperson to take effective delisting decisions;

(ii) Provide for the Ombudsperson process as a first remedy;

(iii) 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;

(iv) Information-sharing between Member States and the Ombudsperson and between the sanctions committee and national and regional courts should be improved;

(v) Transparency should be enhanced, i.e. all decisions should contain adequate and substantial reasons and those reasons should be made publicly available, as should a redacted version of the comprehensive report of the Ombudsperson;

(vi) The mandate of the Ombudsperson should be expanded to include responsibility for conveying requests for humanitarian exemptions and to assist persons who have been removed from the sanctions list or are mistakenly subject to sanctions measures;

(b) With regard to all sanctions regimes:

(i) Listing criteria need to be clarified;

(ii) Each sanctions committee must conduct regular reviews and confirm each listing;

(iii) A standing sanctions technical committee needs to be established;

(c) With regard to other sanctions regimes than the Al-Qaida sanctions regime:

(i) As an initial step the measures to be taken by the Focal Point for the delisting procedure need to be enhanced by introducing an information-gathering phase, requiring a formal decision by the relevant committee on each delisting request and reasons provided to the petitioner, and expanding the mandate of the Focal Point to receive requests for humanitarian exemptions;

(ii) The mandate of the Ombudsperson should ultimately be expanded to other appropriate sanctions regimes;

(iii) Additional due process safeguards are necessary, such as an enhanced transparency of listings and the introduction of clear time limits;

(d) Elements for further reflection: flexibility clauses allowing the application of specific sanctions to a specific listing on a case-by-case basis could be introduced.

I. Introduction

Targeted sanctions continue to serve as an important tool for the Security Council in exercising its primary responsibility for the maintenance of international peace and security under Chapter VII of the Charter of the United Nations. The Security Council has significantly enhanced fair and clear procedures within the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities. The establishment and strengthening of the Ombudsperson process by the Council in resolutions 1904 (2009), 1989 (2011), 2083 (2012) and 2161 (2014) were important steps towards an independent and effective sanctions review mechanism. The Office of the Ombudsperson makes a valuable contribution to the accuracy and legitimacy of the Al-Qaida Sanctions List and thus to its effectiveness.

Nevertheless, considerable concerns about due process persist and legal challenges have been filed in national jurisdictions around the world. In Europe, both the European Court of Human Rights and the Court of Justice of the European Union have confirmed in judgements regarding the Al-Qaida sanctions regime, but also with regard to a country-related sanctions regime,[1] that in the implementation of United Nations measures, actions of Member States remain subject to full judicial review as to their conformity with fundamental norms of due process. Those fundamental norms include, among others, respect for the right to be heard and other rights of the defence (right to have access to the file, subject to legitimate interests in maintaining confidentiality, right to ascertain the reasons for a decision) and the right to an effective remedy. It is possible to limit those rights, subject to the condition that the limitation pursues a legitimate aim, respects the principle of proportionality (including with regard to the duration of the measures) and does not infringe on the essence of the right in question.

As long as national and regional courts consider that United Nations sanctions to be imposed on individuals fall short of the minimum standards of due process, national authorities may find themselves legally unable to implement fully those sanctions at the national level. That situation threatens the uniform and universal application of United Nations sanctions and needs to be addressed. Based on those considerations and in line with the continuous need to render the work of the United Nations sanctions regimes more effective and legitimate and to ensure due process, the Group of Like-Minded States on Targeted Sanctions invites the Security Council to consider the following proposals. The proposals aim to improve further the Ombudsperson process on the one hand and the process with regard to other sanctions regimes on the other, ensuring that the use of Security Council powers is guided by international law, including human rights law, as enshrined in Article 1 of the Charter.

While some of the proposals, notably those with regard to the Al-Qaida sanctions regime (see section II) could be addressed through the forthcoming update

[1] See European Court of Human Rights (Grand Chamber), *Nada* v. *Switzerland*, Application No. 10593/08, Judgement of 12 September 2012; European Court of Human Rights (Chamber), *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, Application No. 5809/08, Judgement of 26 November 2013; Court of Justice of the European Union, *European Commission and Others* v. *Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgement of 18 July 2013. For reference purposes, see the brief unofficial summary of the main reasoning/arguments of the courts in the enclosure to the present document.

of Security Council resolution 2161 (2014) in December 2015, the proposals with regard to other or all sanctions regimes (see sections III and IV) would have to be carried out through a new generic resolution, an update of resolution 1730 (2006) establishing the Focal Point for delisting and directing the sanctions committees to revise their guidelines accordingly or update each sanctions regime individually.

II. Proposals to improve due process in the Al-Qaida sanctions regime

There are a number of elements to be addressed through the forthcoming update of Security Council resolution 2161 (2014).

A. Enable the Ombudsperson to take effective delisting decisions

A new provision should be added empowering the Ombudsperson to decide, on the basis of her comprehensive report, whether to maintain a listing or to delist an individual or entity.

Under the current regime, the Ombudsperson can issue a recommendation on the delisting of those individuals or entities that have requested removal from the Al-Qaida Sanctions List. The Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) retains the possibility of overturning the recommendation of the Ombudsperson by consensus or submitting the question to the Security Council. If the Ombudsperson were given the authority to decide whether to maintain a listing or to delist an individual or entity with procedures in conformity with basic norms of due process, it would to a certain extent be more advantageous to petitioners to submit their delisting requests at the level of the United Nations rather than in national or regional courts. With a view to avoiding future judgements of national or regional courts that strike down measures implementing United Nations sanctions, owing to the lack of conformity with due process norms and other fundamental rights, the Ombudsperson should be given decision-making powers with regard to delisting requests through a new provision in the forthcoming update of Security Council resolution 2161 (2014). The comprehensive reports of the Ombudsperson should be accepted as final by the Committee, otherwise it would retain the possibility of acting as the judge in its own cause, which is not in conformity with the right to an effective remedy.

Since the establishment of the Office of the Ombudsperson, the recommendations of the Ombudsperson have never been overturned by the Committee or referred to the Security Council for a vote. That clearly indicates that the recommendations of the Ombudsperson have been constantly well-founded and thus followed by the Committee. A gradual filtering-off of cases to the international mechanism has already resulted from the establishment and progressive strengthening of the Office of the Ombudsperson. To ensure that the Ombudsperson is a strong and effective mechanism for the efficient consideration of delisting requests, its decision-making power needs to be guaranteed by the forthcoming resolution and anchored in the system.

It may be noted that the Ombudsperson does not question whether the listing was reasonable and appropriate at the time it was decided, but determines on the

basis of the information available to him or her whether a continued listing is justified. On the other hand, nothing would prevent the Committee from relisting the individual or entity if new facts emerged or additional information became available after a delisting decision.

B. Provide for the Ombudsperson process as a first remedy

The Security Council should encourage Member States and relevant international organizations and bodies to encourage individuals or entities that are considering challenging their listing through national and regional courts to first seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson before, or at least in parallel to, instigating court proceedings.

For a petitioner it is to a certain extent more advantageous to submit a delisting request at the level of the United Nations, rather than to seize national or regional courts. The time frames of the Ombudsperson process are relatively narrow: within nine months of depositing her or his request, the petitioner is granted a decision with regard to her or his delisting. National procedures, on the other hand, may take several years. It is therefore the Ombudsperson process that should be seized first by individuals or entities petitioning for a delisting.

That idea is incorporated in operative paragraph 48 of resolution 2161 (2014) in that it "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". That could be emphasized and combined with stronger wording. The Security Council should encourage States to suspend their proceedings while a case is pending before the Ombudsperson and instruct them to encourage petitioners to seek removal first by the Ombudsperson, without prejudice to the decision by the national courts.

C. Ensure the independence of the Office of the Ombudsperson and make it a permanent structure

The Office of the Ombudsperson should be made permanent and the contractual arrangements for the position of the Ombudsperson should be modified and improved.

That could be done in two ways:

(a) The Security Council could enable the Office of the Ombudsperson to be transformed into a permanent office of the Ombudsperson within the Secretariat and call on the Secretary-General and Member States to undertake the necessary steps for implementation;

(b) Alternatively, the Security Council could enable the Office of the Ombudsperson to be transformed into a special political mission within the Secretariat and call on the Secretary-General and Member States to undertake the necessary steps for implementation.

In all cases the Office should be provided with the resources necessary to fulfil the mandate of the Ombudsperson, while maintaining at least the current operational strength of the Office. Institutional safeguards should be incorporated and implemented to ensure the independence and autonomy of the Office.

While the Council, in resolution 2161 (2014), requested the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson to carry out its mandate in an, inter alia, "independent" manner, the current contractual arrangements still fail to implement fully the relevant Security Council resolutions and significantly impair the ability of the Ombudsperson to fulfil the mandate, particularly in terms of independence.

The Ombudsperson is hired as a consultant and is therefore subject to the control and decisions of the Secretariat. According to the terms of the contract, the performance of the Ombudsperson is subject to evaluation by the Security Council Affairs Division, the division from which independence is essential. While that has not yet had any negative consequences for the procedure, it nonetheless raises concerns about the actual independence of the Ombudsperson and on how the mechanism is perceived.

Secondly, the Ombudsperson has no managerial authority with respect to budget, staffing, staff management and resource utilization. The current administrative arrangements therefore lack the critical feature of autonomy. Most importantly, while two staff posts are assigned to the Office, the Ombudsperson does not have any supervisory control over them in terms of reporting and evaluation of performance, because that is carried out by Political Affairs Officers within the Security Council Subsidiary Organs Branch. That situation has in the past put the two staff members in difficult situations, hinders the Office of the Ombudsperson in performing its tasks in an effective and truly independent manner and has also put staff members of the Branch in difficult situations.

It therefore seems evident that the Office of the Ombudsperson needs to be restructured with a view to institutionalizing it and granting it proper safeguards for independence, a key element of due process. That would give more weight and credibility to the work of the Ombudsperson.

The Security Council should include a provision in the update of resolution 2161 (2014) requesting the Secretary-General to make a request for the transformation of the Office of the Ombudsperson either into a permanent office or into a special political mission. While those options would need to be authorized by the Fifth Committee and are thus dependent on the decision of all Member States, a stronger wording in the Security Council resolution would provide both a basis and an impetus for the institutionalization of the Office of the Ombudsperson.

D. Improve information-sharing

1. From Member States to the Ombudsperson

The Security Council should further encourage Member States to provide all the information available to the Ombudsperson and enter into confidentiality agreements or arrangements with the Office of the Ombudsperson.

The standard developed by the Ombudsperson for her or his analysis, observations and conclusions is to make an assessment of whether there is sufficient information to provide a reasonable and credible basis for the listing at the time of the review. Based on all the information available at such time, the Ombudsperson determines whether a continued listing is justified. The cooperation of Member States with the Ombudsperson in terms of information-sharing and provision of confidential or classified material is critical to the effective operation of the Office and must be further improved. The level of detail and supporting information should be enhanced. Further progress should be made with regard to access to confidential information. In resolution 2161 (2014), the Council explicitly encouraged Member States to cooperate with the Office of the Ombudsperson and specified that cooperation should include concluding arrangements with the Office of the Ombudsperson for the sharing of confidential information. Member States which had not yet done so would be encouraged to enter into agreements or arrangements on the sharing of confidential or classified information with the Office of the Ombudsperson, in advance of a specific case. Concluding such agreements or arrangements would be evidence of support on the part of the States in question for the work of the Office and the implementation of the sanctions regime adopted by the Security Council.

2. From the Sanctions Committee to national or regional courts

The Security Council should instruct the Sanctions Committee and Member States to provide, upon request, additional information on the reasons for a listing to national or regional courts.

Challenges at a national or regional level that have already been filed might continue. Moreover, it is not unlikely that petitioners will file new claims as well. In that event, national or regional courts would be much better equipped to uphold United Nations-based listings if they had access to (at least parts of) the material on which the Committee's listing decision was based. It is important that the flow of information from the Sanctions Committee and Member States to national or regional courts is achieved when there are proceedings at national or regional level.

E. Enhance the transparency of the Ombudsperson process

Domestic, regional and international courts and tribunals need to be able to determine whether the Ombudsperson process constitutes an effective remedy for the affected individuals and entities. Only then will they be in a position to judge and acknowledge that the United Nations system provides for adequate protection of fundamental rights of due process. In order to enable them to do this, the transparency of the Ombudsperson process has to be further strengthened, including by publishing the comprehensive report, as well as the reasoning behind each decision.

1. Reasoning behind decisions to delist or to maintain a listing

All decisions regardless of whether they maintain a listing or delist an individual or entity should contain adequate and substantial factual reasons.

Where a listing is maintained or a petitioner is delisted on the basis of the recommendation by the Ombudsperson, the Ombudsperson should be granted the

responsibility to provide the reasons for that determination to the petitioner without undue delay and in compliance with any confidentiality restrictions that are placed on confidential or classified information by Member States, with appropriate safeguards regarding confidential material.

The Security Council should instruct the Committee to provide the actual and specific reasons to the petitioner via the Ombudsperson without undue delay and with appropriate safeguards regarding confidential material in case it decides not to follow the recommendation by the Ombudsperson. The Ombudsperson should also be made aware of those reasons by the Committee.

Lastly, provision should be made for the Ombudsperson to make the reasons publicly available or to disseminate them to interested individuals, States or other bodies, with appropriate safeguards regarding confidential material.

In all communications with the petitioner, interested individuals, States or other bodies, the Ombudsperson shall respect the confidentiality of the deliberations of the Committee and confidential communications between the Ombudsperson and Member States.

It is particularly important to inform the petitioner as to the reasons for a decision to maintain a listing. Only then is the petitioner able to change her or his behaviour and to successfully request delisting at a later stage. In resolution 2161 (2014), the Council acknowledged this and provided for the Committee to transmit the decision to keep the listing, or to delist, within 60 days to the Ombudsperson. While the Ombudsperson reported on some progress made with regard to substantive content, the reasons in certain cases seemingly contained only limited factual and analytical references and did not always reflect the observations, findings and analysis of the Ombudsperson.

Where the recommendation of the Ombudsperson is followed, both in delisting and retention cases, the Ombudsperson is in the best position to prepare and provide the reasons to the petitioner. The Ombudsperson should therefore be empowered to provide the reasons based on the comprehensive report directly to the petitioner. That would enhance transparency and credibility and ensure coherence between the comprehensive report and the reasons.

Where the recommendation of the Ombudsperson is not followed, she or he should also be made aware, in addition to the petitioner, of the actual and specific reasons for the decision of the Committee, since those reasons may have a bearing on the assessment of other cases. Otherwise there is a risk of inconsistency in the practice of the Ombudsperson.

Since the petitioner is provided with the reasons for delisting or maintaining a listing and is free to pass those reasons on, they may as well be made publicly available. That would further enhance the transparency and credibility of the Ombudsperson process.

2. Publication of a redacted version of the comprehensive report

A redacted version of the comprehensive report of the Ombudsperson should be published, allowing for legitimate privacy, security and confidentiality interests to be adequately protected.

Alternatively, the possibility to request a copy of the comprehensive report should be extended to those States from which information was sought during the procedure.

Despite certain improvements, the comprehensive report is not available to the petitioner or to the public. As a result, the reasoning of the Ombudsperson is not generally available. To publish a redacted version of the comprehensive report of the Ombudsperson would enhance the transparency of the Ombudsperson process. Prior to publication, the designating State(s) and other Member States, which have delivered confidential information, have to give their approval with regard to the parts of the redacted report that are based on such confidential information.

The publication of the redacted report is particularly important in cases where a listing has been maintained. In fact, increased transparency at the United Nations level through the availability of the reasoning followed by the Ombudsperson would most likely reduce the number of (successful) challenges in national and regional courts, given that the courts would have a better understanding of the proceedings at the United Nations level: what conclusions have been drawn and, more importantly, how they have been determined.

Some improvements with regard to the transparency of the process were made by introducing in resolution 2161 (2014) the possibility of providing a copy of the comprehensive report upon request to interested States (designating State, State of nationality, residence or incorporation) and with the approval of the Committee, as well as any redactions needed to protect confidential material. At present, the comprehensive report is still not made available to other States which might have a specific interest in a particular case. As suggested by the Ombudsperson in her tenth report, a provision should be added in the update of resolution 2161 (2014) to provide at least those States with a copy of the comprehensive report, upon request.

3. Codification and extension of existing practice

A provision empowering the Ombudsperson to inform the petitioner as soon as possible and before public notification of a delisting decision should be included.

A similar provision empowering the Ombudsperson to do the same in case of retention should be added.

It has been the practice for the Ombudsperson to advise the petitioner, informally, in advance of public notification, of the decision to delist. It is a feature of fairness and would enhance the confidence of petitioners in the delisting process, if the Ombudsperson were given explicit powers to do so in case of delisting and also in case of retention.

F. Enlarge the scope of the mandate of the Ombudsperson

1. Include responsibility for conveying requests for humanitarian exemptions

The Office of the Ombudsperson should be entitled to receive requests for humanitarian exemptions by listed individuals or entities, transmit those requests to the Committee with a recommendation on the granting of a humanitarian exemption and notify the decision of the Committee to the petitioner and the State(s) concerned.

While the Group of Like-Minded States recognizes the improvement made by entitling the Focal Point for delisting to receive requests for humanitarian exemptions by listed individuals and entities (see resolution 2083 (2012)), it would be beneficial to the coherence of the Al-Qaida sanctions regime to assign that responsibility to the Ombudsperson with an enhanced mandate. Alternatively, the mandate of the Focal Point should be extended and it should be empowered to receive requests for humanitarian exemptions for all sanctions regimes (see proposal A.2 in section III below).

2. Assistance to persons who have been removed from the Al-Qaida Sanctions List or subjected to the sanctions measures mistakenly

The Office of the Ombudsperson should be empowered to receive communications from individuals who have been removed from the Al-Qaida Sanctions List and individuals claiming to have been subjected to the measures as a result of false or mistaken identification, or confusion with listed individuals.

In particular, the Ombudsperson should have the competence to submit for consideration by the Committee proposals for documents of negative identification and documents certifying a delisting. Those documents, after approval by the Committee, could then be used by the persons concerned as evidence that they are not subject to Security Council sanctions.

In several cases of individuals delisted by the Committee through the Ombudsperson process, the delisted person has approached the Ombudsperson and claimed that he or she is still subject to the application of sanctions measures even after delisting. The Ombudsperson should be able to assist in such cases.

In resolution 2161 (2014), the Council gave the Focal Point the possibility of receiving and transmitting to the Committee for its consideration "communications from individuals who have been removed from the Al-Qaida Sanctions List" or "individuals claiming to have been subjected to the measures as a result of false or mistaken identification or confusion". While that modification undoubtedly facilitates bringing to the attention of the Committee communications regarding such situations, a transferral of that responsibility from the Focal Point to the Ombudsperson would further enhance the procedure and render it less confusing for the petitioners.

III. Proposals for more just and effective listings: increasing the legitimacy, proportionality and transparency of the listing process for all sanctions regimes

There are elements to be addressed through a new generic resolution, an update of resolution 1730 (2006), establishing the Focal Point for delisting, or an update of each sanctions regime and the committee guidelines individually.

A. Clarification of listing criteria

Clarification of listing criteria under the different sanctions regimes should be considered.

In particular, the Security Council should offer standards of legal clarity as to what amounts to "supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof" and may result in a listing under the sanctions regime established in resolutions 1267 (1999) and 1989 (2011). It should also clarify what can be qualified as "supporting acts or activities of those designated and other individuals, groups, undertakings and entities associated with the Taliban in constituting a threat to the peace, stability and security of Afghanistan" and may result in a listing under the sanctions regime established in resolution 1988 (2011).

In order to provide for increased accuracy and effectiveness and make sanctions more targeted, consideration should be given to clarifying the listing criteria under the sanctions regimes. That pertains in particular to the Al-Qaida and Taliban sanctions regimes, but should also be applied to other sanctions regimes.

In operative paragraphs 2 of resolution 2161 (2014) and 2 of resolution 2160 (2014), the Council defined the acts and activities which indicate that an association with, respectively, Al-Qaida or the Taliban exists. Those acts and activities constitute the criteria for listing and are therefore the nucleus of those sanctions regimes. For reasons of legal certainty and predictability, those criteria should meet certain standards of legal clarity, not least to allow affected individuals, groups, undertakings or entities to change their behaviour in order to be delisted. Given the broad scope of the term "otherwise supporting acts or activities" in operative paragraphs 2 (c) of resolution 2161 (2014) and 2 (d) of resolution 2160 (2014), the Council should specify and exemplify possible supporting acts or activities other than recruitment, such as, for instance, acts of incitement to terrorism.

B. Review and time limits for all listings

Each sanctions committee must conduct regular reviews of all listings in a timely and thorough manner and regularly inform Member States about the results of all reviews. In the course of the reviews, the committees should actively confirm each listing in order to maintain it on the list. In so doing, the committees should give reasons as to why a listing remains appropriate. If a listing is not reviewed and confirmed within the required period, it should automatically be deleted. The regular review should also be used to update information concerning listings, with regard to subsequent indictments by international justice mechanisms.

The outcome of the reviews is highly dependent on the arguments provided by the designating State and on its cooperation. Currently, the committees must take a decision to remove a listing under review; in case of inaction, the listing remains. To require active confirmation by the committees will mean that they have to decide to maintain the listing. That is to say, if there is no consensus within a committee to maintain the listing, the individual or entity will be delisted. To introduce a higher threshold to maintain a listing will underline the preventive and temporary nature of the sanctions measures.

C. Establish a standing sanctions technical committee

The Security Council should establish a standing sanctions technical committee, comprised of the sanctions experts from the missions of each member of the Council.

Sixteen sanctions regimes are currently in force pursuant to Security Council resolutions under Chapter VII of the Charter. In order to ensure the uniform interpretation and application of the sanctions measures across the different regimes, a sanctions technical committee, as proposed in the compendium of the high-level review of United Nations sanctions, should be established (see S/2015/432). Such a committee could be in charge of drafting a standard set of guidelines for the work of the various sanctions committees, from which they should only deviate where provisions of relevant resolutions require it.

IV. Proposals with regard to sanctions regimes other than the Al-Qaida regime

A number of elements should be addressed through a new generic resolution, an update of resolution 1730 (2006), establishing the Focal Point for delisting, or an update of each sanctions regime and the Committee guidelines individually.

A. Enhance the competencies of the Focal Point for delisting

1. Introduce due process safeguards in the Focal Point delisting procedure

Upon receipt of a delisting request, the Focal Point should be entitled to transfer the request to the relevant committee and the designating State, the State of nationality, residence or incorporation and other States which have a particular interest in the case (such as the State where assets of a listed individual or entity are located and were frozen following the listing).

The Focal Point should then be empowered to proceed to an information-gathering phase.

The information gathered would subsequently be transmitted to the committee, which, on the basis of the information provided by the Focal Point and the interested States who received the request, would have to take a formal decision on whether to retain the listing or not.

In case of retention, the committee should provide substantive factual reasons which would be transmitted through the Focal Point to the petitioner.

As an initial step, the mandate of the Focal Point established pursuant to resolution 1730 (2006) should be amended to confer additional competencies on the Focal Point in order to include due process safeguards and ensure that the most basic rights are respected. The Security Council should direct all sanctions committees to amend their guidelines accordingly.

Under the current system, the Focal Point for the delisting procedure has not proved effective: it is heavily dependent upon the approval or opposition of the "reviewing States" (designating State, State of citizenship, State of residence), no information-gathering phase takes place, no formal decision is taken, nor are any reasons provided to the individual or entity who submitted the request. For that reason, only very few requests have been (successfully) submitted.

Due to the lack of due process, it is crucial to enhance the procedure by expanding the mandate of the Focal Point and by demanding that the relevant

committee for each delisting request take a formal decision accompanied by reasons to be transmitted to the petitioner.

2. Expand the mandate of the Focal Point with regard to humanitarian exemptions

The competence of the Focal Point to receive requests for humanitarian exemptions directly from individuals should be expanded to all sanction regimes.

The requirements and procedure for exemptions need to be standardized in order to ensure a coherent approach across the different sanctions regimes.

At present, only the Al-Qaida system allows individuals to address an exemption request to the Focal Point. Under the other systems, for those regimes which carry the possibility of applying for humanitarian exemptions, only Member States may advance such a request. However, States may lack the will to present exemption requests to the relevant committee, or the resources to do so. In order to guarantee full respect for fundamental rights, individuals and entities themselves should be able to avail themselves of the possibility to petition for an exemption through the Focal Point.

Harmonizing the procedure for humanitarian exemptions would increase coherence between the different sanctions regimes.

B. Expansion of the mandate of the Ombudsperson to other sanctions regimes

Gradually extending the important procedural safeguards of the Ombudsperson process to other appropriate sanctions regimes should be considered. Accordingly, consideration should be given to equipping the Office of the Ombudsperson with adequate resources.

Currently, only individuals and entities listed on the Al-Qaida Sanctions List have access to the Ombudsperson process. However, similar due process concerns exist in relation to other Security Council sanctions regimes. Some of the country-specific sanctions regimes do not in fact target a country or its regime and its policies. Instead, they target persons, groups and entities in stark and often violent opposition to the internationally recognized Government and its policies. Thus, they do not enjoy the protection of their rights and interests that a Government with access to diplomatic channels and representation at the United Nations would normally offer. Persons listed under those sanctions regimes have also started to challenge their listing under legal acts implementing Security Council designations. In November 2013, the European Court of Human Rights decided the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*, relating to resolution 1483 (2003). The Chamber of the Court declared that the Focal Point procedure did not offer equivalent protection of fundamental rights. The case was subsequently referred to the Grand Chamber and judgement is awaited in late 2015. The Security Council should therefore consider the possibility of extending the mandate of the Ombudsperson to other appropriate regimes on the occasion of their next mandate renewals. The possibility of adapting the mandate of the Ombudsperson to the various sanctions regimes should also be explored.

C. Additional due process safeguards

1. Enhance the transparency of listings

The Security Council should require Member States to provide a detailed statement of case when proposing names to a committee for inclusion on a consolidated list. Member States should identify those parts of the statement of case that may be publicly released and those parts which may be released upon request to interested States.

After a name is added to a consolidated list, a substantial narrative summary of reasons for listing should be made accessible on the committee website.

The Secretariat should be instructed to notify the permanent mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national. Subsequently, those Member States should notify or inform in a timely manner the listed individual or entity of the designation. The notification or information should include a copy of the portion of the statement of case that can be publicly released, the summary of reasons, a description of the effects of designation and information on where to submit a delisting request.

Increased transparency at the level of the United Nations through the availability of a statement of case for each listing would be likely to reduce the number of (successful) challenges in national and regional courts, given that the courts would have a better understanding of the proceedings at the United Nations level, i.e. on what basis a listing was determined.

Another feature of transparency related to due process and fair trial resides in the information available to the listed person or entity. Notification needs to be given in a timely and the most exhaustive possible manner.

2. Extension to other sanctions regimes of the “hold” procedure time limits adopted by the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities

The Security Council should direct all sanctions committees to amend their guidelines to ensure that no decision to maintain a listing or to delist is left pending for a period longer than six months. Accordingly, all sanctions committees should amend their guidelines.

The right to have cases decided within a reasonable time is an essential element of due process. The past practice of the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) of placing a hold on proposed decisions, some of which were left undecided for years, was successfully brought to an end in 2010. Extending to all sanctions committees time limits for placing a hold on proposed decisions would be an important element of due process and would significantly strengthen the fairness and transparency of decision-making in all committees.

V. Elements for further reflection

Introduction of flexibility clauses

The Security Council could consider introducing flexibility clauses into each sanctions regime, which would allow the application of specific sanctions to a specific listing to be decided at the moment of the listing, or of the review, and based on all the information available.

By introducing flexibility clauses in the different sanctions regimes, the committees responsible for listing could be empowered to decide on a case-by-case basis which kind of sanction would be the most appropriate to be applied to a specific listing. That would allow the sanctions committees to apply, for example, only an asset freeze, without resorting to a travel ban (or vice versa) for each listing at the moment of the listing or of the review, based on all the information available to the committee. The criteria for the application of the different measures would have to be clearly mentioned in the resolution. The concrete measures for each listing would have to be specified in the consolidated list and not impede the national implementation process.

By imposing only the type of sanctions that is necessary to achieve the intended result, those sanctions could become more proportionate (if, for example, in the case of *Nada v. Switzerland* before the European Court of Human Rights only an asset freeze was applied).

Enclosure

European Court of Human Rights, *Nada v. Switzerland*, September 2012

Article 13 of the European Convention on Human Rights states that there must be a remedy allowing the competent national authority both to deal with the substance of the relevant complaint and to grant appropriate relief (para. 207 of the judgement of 12 September 2012).

Article 13 seeks to ensure that anyone who makes an arguable complaint about a violation of a right under the Convention will have an effective remedy in the domestic legal order (para. 208).

The European Court of Human Rights cited the Swiss Federal Court as acknowledging that "the delisting procedure at the United Nations level … could not be regarded as an effective remedy within the meaning of Article 13 of the Convention" (para. 211). However, the statement by the Swiss Federal Court was made in 2007 before the establishment of the Office of the Ombudsperson.

The Swiss authorities did not examine the merits of the applicant's complaints concerning the alleged violation of the Convention (para. 210).

There was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions (para. 212).

Court of Justice of the European Union, *European Commission and Others v. Yassin Abdullah Kadi*, July 2013

The Court noted that with regard to the listing or decision to maintain the listing, only the narrative summary of reasons was provided to the authorities that were obliged to implement the resolution. No other evidence was provided (paras. 107-110 of the judgement of 18 July 2013).

The authorities are required to disclose the summary of reasons provided by the sanctions committee to the applicant (para. 111) and to ensure that the applicant is in a position in which he or she may effectively make known his or her views on those reasons (para. 112).

Further, the authorities must examine carefully and impartially whether those reasons are well-founded (para. 114).

For that examination, the Committee and the designating State must disclose the relevant information and evidence (para. 115). The allegations factored into the summary of reasons must be verified, i.e. it must be assessed as to whether at least one of the reasons is substantiated. If not enough information is disclosed, the decision will be based solely on the material which has been disclosed (para. 119).

Such a review by national authorities is all the more essential since, despite additional improvements (in particular after the adoption of the contested regulation, i.e. after 28 November 2008), the procedure for delisting and ex officio re-examination at the United Nations level do not provide a guarantee of effective judicial protection (para. 133).

The essence of effective judicial protection must mean to obtain a declaration from a court by means of a judgement ordering annulment, whereby the contested

measure is retroactively erased from the legal order and is deemed never to have existed; that the listing of a person's name or the continued listing of her or his name on the list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute a form of reparation for the non-material harm she or he has suffered (para. 134).

European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, November 2013, (the case is currently pending before the Grand Chamber)

States parties to the European Convention on Human Rights are not prevented from transferring competences to international organizations. However, they remain responsible under the Convention for all acts and omissions of their own organs, regardless of whether they result from an obligation deriving from their membership to the international organization. If the organization offers protection of fundamental rights which is equivalent to the Convention, it is presumed that the State acted in conformity with the Convention if it simply implemented its obligations deriving from its membership. Where the State has discretion, on the other hand, all acts have to be in strict conformity with the Convention (para. 114 of the judgement of 26 November 2013).

Security Council resolution 1483 (2003) leaves no discretion to Member States of the United Nations (para. 117). The requirement of equivalent protection also applies to the United Nations (para. 116).

The Focal Point mechanism does not provide for equivalent protection. The Court endorses the conclusion of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that the Al-Qaida sanctions regime established by resolution 1267 (1999) does not guarantee respect of the minimal standard (even after resolution 1989 (2011)). A fortiori, the regime established by resolution 1483 (2003) cannot be said to provide for equivalent protection either (paras. 118-120).

As a result, the Court examined the question of whether the applicant's right to a remedy had been violated. The Court concluded that the lack of equivalent protection at the United Nations level had not been compensated by national proceedings, as the Swiss Federal Court had not reviewed the lawfulness of the measures taken. Special consideration was thereby given to the time that had elapsed since the asset freeze had been implemented (proportionality) (paras. 126-134).