

## **Fair and clear procedures for a more effective UN sanctions system**

**Proposal to the United Nations Security Council by the Group of Like-Minded States on  
targeted sanctions (Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein,  
the Netherlands, Norway, Sweden and Switzerland)**

### **Executive summary**

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

#### I. With regard to the Al-Qaida sanctions regime:

- A. Enable the Ombudsperson to take effective de-listing decisions;
- B. Provide for the Ombudsperson process as a first remedy;
- C. The Office of the Ombudsperson should be restructured with a view to institutionalizing the Office, i.e. through its transformation into a Permanent Office or a Special Political Mission Office within the Secretariat;
- D. Information sharing between Member States and the Ombudsperson as well as between the Sanctions Committee and national/regional courts should be improved;
- E. Transparency should be enhanced, i.e. all decisions should contain adequate and substantial reasons and those reasons, as well as a redacted version of the comprehensive report, should be made publicly available;
- F. The mandate of the Ombudsperson should be expanded to include the responsibility for conveying requests for humanitarian exemptions and to assist persons who have been removed from the sanctions list or are subjected to the sanctions measures mistakenly.

#### II. With regard to all sanctions regimes:

- A. Listing criteria need to be clarified;
- B. Each Sanctions Committee must conduct regular reviews and confirm each listing;
- C. A standing Sanctions Technical Committee needs to be established.

#### III. With regard to other sanctions regimes than the Al-Qaida sanctions regime:

- A. As an initial step the Focal Point for de-listing procedure needs to be enhanced, i.e. by introducing an information gathering phase, requiring a formal decision by the Committee on each de-listing request as well as reasons provided to the petitioner, and expanding the Focal Point's mandate to receive requests for humanitarian exemptions;
- B. The mandate of the Ombudsperson should ultimately be expanded to other appropriate sanctions regimes;
- C. Additional due process safeguards are necessary, such as an enhanced transparency of listings and the introduction of clear time-limits.

#### IV. Elements for further reflection:

- A. Flexibility-clauses allowing the application of specific sanctions to a specific listing on a case-by-case basis could be introduced.

## Introduction

Targeted sanctions continue to serve as an important tool for the UN Security Council in exercising its primary responsibility for the maintenance of international peace and security under Chapter VII of the UN Charter. The Security Council has significantly enhanced fair and clear procedures within the Security Council Committee pursuant to resolution 1267 (1999) concerning Al-Qaida and associated individuals and entities. The establishment and strengthening of the Ombudsperson process by 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 due process concerns still persist and legal challenges have been filed in national jurisdictions around the world. In Europe, both the European Court of Human Rights as well as the Court of Justice of the EU confirmed in judgments – regarding the Al-Qaida sanctions regime but also with regard to a country-related sanctions regime<sup>1</sup> – that in the implementation of UN 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 defense (right to have access to the file, subject to legitimate interests in maintaining confidentiality; right to ascertain the reasons of a decision) and the right to an effective remedy. It is possible to limit those rights, subject to the condition that this 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 UN sanctions to be imposed on individuals to fall short of the minimum standards of due process, national authorities may find themselves legally unable to fully implement the sanctions at the national level. This situation threatens the uniform and universal application of UN sanctions and needs to be addressed. Based on these considerations and in line with the continuous need to render the work of the UN 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. These proposals aim at further improving the Ombudsperson process, on the one hand, and the process with regard to other sanctions regimes on the other, ensuring that the use of the 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 (section I) could be addressed through the forthcoming update of Security Council resolution 2161 (2014) in December 2015, the proposals with regard to other or all sanction regimes (sections II and III) would have to be carried out through a new generic resolution, an update of resolution 1730 (2006) establishing the Focal Point for de-listing and directing the Sanctions Committees to revise their guidelines accordingly or an update of each sanctions regime individually.

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<sup>1</sup> See: European Court of Human Rights (Grand Chamber), *Nada v. Switzerland*, Application No. 10593/08, 12 September 2012; European Court of Human Rights (Chamber), *Al-Dulimi v. Switzerland*, Application No. 5809/08, 26 November 2013; Court of Justice of the European Union, *European Commission and UK v. Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013. For reference purposes, please find a brief unofficial summary of the main reasoning/arguments of the courts in the annex.

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

Elements to be addressed through the forthcoming update of Security Council resolution 2161 (2014).

### A. Enable the Ombudsperson to take effective de-listing 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 de-listing of those individuals or entities that have requested removal from the Al-Qaida Sanctions List. The Committee retains the possibility of overturning the Ombudsperson's recommendation by consensus or submitting the question to the Security Council.<sup>2</sup> 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 de-listing requests at the UN level than in national or regional courts. With a view to avoiding future judgments of national or regional courts that strike down measures implementing UN sanctions due to the lack of conformity with due process norms and other fundamental rights, the Ombudsperson should be given decision-making power with regard to de-listing requests through a new provision in the forthcoming update of Security Council resolution 2161 (2014). The Ombudsperson's comprehensive reports should be accepted as final by the Committee. Otherwise, the Committee would retain the possibility to act 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. This clearly indicates that the Ombudsperson's recommendations were constantly well-founded and thus followed by the Committee. A gradual filtering off of cases to the international mechanism has already resulted from its establishment and progressive strengthening. To ensure that the Ombudsperson is a strong and effective mechanism for the efficient consideration of de-listing 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 the reasonableness and appropriateness of the listing at the time it was decided, but determines on the basis of the information available in the present day whether a continued listing is justified. On the other hand, nothing would prevent the Committee from relisting the individual or entity if new facts emerge or additional information become available after a de-listing decision.*

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<sup>2</sup> S/RES/2161 (2014) OP 41, 43, Annex II OP 8 (c), OP 15.

## **B. Provide for the Ombudsperson process as a first remedy**

The Security Council should encourage Member States and relevant international organisations and bodies to encourage individuals or entities that consider challenging their listing through national and regional courts first seek removal from the Al-Qaida Sanctions List by submitting de-listing 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 de-listing request at the UN level, rather than seize national or regional courts. The timeframes 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 de-listing; national procedures, on the other hand, may take several years. Therefore, it is the Ombudsperson process that should be seized first by individuals or entities petitioning for a de-listing.*

*Resolution 2161 (2014) incorporates this idea in OP 48 in that it “requests that Member States and relevant international organisations 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 de-listing petitions to the Office of the Ombudsperson”. This could be emphasised 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 States 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.

This could be done in two ways:

The Security Council could enable the transformation of the Office of the Ombudsperson into a Permanent Office of the Ombudsperson within the Secretariat and call on the Secretary General and Member States to undertake the necessary steps.

Alternatively, the Security Council could enable the transformation of the Office of the Ombudsperson into a Special Political Mission within the Secretariat and call on the Secretary General and Member States to undertake the necessary steps.

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

*While 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 a inter alia “independent” manner<sup>3</sup>, the current contractual arrangements still fail to fully implement the 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 contract, the Ombudsperson’s performance is subject to an evaluation of the Security Council Affairs Division (SCAD), the division from which independence is essential. While this has not had yet any negative consequences for the procedure, it raises nonetheless concerns about the actual independence of the Ombudsperson and on how it 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 in terms of reporting and evaluation of performance over them, which is carried out by political affairs officers within the Security Council Subsidiary Organs Branch (SCSOB). This situation has put the two staff members in conflicting situations in the past, hinders the Office of the Ombudsperson to perform its tasks in an effective and truly independent manner and has also put staff members of the SCSOB in difficult situations.*

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

*The Security Council should include a provision in the update of Security Council 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 of the Ombudsperson or into a Special Political Mission. While these options would need to be authorized by the 5<sup>th</sup> Committee and are thus depending on the decision of all Member States, a stronger wording in the Security Council resolution would provide both a basis and an impetus for an institutionalization of the Office of the Ombudsperson.*

## **D. Improve information sharing**

### **i 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*

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<sup>3</sup> S/RES/2161 (2014) OP 46.

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. Member States' cooperation with the Ombudsperson in terms of information sharing and provision of confidential/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. Resolution 2161 (2014) explicitly encourages Member States to cooperate with the Office of the Ombudsperson and specifies that the cooperation includes concluding arrangements with the Office of the Ombudsperson for the sharing of confidential information.<sup>4</sup> Member states who have not yet done so, shall be encouraged to enter into agreements/arrangements on the sharing of confidential/classified information with the Office of the Ombudsperson, in advance of a specific case. Concluding such agreements/arrangement would evidence 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.

#### ii 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 this event, national or regional courts would be much better equipped to uphold UN-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 UN system provides for adequate protection of fundamental due process rights. 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 of each decision.

#### i Reasoning of 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

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<sup>4</sup> S/RES/2161 (2014) OP 47.

restrictions that are placed on confidential or classified information by Member States providing it 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 these 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 Committee deliberations and confidential communications between the Ombudsperson and Member States.

*It is particularly important to inform the petitioner about the reasons of a decision to **maintain a listing**. Only then is the petitioner able to change her or his behaviour and to successfully request de-listing at a later stage. Resolution 2161 (2014) acknowledges this and provides for the Committee to transmit the decision to keep the listing or delist within 60 days to the Ombudsperson.<sup>5</sup> While the Ombudsperson reported on some progress made with regard to substantive content, the reasons in certain cases seemingly contain only limited factual and analytical references and do not always reflect the observations, findings and analysis of the Ombudsperson.*

*Where the recommendation of the Ombudsperson is followed, both in de-listing and retention cases, the Ombudsperson is in the most advantageous position to prepare and provide the reasons to the petitioner. Therefore, the Ombudsperson should be empowered to provide the reasons based on the comprehensive report directly to the petitioner. This would enhance transparency and credibility as well as ensure coherence between the comprehensive report and the reasons.*

*Where the recommendation of the Ombudsperson is not followed, the Ombudsperson should also be made aware – in addition to the petitioner – of the actual and specific reasons of a decision by the Committee, since these reasons may have a bearing in the assessment of other cases. Otherwise there is a risk of inconsistency between the practice of the Ombudsperson.*

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

## ii **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.

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<sup>5</sup> S/RES/2161 (2014) Annex II OP 16.

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

*Despite certain improvements the comprehensive report is not available to the petitioner nor 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 will enhance the transparency of the Ombudsperson process. Prior to publication, the designating State(s) and other Member States that delivered confidential information have to give their approval with regard to the parts of the redacted report that is based on such confidential information.*

*The publication of the redacted report is particularly important in cases where a listing was maintained. In fact, increased transparency at UN level through the availability of the reasoning followed by the Ombudsperson would most likely reduce the number of (successful) challenges in national/regional courts given that the courts would be able to have a better understanding about the proceedings at UN level, i.e. 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 to provide 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.<sup>6</sup> 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 10<sup>th</sup> report, a provision should be added in the update of resolution 2161 (2014) to provide at least these States a copy of the comprehensive report upon request.*

### iii 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 de-listing decision should be included.

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

*It has been 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 confidence of petitioners in the de-listing process, if the Ombudsperson were given explicit powers to do so in case of de-listing but also in case of retention.*

## F. Enlarge the scope of the mandate of the Ombudsperson

### i Include the 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 these requests to the Committee with a recommendation on

<sup>6</sup> S/RES/2161 (2014) Annex II OP 13.



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 on targeted sanctions recognizes the improvement made by entitling the Focal Point for de-listing to receive requests for humanitarian exemptions by listed individuals and entities<sup>7</sup>, it would be beneficial to the coherence of the Al-Qaida sanction regime to assign this responsibility to the Ombudsperson with an enhanced mandate. Alternatively, the Focal Point's mandate should be extended and it should be empowered to receive requests for humanitarian exemptions for all sanctions regimes (see proposal A .ii. in section III below).*

**ii 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 lists, 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 de-listing. Those documents, after approval by the Committee, could then be used by the concerned persons as evidence for not being 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/she is still subject to the application of sanctions measures even after the de-listing. The Ombudsperson should be able to assist in such cases.*

*Resolution 2161 (2014) gave the Focal Point the possibility to receive and transmit 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"<sup>8</sup>. While this modification undoubtedly facilitates the bringing to the attention of the Committee of communications regarding such situations, a transferal of this responsibility from the Focal Point to the Ombudsperson would further enhance the procedure and render it less confusing for the petitioners.*

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<sup>7</sup> S/RES/2083 (2012) OP 8.

<sup>8</sup> S/RES/2161 (2014) OP 63.

## **II. Proposals for more just and effective listings: Increasing the legitimacy, proportionality and transparency of the listing process for all sanctions regimes**

Elements to be addressed through a new generic resolution, an update of resolution 1730 (2006) establishing the Focal Point for de-listing 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 1267/1989 sanctions regime and 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 1988 Taliban sanctions regime.

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

*OP 2 of Resolution 2161 (2014) and OP 2 of Resolution 2160 (2014) define the acts and activities which indicate that an association with Al-Qaida or the Taliban respectively exists. These acts and activities constitute the criteria for listing and are therefore the nucleus of these 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 behavior in order to become delisted. Given the broad scope of the term “otherwise supporting acts or activities” in OP 2 lit. c) of Resolution 2161 (2014) and OP 2 lit. 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 why a listing remains appropriate. In case 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 mechanism.

*The outcome of the reviews is highly dependent on arguments provided by and cooperation of the designating State. Currently, the Committees need to 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 the Committees have to decide to maintain the listing. That is to say, if there is no consensus within the 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 (STC)**

The Security Council should establish a standing Sanctions Technical Committee, comprised of the sanctions experts from the missions of each Council Member.

*Sixteen sanctions regimes are currently in force pursuant to Security Council resolutions under Chapter VII of the UN 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.<sup>9</sup> 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.*

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<sup>9</sup> S/2015/432 p. 23.

### **III. Proposals with regard to sanctions regimes other than the Al-Qaida regime**

Elements to be addressed through a new generic resolution, an update of resolution 1730 (2006) establishing the Focal Point for de-listing or an update of each sanction regime and the Committee guidelines individually.

#### **A. Enhance the competencies of the Focal Point for de-listing**

##### **i Introduce due process safeguards in the Focal Point de-listing procedure**

After receipt of a de-listing request, the Focal Point should be entitled to transfer the request to the relevant Committee as well as 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 as well as 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 are to 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 to 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 de-listing procedure has not proven 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. Hence, only very few requests were (successfully) submitted.*

*Due to this lack of due process, it is crucial to enhance the procedure by expanding the Focal Point’s mandate and by demanding the relevant Committee in each de-listing request to take a formal decision accompanied with reasons to be transmitted to the petitioner.*

##### **ii Expand the mandate of the Focal Point with regard to humanitarian exemptions**

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

The requirements and possibility as well as the procedure for exemptions need to be standardised in order to ensure a coherent approach between 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 convey the possibility to apply for humanitarian exemptions, only Member States may advance such a request. However, States may lack the will to present exemption requests to the 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 to petition for an exemption through the Focal Point.*

*Harmonizing the procedure for humanitarian exemptions would increase coherence among 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 equip 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. Yet, similar due process concerns exist in other UNSC 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 recognised 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 UN would normally offer. Persons listed under those UNSC sanctions regimes have also started to challenge their listing under legal acts implementing UNSC designations. In November 2013 the European Court of Human Rights decided the Al-Dulimi case relating to UNSC Res. 1483 (Iraq). The Chamber declared that the Focal Point procedure did not offer equivalent protection of fundamental rights. The case was subsequently referred to the Grand Chamber and judgment is awaited for fall 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**

### **i Enhance the transparency of listings**

The Security Council should require that Member States 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's 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/information should include a copy of the publicly releasable portion of the statement of case, the summary of reasons, a description of the effects of designation as well as information on where to submit a de-listing request.

*Increased transparency at UN level through the availability of a statement of case for each listing would most likely reduce the number of (successful) challenges in national/regional courts given that the courts would be able to have a better understanding about the proceedings at UN 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.*

**ii Expansion of the “holds-procedure” time limits adopted by the 1267/1989-Committee to other sanctions regimes**

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 before the Committee 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 in the 1267/1989 Committee of placing holds on proposed decisions, some of which were left undecided for years, was successfully put to an end in 2010. Expanding time limits for placing holds on proposed decisions to all Sanctions Committees would be an important element of due process and would significantly strengthen the fairness and transparency of decision-making in all sanctions committees.*

## IV. Elements for further reflection

### A. Introduction of flexibility-clauses

The Security Council could consider introducing flexibility-clauses in 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 is the most appropriate to be applied to a specific listing. This would allow the Sanctions Committees to apply for instance 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 sanction that is necessary to achieve the intended result, the sanctions could become more proportionate (e.g. if in the Nada case before the European Court of Human Rights only an asset freeze was applied).*

## **Annex**

### **European Court of Human Rights, Nada, September 2012:**

- Art. 13 of the European Convention on Human Rights (ECHR) demands that there must be a remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (§ 207).
- Art. 13 ECHR seeks to ensure that anyone who makes an arguable complaint about a violation of a Convention right will have an effective remedy in the domestic legal order (§ 208).
- The European Court of Human Rights (ECtHR) then cites the Swiss Federal Court: “de-listing procedure of the UN is not an effective remedy within the meaning of Art. 13 ECHR” (§ 211). [However, the Swiss Federal Court’s statement was made in 2007, i.e. 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 (§ 210).
- There was nothing in the UNSC resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions (§ 212).

### **Court of Justice of the EU, Kadi, July 2013:**

- The Court notes that with regard to the listing/the decision to maintain the listing, only the narrative summary of reasons was provided to the authorities that are obliged to implement the resolution. No other evidence was provided (§§ 107 - 110).
- The authorities are obliged to disclose the summary of reasons to the applicant (§ 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 (§ 112).
- Further, the authorities must examine whether those reasons are well-founded (§ 114).
- For this careful and impartial examination, the Committee and the designating State must disclose the relevant information and evidence (§ 115). The allegations factored in the summary of reasons must be verified, i.e. it must be assessed 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 (§ 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 de-listing and ex officio re-examination at the UN level do not provide the guarantee of effective judicial protection (§ 133).
- The essence of effective judicial protection must mean to obtain a declaration from a court by means of a judgment 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 (§ 134).

### **European Court of Human Rights, Al-Dulimi, November 2013, (the case is currently pending before the Grand Chamber):**

- States Parties to the ECHR are not prevented from transferring competences to international organisations. However, they remain responsible under the ECHR for all acts and omissions of their own organs, regardless of whether they result from an obligation deriving from their membership to the international organisation. If the organisation offers protection of fundamental rights which is equivalent to the ECHR, it is presumed that the State acted in conformity with the ECHR if it simply implements 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 ECHR (§ 114).



- Resolution 1483 (2003) leaves no discretion to UN Member States (§ 117). The requirement of equivalent protection also applies to the UN (§ 116).
- The Focal Point mechanism does not provide for equivalent protection. The Court endorses the Special Rapporteur's conclusion, that the 1267-regime does not guarantee the respect of the minimal standard [even after Resolution 1989 (2011)]. A fortiori, the 1483-regime cannot be said to provide for equivalent protection either (§ 118 - 120).
- As a result, the Court examines whether the applicant's right to a remedy has been violated. The Court concludes that the lack of equivalent protection at the UN level was not compensated by the national proceedings, as the Swiss Federal Court did not review 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) (§§ 126 – 134).