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The Impact of Counter-Terrorism Targeted Sanctions on Human Rights

Position Paper of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism



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SCOPE & METHODOLOGY

This document sets out the working position of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the human rights and rule of law implications of the United Nations Security Council counter-terrorism sanctions regimes and work of the relevant subsidiary bodies of the Council, namely the sanctions committees.¹ The position paper is strongly informed by existing reports of the mandate submitted to the Human Rights Council and General Assembly. The mandate looks forward to further and direct engagement with the United Nations entities supporting the Sanctions Committees specific to counterterrorism, namely the Al-Qaida Analytical Support and Sanctions Monitoring Team. The mandate calls attention to the Basic Human Rights Reference Guide on Proscription of Organizations in the Context of Countering, which provides a detailed guide to Member States on human rights and proscription of organizations at the national, regional, and international level.² Finally, the mandate recognizes the ongoing work of the Group of Like-Minded States on Targeted Sanctions³ and their continued and diligent efforts to work on the due process and other challenges raised, including for those sanctions' regimes aimed at countering terrorism.

The mandate recognizes that United Nations Security Council sanction regimes serve many functions and are acknowledged preventive measures, including with the aim of facilitating the peaceful resolution of conflict and the cessation of hostilities, humanitarian efforts, non-proliferation, compliance with international human rights law, and more.⁴ In line with the mandate of the Special Rapporteur,⁵ the analysis contained herein is limited to the use of sanctions to counter-terrorism, specifically agreed by the United Nations Security Council from 1999 to present. A useful distinction between targeted sanctions aimed at counter-terrorism versus other objectives is that counter-terrorism sanctions are measures aimed at excluding the "target from participation in international society," whereas sanctions regimes in the non-proliferation and armed conflict contexts are intended to achieve political leverage.⁶ The position paper differentiates between the human rights and rule of law requirements for targeted sanctions and the impact of sanctions imposed on entities and individuals. The position paper articulates the mandate's position on the connection between sanctions aimed at countering terrorism more broadly, and the integration or non-integration of human rights compliance considerations on a structural and case by case basis. Notably, the Special Rapporteur does not address the issues of effectiveness and the role of conflict sensitivity and analysis required for the United Nations Security Council to consider the long-term effectiveness and how conflict sensitivity may require alternative approaches to counter-terrorism objectives within sanctions regimes.⁷ The Special Rapporteur continues to underscore that human rights and rule of law compliant counter-terrorism measures are prerequisites for any measures to prevent or counter-terrorism.



SCOPE & METHODOLOGY

The Special Rapporteur draws upon her own reporting to the General Assembly, the reporting of her predecessors,⁸ and the wealth of analysis of existing counter-terrorism sanction regimes from the United Nations, other international organizations, academia, and civil society organizations of both national and regional diversity. She particularly draws on knowledge concerning the relationship and impact of counter-terrorism sanctions on international human rights, refugee, and humanitarian law standards.

The Special Rapporteur includes references to the work of the Office of the Ombudsperson to the ISIL (Da'esh) and Al-Qaida Sanctions Committee⁹ and its reports, specifically in reference to the procedural, independence and due process deficits within its mandate.¹⁰ The recent resignation¹¹ of the Ombudsperson citing lack of progress on due process and rule of law reforms, including encroachment on the ability to independently conduct the work involved places a shadow over the entirety of the United Nations sanctions practice. In addition, the resignation poses great risk to the promotion and protection of human rights, great reputational hazards for the Council, Member States, and the United Nations' entire global counter-terrorism architecture.

The Special Rapporteur underscores that this document does not reflect the mandate's position on the full scope of human rights and rule of law impact of targeted sanctions at the international or national level. Specifically, the Special Rapporteur reserves further human rights related observations on measures taken to implement United Nations Security Council resolutions, particularly those obligations¹² found in Chapter VII Security Council resolutions. The Special Rapporteur continues to productively engage Member States in context-specific and dedicated review of national legislation on the use of sanctions measures and their compliance and impact of human rights and rule of law, including on national level measures undertaken to comply with Chapter VII resolutions of the Security Council. The current mandate holder subscribes to her previously stated positions on the quasi-legislative and quasi-judicial functions of the Security Council and underscores the importance of affirming human rights treaty bodies well-recognized principle of norm construction wherein the Council's resolutions should be read subject to a presumption that it was not the Council's intention to violate fundamental rights.¹³ This principle is consistent with the Council's own language on the observance of international law, international humanitarian law and human rights in its counter-terrorism resolutions. The mandate recalls that pursuant to Article 24.2 of the Charter, the Security Council, in discharging its duties, "shall act in accordance with the purposes and principles of the United Nations" which by virtue of Article 1 includes the maintenance of international peace and security "in conformity with the principles of justice and international law."



INTRODUCTION

PHOTO BY MOHAMMAD RAHMANI

The Special Rapporteur has regularly addressed the human rights and rule of law concerns around the practices of the United Nations Security Council since 11 September 2011, including the expanded use of sanctions.¹⁴ The mandate recalls the report of her predecessor (A/67/396), evaluating the impact of the Office of the Ombudsperson on the 1267/1989 Al Qaida sanctions regime and its compatibility with international human rights norms and endorsing the Ombudsperson's critical recommendations.¹⁵ She concurs with previous reports' description of the use of United Nations sanctions as having transformed into a "permanent tool of the United Nations global counter-terrorism apparatus, more closely resembling a system of international law enforcement than a temporary political measure adopted by the Security Council with a view to averting an imminent threat to international peace and security."¹⁶ She confirms that this critique remains relevant to all sanctions regimes established with the aim of countering terrorism.

She notes with great concern the continued lack of compliance with international human rights and due process guarantees across sanctions regimes, particularly through the continued failure to provide the requisite measures of due process guarantees and independent review. Only one of the six¹⁹ United Nations counter-terrorism sanctions regimes have any measure of independent oversight or review apart from the ability to request delisting from the Committee itself²⁰ (responsible for the designation²¹) or the Focal Point.²² Across all regimes only the Committee or the Council can decide whether to delist an individual or an entity, even when the

As at the time of writing the Security Council **maintains six counter-terrorism targeted sanctions regimes or regimes that include counter-terrorism provisions**, which include: (1) the Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities; (2) Security Council Committee pursuant to resolution 751 (1992) concerning Somalia (3) Security Council Committee established pursuant to resolution 1636 (2005) (Lebanon); (4) Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan; (5) Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya; and (6) Security Council Committee established pursuant to resolution 1988 (2011) (Taliban). As reported by the Department of Peacebuilding and Political Affairs as of July 2021, the regimes collectively designate 446 individuals and 92 entities,¹⁷ with the majority of designations made under the ISIL (Da'esh) and Al-Qaida Sanctions Regime (262 individuals and 84 entities) and 1988 Sanctions Regime (Taliban – 135 individuals and 5 entities).¹⁸

Notably, although the above Libya, Somalia and Sudan sanctions regimes contain counter-terrorism provisions these regimes are much broader in scope and in the range of designation criteria.



Ombudsperson reviews a case and submits a report recommending removal. The Office of the Ombudsperson for the ISIL (Da’esh) and Al-Qaida Sanctions Regime remains the one exceptional initiative to achieve oversight yet continues to face barriers to its structural independence and the human rights, rule of law, and due process concerns it and others have identified. The oversight chasm persists despite wide documentation of the need, litigation, research and findings and concrete recommendations.²³

The mandate has identified the “consolidation and expansion” of sanctions regimes beyond recognition post-11 September 2001.²⁴ Sanctions are global in scope and potentially limitless in duration.²⁵ All counter-terrorism and human rights Special Rapporteurs have consistently articulated concerns that terrorism sanctions are applied **both as a result of allegedly criminal conduct and as a purely preventative measure.**²⁶ Sanctions function as a pre-emptive legal power, with few meaningful legal constraints and limited oversight, and constitute an exercise of unprecedented supranational power. The basis upon which persons are subjected to the most invasive human rights violations are secret; data are collected primarily by intelligence entities, most of whom operate without independent

oversight; and, in respect of both United Nations and national processes, no comprehensive remedies exist for the individual, despite hearty political protestations to the contrary.

The mandate regularly recalls that Member States are bound by international human rights law, international humanitarian law, and international refugee law, particularly as it flows from treaty obligations. The hierarchy of primary sources of international law is regularly recognized by United Nations Security Council resolutions in formulaic text,²⁷ which call on Member States to ensure that *any measures* taken to combat terrorism and violent extremism, including incitement of and support for terrorist acts, must comply *fully with all their obligations under international law*. The mandate stresses that the reinterpretation of the primacy of Security Council resolutions is patently unacceptable by both Member States and United Nations entities without the interpretive authority and often places Member States in violation of international law standards and subject to legal challenge.²⁸ The Special Rapporteur acknowledges Security Council resolution 2560 (2020), which pays welcome attention to the rules and procedures regulating sanctions, yet notes that it does not resolve the weighty legal concerns surrounding them.

OVERALL COMPLIANCE WITH INTERNATIONAL HUMAN RIGHTS, REFUGEE AND HUMANITARIAN LAW

A. Overly Broad or Ill-Defined Definitions of Terrorism

The Security Council's requirement for States to adopt several measures in relation to "acts of terrorism", a prohibited conduct that has continuously failed to be precisely defined by Member States is an issue highlighted by this mandate from its inception.²⁹ The lack of a definition of terrorism is at the source of some of the most egregious and systematic human rights violations occurring globally since 9/11. Similarly, references made by the Council to "terrorists" as a category of individuals separated from the criminal acts,³⁰ or to "terrorism in all forms and manifestations" as one of the most serious threats to international peace and security without further qualification,³¹ have opened the door to repressive national measures, including against the lawful non-violent activities of civil society.

At the United Nations, and particularly within the United Nations Security Council, this has resulted in and perpetuated an architecture that resembles an international law enforcement branch rather than a temporary political measure. Moreover, the continued use and reliance on overly broad definitions of terrorism at the national level are particularly problematic as Member States seek to comply with United Nations Security Council resolutions, including sanctions. *This directly results in United Nations Security Council resolutions being used as the primary defence or citation in justifying the misuse or abuse of sanctions to stifle civil society and infringe on the rights of individuals and civil society actors.*³² Functionally, the cover provided by the lack of due process considerations in the most

basic of terms – the definition of terrorism itself – and the evolution of sanctions as counter-terrorism "preventive" or "precautionary" measures present one of the most dubious forms of counter-terrorism measure abuse; wherein a system has arisen to circumvent human rights and rule of law based approaches to criminal justice, violence prevention, and rule of law. The continued reliance on overly broad definitions of terrorism at the national level and the lack of agreed upon multilateral definitions continues to pose the first and foremost barrier to a human rights and rule of law compliant counter-terrorism sanctions regime.

B. Rule of Law and Due Process

The United Nations counter-terrorism sanctions regimes have been under intense scrutiny over the last 20 years.³³ The scope of due process challenges have been fulsomely documented.³⁴ In 2009, the Report of the Eminent Panel Jurists Panel on Terrorism, Counter-Terrorism and Human Rights stated plainly that "it is disturbing to report that there is not due process in the listing procedures carried out by the United Nations on counter-terrorism."³⁵ Despite "incremental changes,"³⁶ including those taken after the report of the panel of jurists, in the context of UN counterterrorism sanctions regimes, the designation or listing of an individual remains an opaque, and highly secretive process with little oversight or semblance of due process. **The mandate reiterates its finding that the United Nations Security Council counter-terrorism sanctions regimes do not meet structural due process requirements, including independent oversight or review of the actions of the Committee.**

The “nomination” function wherein Member States nominate individuals “provides a ready means by which individual States can make executive decisions with far reaching consequences apparently unconstrained by domestic judicial review or the international human rights treaties by which they are bound.”³⁷ Any designation of individuals or organizations on such lists should be because of a fair and accountable legal process rooted in procedural fairness and due process of law. To make such a determination without such processes amounts to a violation of the presumption of innocence, in breach of article 14(2) of the ICCPR.

The absence of adequate and comprehensive legal oversight of sanctions regimes has been the subject of sustained concern for national courts,³⁸ regional courts³⁹ and human rights actors. As noted above, this mandate has regularly reviewed and commented on the practice of the UN’s sanction regimes. Responding in part to those concerns, the Security Council adopted resolution 1904 (2009) establishing the Office of the Ombudsperson⁴⁰ to receive de-listing requests directly from designated individuals and entities on the ISIL (Da’esh) and Al-Qaida Sanctions List.⁴¹ Recognizing that this Committee remains the most active in review, it is critical to note that no similar measures were adopted for the remaining counter-terrorism sanctions regimes or regimes that include counter-terrorism provisions. All holders of the office of the Ombudsperson have been recognized jurists of integrity,⁴² yet, despite their best efforts to work within the constraints of the procedures provided,⁴³ disquiet remains about listing on rule of law grounds. Persons are targeted often on unclear or non-independent grounds. The basis of the information provided has been rightly critiqued by those who see it, specifically the Ombudsperson.⁴⁴ The process is highly politicized, and the rights of the targeted individuals and their families play no meaningful role in the outcomes or deliberations concerning listing. **Notwithstanding the fact that the Office of the Ombudsperson undertakes important and valuable work to delist, the process provides neither a fair process nor a fair remedy to those who are subject to it, as is required by international law.**⁴⁵

In 2010, the High Commissioner for Human Rights articulated the primary due process concerns related to targeted sanctions imposed by the United Nations Security Council, as did this mandate in 2012.⁴⁶ These factors include the lack of judicial safeguards for listing and delisting, particularly related to the 1267 Regime, including the right to a fair hearing, the right to judicial review and the right to an effective remedy.⁴⁷ At the time the High Commissioner underscored the lack of recourse to independent judicial or quasi-judicial review for listing or delisting, and that there is no requirement to publish the Ombudsperson’s report or for the petitioner to be made aware of the full information used against them.⁴⁸

Notably, however, the reforms that brought the establishment of the Ombudsperson were also followed by strengthened presumption that any recommendation to delist by the Ombudsperson will be abided by.⁴⁹ Still, as noted in the mandate’s most recent report to the Human Rights Council in 2021, the Ombudsperson continues to rely on the willingness of Member States to provide non-redacted information to credibly process delisting requests and the decision “ultimate decision-making power continues to reside with the Committee.” Finally, the Office of the Ombudsperson lacks the authority to grant appropriate relief in cases where human rights are violated, whilst the ability of individuals and entities to challenge their listing and seek relief at national level is constrained by the obligation on Member States to implement Security Council sanctions imposed under Chapter VII.⁵⁰ Despite the unprecedented and important weight now given to the Ombudsperson’s recommendations, the Office has not yet achieved the necessary level of independence required under international law.

Flowing from the due process deficits, the Special Rapporteur further underscores the requirements of necessity and proportionality as they relate to restrictions on human rights and fundamental freedoms. Designating individuals or entities under a sanction’s regime should be both necessary and proportionate. It should therefore occur only in response to an actual, distinct, and measurable

terrorism act or demonstrated threat of support to an act of terrorism. As noted above, ill-defined and overly broad definitions of terrorism necessarily imply a failure to meet the requirements of necessity and proportionality. Member States' nominations and/or imprecise listing criteria that fail to be accompanied by robust independent review and due process guarantees, such as the right to a fair hearing, right to an effective remedy, fail to meet the criteria of necessity and proportionality. For example, the Human Rights Committee has articulated the threshold of necessity and proportionality for several rights under the ICCPR.

Of particular relevance to sanctions regimes is the Committee's General Comment on Article 12 (freedom of movement) as each of the sanctions' regimes on counter-terrorism included travel bans. The General Comment states that "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instruments among those, which might achieve the desired results; and they must be proportionate to the interest to be protected."⁵¹

Designation can only be consistent with international law when it is applied through an adequately construed definition of terrorist acts thus meeting the necessity and proportionality elements to ensure that such designation is in response to an actual, distinct,

and measurable threat as defined by law and that the least restrictive measures are used to achieve the desired results. These requirements under international law are thwarted by the continued practice of Member States to nominate individuals without judicial oversight "unconstrained by domestic judicial review, or international human rights treaties by which they are bound."⁵²

C. Impact on the Rights of Listed Individuals, and Families

The UN Security Council counter-terrorism sanctions regimes all include asset freezes and travel bans. Arms embargoes are applied in 4 of 6 regimes.⁵⁴ Commodities bans, or measures are included in the Somalia Sanctions Regime, and functionally apply in ISIL (Da'esh)/Al-Qaida Sanctions Regime through resolution 2368 (2017). This resolution interprets asset freeze as applicable to several categories of goods that are generally considered commodities, e.g., trade in petroleum products, natural resources, or chemical or agricultural products, and Libya via provisions related to illicit export of petroleum.⁵⁵ An Improvised Explosive Device Components ban is included in the Somalia Sanctions regime. These measures form the basis of restrictions imposed on individuals and entities after the designation to a United Nations targeted sanctions regime. Yet, the reputational, relational, and less visible rights violations flow from the stigma and less visible harms of listing. As noted above, the impact of these measures on human rights and fundamental freedoms is immense, a reality which has resulted in one national court characterizing the Al-Qaida Sanctions regime in 2010 and its designated individuals as "effectively prisoners of the State."⁵⁶



Impact on the rights of listed individuals

The human rights risks associated with the administration of sanctions regimes rooted in an overly broad definition of terrorism, including the United Nations regimes, necessarily hinders the Council's and Member States' ability to implement targeted sanctions in compliance with international human rights law. This follows from its infringement upon the principle of legal certainty, which requires that criminal laws are sufficiently precise so it is clear what types of behaviour and conduct constitute a criminal offence and what would be the consequence of committing such an offence. Currently, activists, human rights defenders, civil society, journalists, and other legitimate activities are at risk of being brought under this overly broad criminalization and subsequent listing that may restrict and infringe upon the enjoyment of rights and freedoms in absolute ways, including exercising freedom of expression, opinion and assembly, as well as the full scope of economic, social and cultural rights, including the right to work,⁵⁷ the right to adequate housing,⁵⁸ and the right to education.⁵⁹ In addition, such ill-defined or overly broad laws leave space for arbitrary application and abuse.

The Special Rapporteur further recalls the breadth of reports on the human rights impacts of designation on individual rights. Some of these impacts include:

- The denial of access to one's own property;
- Refusal of social security benefits; limitations on ability to work;
- Restrictions on domestic and international travel, and overall freedom of movement; and
- The right to privacy in its full form.

Other measures have included the confiscation of passports; denial of certain political rights, such as ineligibility for employment in public service or representative bodies and freezing of financial assets; or disqualification from political activity.

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Impact on families and the rights of individual family members

The above restrictions on listed individuals' human rights necessarily infringe upon a range of rights for family members, including dependent children.

The failure to consider the relational dependence and impact of designation on family members poses an even greater window into the scope of reforms required for the UN's targeted sanctions regimes. The reputational costs for the individual and family are also severe and further produce stigma and relational human rights violations. The mandate reiterates its analysis included in its 2021 report to the Human Rights Council on the impact of the United Nations sanctions regimes on individual rights and families. Here, the Special Rapporteur articulated that the "protection of the rights of the family⁶⁰ in all of its diverse forms remains a distinct and complex agenda within the international legal framework for the protection and promotion of human rights."⁶¹ She noted that families do not enjoy equal recourse or status under the law and may be "increasingly vulnerable to State intervention in the name of countering terrorism." The mandate underscores the direct human rights impact on family members of listing, including negative impacts on civil and political and social, cultural, and economic rights.

The impact on family life is intergenerational and long-term. Children suffer directly from the penalties and stigma being (often unreasonably and opaquely) applied against adults in their families; young family members, particularly boys, are the subject of harassment and surveillance by security services based on the listing of a family member; and the mandate holder is aware of credible information that pressure to become informants for the security and intelligence sector is applied on the penalty of being listed because of non-cooperation.

Helpfully, the Ombudsperson has undertaken a complementary analysis in his latest report documenting “the enormous effect that sanctions have had not only on their own lives [designated individuals], but also on those of their spouses and children.”⁶² The Ombudsperson notes that petitioners working with the Office have been listed for 10 to 15 years, many of whom have felt “the long-term repercussions of sanctions,” who were unaware of any remedy or opportunity for appealing the listing.⁶³

The Ombudsperson documented the situation of petitioners who were the “sole breadwinner of the family, leaving whole families without income, in poverty and unable to afford the desired level of education for their children.” These same petitioners also confirmed the stigma and reputational harms from sanctions on the family, articulating the family’s experience as social outcasts. The mandate articulates the wide-ranging negative impact on the enjoyment of human rights, including economic, social, and cultural rights, to underscore that counter-terrorism sanctions aimed at contributing to long-term violence, terrorism, and conflict prevention may be alternatively contributing to rights restrictive environments, humanitarian needs, and further entrenching the human rights and rule of law deficits that ultimately fuel terrorism, violence, and conflict.

D. Gendered Impact of Sanctions⁶⁵

The rule of law deficits of the United Nations sanctions regimes fall particularly hard on women and children, whose capacity to access justice is severely attenuated in many parts of the world.⁶⁶

The impact of counter-terrorism sanctions and listing on women, girls and families are wide-ranging. The impact of sanctions goes far beyond the effects on a particular listed individual. If listed,⁶⁷ women, like men, are subject to an opaque and Kafkaesque political process which affects their civil and political and economic, social, and cultural rights; the consequences are severe and raise fundamental concerns of a lack of legality, legal certainty, and proportionality.⁶⁸

For example, securing work is difficult (article 6 of International Covenant on Economic, Social and Cultural Rights); renting or purchasing a home will be challenging, if not impossible (article 25 (1) of the Universal Declaration of Human Rights); travel is prohibited (article 13 (2) of the Universal Declaration of Human Rights); accepting financial assistance makes other persons criminally liable, inter alia, affecting the family (article 16 (3) of the Universal Declaration of Human Rights and article 23 (1) of the International Covenant on Civil and Political Rights); and few meaningful legal remedies exist (article 2 of the International Covenant on Civil and Political Rights). Being listed has been likened to a “civil death penalty.”⁶⁹

Women whose family members or spouses are listed bear the full brunt of many of the impacts, not least because, in many legal systems, or by virtue of the patriarchal construction of family finances, they may not have independent access to work, funds or bank accounts or independent sources of income. In countries where women cannot own property, they may not alienate property held by a family member or spouse who has been listed. While humanitarian exemptions for individuals exist in some contexts,⁷⁰ the Special Rapporteur finds them to be financially inadequate and difficult to access,



operating to increase stigma and exclusions for family members, rather than to alleviate them. The fact that no legal aid is provided to those who seek to challenge their listing may fall particularly heavily on women and families with little material means to hire legal representation and undertake the arduous task of challenging the listing. In a report emanating from the high-level review of United Nations sanctions, issues of gender and women's rights were raised with a focus on the impact of armed conflict on women, without addressing the negative impacts on women with listed family members or spouses.⁷¹ The Special Rapporteur has directly encountered such impacts in her country visits and seen the poverty, shame and vulnerability listing creates for families. She is profoundly concerned by the practices she has observed in multiple countries, whereby States have developed their own listing and sanctions procedures for persons suspected, charged, or convicted under domestic law of terrorism or "extremism".

The most recent report of the Ombudsperson affirms the findings of the Special Rapporteur presented to the Human Rights Council in February 2021. As noted by the Special Rapporteur, the limited number of women listed in the Da'esh and Al-Qaida sanctions list has prevented robust and concrete analysis and attention to the impact of sanctions regimes on women and girls or their overall gender dimensions, which as they remain predominantly men is glaring as it relates to the racialization and masculinization of the terrorism phenomenon. Others lamented their inability to

marry because of the stigma associated with sanctions and being perceived as a "terrorist". Yet another petitioner described how his grown-up daughters were unable to find spouses and start their own families for the same reasons. The impact of targeted sanctions on the rights of dependent children should be accounted for, assessed, and express provisions and safeguards in place to ensure the full realization of the rights of children, including to primary and higher education.

E. Protecting the Integrity of Principled Humanitarian Action: Humanitarian Exemptions⁷² and Inclusive Engagement with Humanitarian Actors and Civil Society

The Special Rapporteur has previously addressed the impact of interwoven counter-terrorism measures, legislation, regulations, donor requirements and terrorism sanctions regimes aimed at limiting, and sometimes criminalizing, various forms of broadly defined support and assistance to terrorist groups.⁷³ She is also aware that sanctions regimes have in various instances led to the impediment or delay of humanitarian operations, many of which relate to the core mandate of humanitarian actors, including that of International Committee of the Red Cross (ICRC).⁷⁴



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Such measures have also led to less visible and less measured indirect impacts or trickle down barriers, such as the imposition of prohibitive or burdensome restrictions on funding for humanitarian assistance or activities which have even led to the suspension or termination of funding. They have also led to very real targeting for prosecution and penalization of humanitarian actors and medical care providers, such as the prosecution of physicians, travel to provide medical care, English language training to nurses in hospitals in ISIS-held territory, which in contravention of international humanitarian law “recasts medical care as support to the enemy.”⁷⁵

The proliferation of these broad and vague measures, which can be opaque and lacking in clear implementation guidance, not only restrict access to populations in need in areas controlled by non-State armed groups but also have an impact on humane, neutral, independent, and impartial humanitarian action in various ways.⁷⁶ Regrettably, they can result in the arrest and prosecution of humanitarian, human rights, and other civil society actors. Indeed, such measures may ultimately impede the ability of impartial humanitarian organizations, including ICRC, to carry out life-saving humanitarian tasks assigned to them by States parties to the Geneva Conventions of 1949 and their Additional Protocols,⁷⁷ including the provision of food and medical assistance.⁷⁸ Furthermore, while the primary focus in this context is humanitarian action, the Special Rapporteur notes that the measures also limit critical work in the field of supporting respect

for international norms, such as:

- human rights representation and advocacy
- training
- conflict resolution
- fact-finding and evidence gathering for the purposes of prosecution

These elements play an important role in peacebuilding, delivering justice to victims and reconciliation, and are therefore as much a part of an effective strategy for counter-terrorism and preventing violent extremism as bringing life-saving assistance to populations stranded under the aegis of violent non-State armed groups.

The Security Council holds a particular responsibility, given that a number of the counter-terrorism measures that it has adopted play a central role in impeding humanitarian action, not least in the areas of sanctions (both sanctions administered by the United Nations and those resulting from Council resolution 1373 (2001)), financing and support for terrorism or terrorist actors and travel.

The reality that such resolutions and subsequent regimes are negotiated without international humanitarian law expertise exacerbates the lack of legal certainty for humanitarian actors and medical care providers.⁷⁹ Worryingly, although the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities has never listed an individual solely on the basis of the provision of medical or humanitarian assistance, it has nonetheless referred to medical activities as part of the basis for listing two individuals and two entities, implying that medical care and medical supplies are considered forms of impermissible support for designated terrorist groups.⁸⁰

The Special Rapporteur is encouraged that the Secretary-General has called upon States to not impede efforts by humanitarian organizations to engage with armed groups in order to seek improved



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protection for civilians – even those groups that are proscribed in some national legislation (see S/2009/277, para. 45). The Secretary-General has also called for measures that guarantee the ability of medical personnel to treat patients in all circumstances, without leading to any form of sanctions being adopted.⁸¹ These are essential measures to protect both the human rights of individuals and their protective entitlements under international humanitarian law. The Special Rapporteur is also encouraged that, heeding these calls, the Security Council, following the General Assembly (see Assembly resolutions 70/291, para. 22, and 72/284, para. 79), has recently urged States, when designing and applying measures to counter terrorism, to take into account the potential effect of such measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law (see Council resolutions 2462 (2019), para. 23, and 2482 (2019)).

This is a welcome and positive development.⁸²

However, these statements of principle are not sufficient to actively protect the integrity of humanitarian action and actors working in areas where terrorist groups are active. Indeed, humanitarian law already protects engagement for humanitarian purposes, and the importance of humanitarian access is routinely included in Security Council resolutions (see, for example, resolutions 2139 (2014), para. 7, and 2175 (2014), para. 3). Given the effect – real or chilling – that these measures have already had on the delivery of principled humanitarian assistance in challenging environments to populations in Afghanistan, Iraq, Mali, Nigeria, Somalia, the Syrian Arab Republic, Yemen and Gaza, **it is the clear position of the Special Rapporteur that the current matrices do not permit humanitarian actors to carry out their mandates in a way that**

complies with international humanitarian law, thus compromising the fundamental rights and dignity of vulnerable people.⁸³ Misinformation persists even among the most basic of rules, such as general contact, and is readily observed in the lack of certainty around the questions posed over “no contact” policies. The mandate concurs with the observations that as a matter of law, any “no contact” policy would violate international humanitarian law.⁸⁴ States and international organizations must take specific action to ensure that their counter-terrorism frameworks are effectively respectful of international humanitarian law, thereby advancing the fundamental obligation of States to protect and promote the rights of individuals.⁸⁵ It is unacceptable for Member States and the United Nations to allow the present lack of clarity to persist and interfere with the delivery of humanitarian assistance and medical care.

To ensure the integrity of humanitarian action, States and international organizations must regulate in a way that effectively gives precedence to the rules of international humanitarian law when the latter govern. Correspondingly, States and international organizations are encouraged to authorize and not prohibit the assistance or protection activities carried out by impartial humanitarian organizations in accordance with international humanitarian law, even if they benefit individuals designated as terrorists. **The Special Rapporteur has already addressed the need for States and international organizations, including the Security Council, to adopt humanitarian exemption clauses⁸⁶ that unambiguously exempt humanitarian actions from their counter-terrorism measures, granting immunity from counter-terrorism and sanctions regimes to all individuals and organizations engaged in principled humanitarian action (see A/HRC/40/52, paras. 21–22).**



The Special Rapporteur acknowledges that exemptions already exist in certain national jurisdictions.⁸⁷ They can take various forms—providing pre-emptive, blanket immunity to certain specified organizations or requiring applications for exemption to be made on a case-by-case basis—and be varyingly restrictive. For example, the concept of what is considered “humanitarian” can also be unhelpfully compartmented, with distinctions between, for example, the delivery of medicine and the provision of medical services.⁸⁸ By creating silos around humanitarian activity, or rendering their practical application seemingly random, such exemptions fail to grasp the complexity of humanitarian action and provide insufficient legal certainty to humanitarian actors, a prerequisite for the delivery of principled humanitarian action and a central requirement of human rights law (see International Covenant on Civil and Political Rights, art. 15). The Security Council should draw on its experience with other humanitarian

exemptions to sanctions regimes, in particular its – albeit limited – humanitarian exception incorporated into sanctions measures pursuant to resolution 751 (1992) concerning Somalia, which also includes terrorist groups (see resolutions 1916 (2010) and 2444 (2018), para. 48, containing exemptions in the context of famine). **In contrast with humanitarian exemptions, derogation systems, temporary authorizations or specific licences not only raise obstacles but are also often unworkable from an operational perspective.**

In addition, derogation, authorization, or licence systems are not compatible with international humanitarian law, adding a layer of consent to humanitarian action not foreseen under that body of law, which only requires impartial humanitarian organizations to obtain the consent of the belligerents concerned, not that of third States or international organizations, to conduct their activities. Third States and international organizations are only under the obligation to allow and facilitate humanitarian action, a function that derogations do not fulfil. The Special Rapporteur underscores the essential interconnectedness between the provision of humanitarian assistance and the protection of individual human rights (health, food, water, education, and security)⁸⁹ and stresses that to undermine the work of humanitarian actors using counter-terrorism discourse and practice is to undermine the most essential rights of the most vulnerable of people on the planet.

In both its legislative action and its sanctions regime, the Security Council disallows, almost entirely, any form of loose support for terrorism or for terrorist groups. Although some sanctions regime administered by the United Nations provides for humanitarian exemptions, national and regional regimes are not required to provide for humanitarian exemptions, thereby leaving it up to individual States to include them, or not, in their own national provisions.⁹⁰ In its resolution 72/284, the General Assembly urged States to ensure that counter-terrorism measures did not impede humanitarian activities or engagement. Humanitarian exemptions are critical in protecting civil society actors operating in challenging environments where terrorist groups are active from sanctions regimes and counter-terrorism measures.⁹¹

The Special Rapporteur fully supports the recommendation of the Special Rapporteur on extrajudicial, summary or arbitrary executions that States should unambiguously exempt humanitarian actions from their counter-terrorism measures at every possible opportunity, nationally, regionally and internationally, and that the Security Council should adopt a resolution expressly clarifying that humanitarian protection and assistance must never be conceptualized as support for terrorism and suppressed or criminalized on that basis.⁹² The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism further recommends that adequate remedies at all levels be available and accessible to all civil society actors affected by sanctions, not solely humanitarian actors.

The Special Rapporteur has examined the human rights consequences of the regulatory requirements contained in Council resolutions 1373 (2001), 1624 (2005), 2170 (2014), 2178 (2014) and 2396 (2017), and of the overall approach of the resolutions on human rights, which are far-reaching and can be particularly severe for civil society.⁹³ **Procedurally, the mandate**

has underscored that the Security Council resolutions regulating counter-terrorism and prevention and countering of violent extremism are all characterized by a lack of engagement with civil society actors in the determination of legal, political, social and cultural effects of such resolutions.⁹⁴ Resolution 2178 (2014) is the first such resolution to contain a reference to civil society in its operative paragraphs.⁹⁵ In its resolution 2396 (2017), the Council recognized the role that civil society organizations could play in the health, social welfare and education sectors in contributing to the rehabilitation and reintegration of foreign terrorist fighters and their families, and encouraged States to engage with them proactively in that context.

The Special Rapporteur cautions against co-opting civil society into State-led international and national security agendas, promoting limited engagement with civil society on specific issues, and allowing key constituencies, including women, to be instrumentalized and empowered solely in furtherance of a broader security agenda. Instead, the Security Council should positively promote civil society's key role as a force for change and remind States of their obligations to respect and protect it.

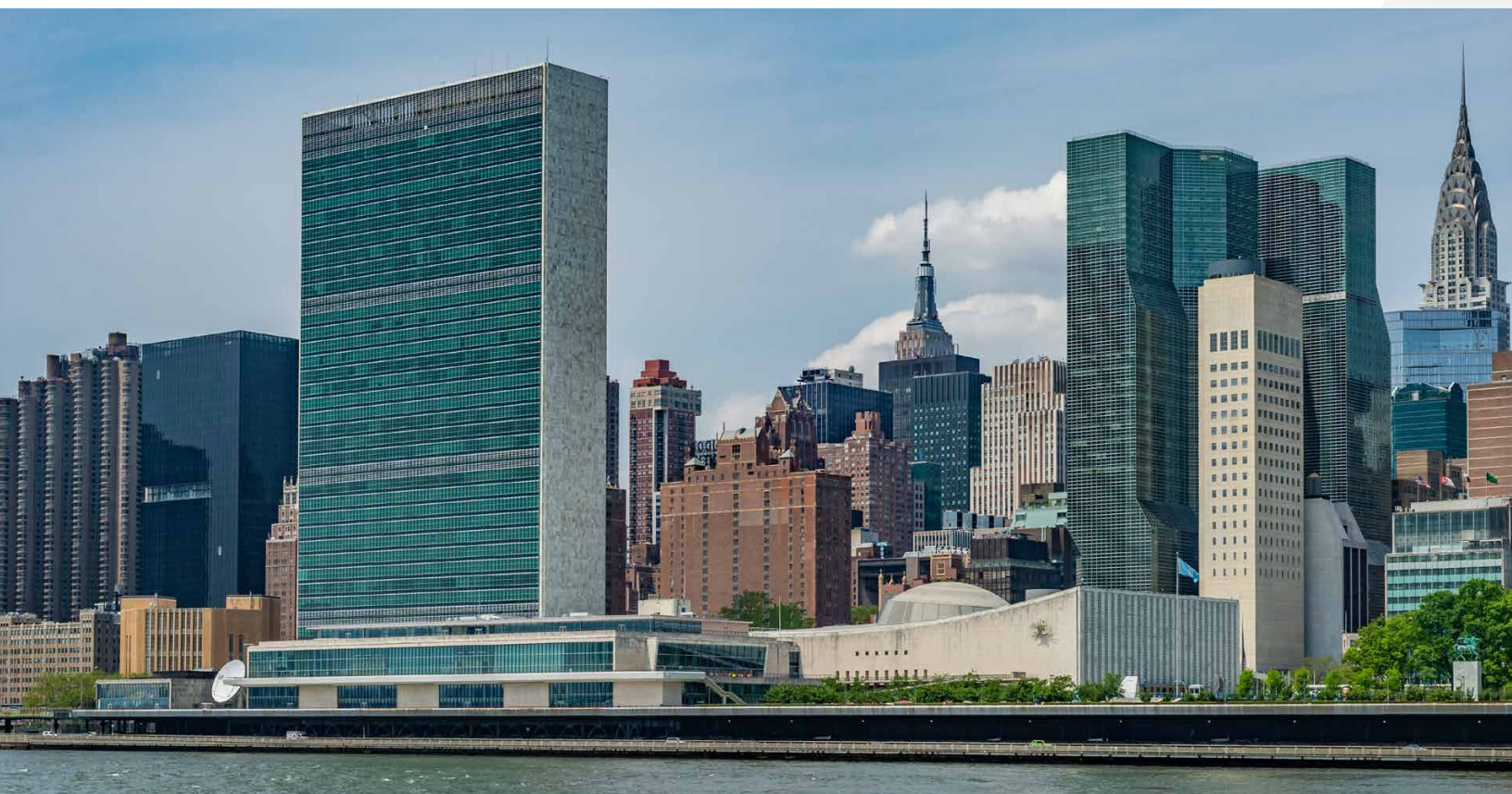


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CONCLUSION & RECOMMENDATIONS

An additional and significant overhaul of the Security Council's counter-terrorism sanctions regimes is overdue. Such a reform should at a minimum be aimed at matching the rhetoric of independence and be accompanied by an expansion of the capacity of the Ombudsperson with precise legal guarantees to that effect. An expanded and adequately empowered Office of the Ombudsperson should apply to all listing procedures.

The Special Rapporteur reiterates her recommendations presented to the Human Rights Council in recent reports⁹⁶ and the recommendations of her predecessors,⁹⁷ as well as the most recent structural recommendations from the Ombudsperson,⁹⁸ and offers immediate recommendations for consideration of the United Nations Security Council and Member States.

The Special Rapporteur calls on the United Nations Security Council and its Members to, in the immediate, including in relation to mandate renewals for relevant sanctions regimes⁹⁹ and the renewal of the Ombudsperson in December 2021, to:

- 1. Recognize that human rights and rule of law compliant sanctions regimes remain the only effective way to counter-terrorism in the long-term and that by implementing rights protections, due process safeguards and humanitarian exemptions, sanctions regimes can better contribute to the solution rather than fuel the grievances, deprivation and rights violations that perpetuate the production of violence.** Sanctions regimes should include independent oversight, such as a reformed and dedicated ombudsperson role, and provisions on the promotion and protection of human rights and humanitarian action of the requisite detail to ensure Member States are acting consistent with the obligations under international law.
- 2. Consider adoption of a Security Council resolution expressly clarifying that humanitarian protection and assistance must never be conceptualized as support for terrorism and suppressed or criminalized on that basis.**¹⁰⁰ The Special Rapporteur acknowledges the long-term complexity of such an effort and recommends in the immediate term that Member States take action through individual regimes to provide meaningful and tailored safeguards compliant with international humanitarian law, whether through licensing, sectoral exemptions, dual-use exemptions, or other means. The Special Rapporteur underscores that consultation with humanitarian organizations operating in the country settings under consideration is necessary to prevent overly burdensome and, in practice, violative measures that ultimately continue to interfere with their ability to carry out their work.
- 3. Consider overarching reform of UN sanctions regime practice to establish how independent forms of oversight and guarantees of due process under international law can be achieved across all sanctions' regimes aimed at countering terrorism.** The mandate notes that such considerations may be more widely applicable to the full scope of sanctions measures undertaken by the Council and the required role of an Ombudsperson across all sanctions' regimes implemented. This remains the only pathway to ensuring that the system does not violate the fundamental customary international law standard of *nemo debet esse iudex in propria sua causa* (no one may be a judge in his own cause).

4. **Consider ways to build greater transparency within the work of the Sanctions Committee for counter-terrorism regimes, including through engagement with civil society.** The mandate recognizes the increased engagement of the Analytical Sanctions Support and Monitoring Team with civil society, but consistent inclusion of civil society in briefings and dialogue with Member States should be made possible to facilitate greater transparency and reflection on the impact of UN counter-terrorism sanctions on the ground and the downstream harms on individual rights, and civil society. This includes dedicated engagement of women civil society leaders and gender equality advocates in line with the Security Council's commitments to women, peace, and security.
5. **Review and reform the mandate of the Ombudsperson to finally establish a properly functioning Office of the Ombudsperson consistent with the creation of a distinct UN entity with independence and capacities to undertake a greater degree of meaningful oversight over relevant designations, including through:**
 - a. Revising the type and duration of the mandate holder's term, as well as the impact on reasonable benefits commensurate with senior UN officials, including its short-term nature, the five-year limit imposed by contract modality limitations rather than any directive from the Security Council, and the lack of pension, health insurance, sick leave or other leave or any guarantee of medical evacuation. These factors have been flagged by the Office as "simply not appropriate for the function of the Ombudsperson as an independent reviewer."¹⁰¹ This mandate concurs.
 - b. Review the pathways for the Ombudsperson to receive and determine petitions from designated individuals or entities "(i) for their removal from the Consolidated List and (ii) for the authorization of humanitarian exemptions; and to render a determination that is accepted as final by the Al-Qaida Sanctions Committee and the Security Council."¹⁰²
 - c. Ensuring staff reporting lines within the Office of the Ombudsperson effectively report to the Ombudsperson to remedy the current conflict of interest in their reporting to the Security Council Subsidiary Organs Branch of the Department of Political and Peacebuilding Affairs. The Ombudsperson has rightly labelled this a "prima facie conflict of interest."¹⁰³
 - d. Taking all measure to preserve the confidentiality of the Ombudsperson proceedings, including measure to protect confidential work product and confidentiality issues related to travel.¹⁰⁴

The Special Rapporteur calls on the Secretary-General to:

1. Consider the Executive Office of the Secretary-General's role in taking a public, principled, and official stance aimed at advancing the human rights and rule of law compliance of sanctions regimes, particularly those aimed at countering terrorism.
2. Consider the Executive Office of the Secretary-General's role as the senior most administrative official in advocating for and advancing practical Secretariat measure to boost independent oversight of the United Nations counter-terrorism architecture, including how the Secretariat may offer practical solutions and guidance to Member States to advance the above aims.
3. Ensure that positions and analyses on the use of targeted sanctions to address terrorism are informed by meaningful engagement with civil society and humanitarian actors, as well as the latest evidence on the impact of targeted sanctions on human rights and overall effectiveness. The Office can lead by example in its engagement with civil society and non-governmental actors in this space. The Office must engage with such expertise to ensure adherence to a do-no-harm approach for civil society and non-governmental organizations, as well as for United Nations staff operating under humanitarian and development mandates whose work may be impacted by the use of counter-terrorism language and measures.

ANNEX 1: 1988 SANCTIONS REGIME

A. Introduction

The mandate of the Special Rapporteur acknowledges the timeliness of a critical discussion among Member States related to the 1988 Sanctions Regime based on reviews and recommendations conducted both within and outside the United Nations. The mandate further acknowledges the recent appointment of a new Government in Afghanistan, which includes individuals designated through the 1988 Sanctions Regime and through national level sanctions procedures.¹⁰⁵ The Security Council and its members have continued to reiterate that a Taliban Government established through the use of military force would not be recognized by the Council.¹⁰⁶ **With the forthcoming renewal of the 1988 Regime scheduled for December 2021 and the Taliban's asserted control over the territory of Afghanistan and the unilateral appointment of designated individuals into senior government posts, the United Nations Security Council and its 1988 Sanctions Committee will need to address challenging legal questions that balance international legal obligations related to justice and accountability, security, and human rights and humanitarian law.**

The mandate underscores its unequivocal call upon the United Nations Security Council and Member States to fundamentally reform sanctions regimes, including the 1988 Regime, which lack no resemblance in function to the required due process guarantees under international law. **According to the Department of Peacebuilding and Political Affairs, as of 16 July 2021, there are 135 individuals and 5 entities designated under the 1988 sanctions regime.**¹⁰⁷ The Special Rapporteur offers a working analysis of the immediate, short to medium-, and long-term analysis of the situation in Afghanistan from a human rights and rule of law-based approach to countering terrorism. This includes an analysis of the complex linkages between the obligations to address and remedy gross violations of human rights and the designation of individuals and entities under 1988.

B. 1988 Sanctions Regime

Evolution of the Regime – Countering Terrorism and Negotiating Peace

UN Security Council resolutions 1989 and 1988 split the Al-Qaida and Taliban sanctions into two regimes, with the 1988 Sanctions Regime in place today, and the Al-Qaida Sanctions Regime (1989) in place and substantially expanded to encompass the designation of ISIL (Da'esh) through security Council resolution 2253 (2015). The current 1988 Sanctions Regime.¹⁰⁸ arose from the Security Council's own balancing of long-term peace and stability considerations and reckoning with the realistic pathways toward peace and reconciliation

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in Afghanistan, and the advocacy of the Government of the Islamic Republic of Afghanistan's national strategy and investment in negotiated peace with the Taliban.¹⁰⁹ The bifurcation corresponded to movement in Afghanistan towards a reconciliation process first in the form of the Consultative Loya Jirga a year prior in June of 2010 to the continued progress towards greater confidence among negotiating parties in 2011. The Loya Jirga, which preceded the bifurcation reached "broad-based endorsement" of the Government's peace plan, included the participation of 1,600 delegates "from a wide spectrum of the Afghan society and Afghan institutions."¹¹⁰ The jirga set the tone for and established a credible starting point to "help define the framework for an intra-Afghan dialogue and facilitate discussion."¹¹¹ Among the action points included in the 16-point Communiqué, were requests for the Government of Afghanistan and the international forces to release Afghans detained on "unreliable reports and unproved accusations"; to remove the names of the Afghan opposition from the sanctions list established pursuant to Security Council resolution 1267 (1999); and to guarantee the safety and security of those who join the peace process."¹¹² Afghanistan continued to struggle with questions of impunity for gross violations of human rights.¹¹³

Temporally Security Council resolution 2255 (2014) delineates that the "relevant measures should be applied to individuals and entities designated prior to the date of the adoption of resolution 1988 (2011) as the Taliban," as well as new designations of "individuals, groups, and entities associated with the in constituting a threat to the peace, stability and security of Afghanistan."¹¹⁴ Recognizing that the political reconciliation process requires listed individuals to travel, the Council also invited the Government of the Islamic Republic of Afghanistan to nominate individuals, in close coordination with the High Peace Council, to be temporarily exempted from the travel ban.¹¹⁵ Today, the United Nations Security Council is operating under very changed circumstances. In 2020, the Security Council recognized the agreement between United States and the "Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban" through its resolution 2513 (2020).¹¹⁶

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The Council added further priorities to the future of a negotiated settlement and emphasized “the importance of the effective and meaningful participation of women, youth, and minorities.”¹¹⁷ The Council also affirmed “that any political settlement must protect the rights of all Afghans, including women, youth and minorities, and respect the strong desire of Afghans to achieve durable peace and prosperity, and must respond to the strong desire of Afghans to sustain and build on the economic, social, political and development gains achieved since 2001, including adherence to the rule of law, respect for Afghanistan’s international obligations, and improving inclusive and accountable governance.”¹¹⁸

In a statement from August 2021,¹¹⁹ the Security Council affirming “that there is no military solution to the conflict” and “that they do not support the restoration of the Islamic Emirate” may have presumably set the tone for measured responses from the Taliban. However, as of September 8, 2021, the Taliban has declared an Islamic Emirate and appointed a transitional government composed of 10 men, at least 8 of whom are designated individuals under the 1988 Sanctions Regime, without any measures towards an inclusive or negotiated intra-Afghan dialogue or settlement.¹²⁰ The United Nations has also reported in a press conference that the Ministry of Women’s Affairs has been dissolved. The Security Council and Member States will therefore be situated to respond to promote and protect the rights of Afghan citizens, their right to self-determination, as well as the full scope of their civil and political and economic, social, and cultural rights, without discrimination and fully and equally to ethnic and religious minorities and women and girls.

Listing Criteria and the United Nations Security Council’s Role in Determining Threats to International Peace and Security

C. Balancing Counter-Terrorism and Human Rights and Rule of Law Dilemmas

The initial listing of individuals and entities under the 1267 Regime stemmed ultimately from the Taliban’s affiliation with Al-Qaida, role in providing “sanctuary and training” to “terrorist organizations,” including “providing safe haven to Usama Bin Laden” and refusal to comply with extradition requests from the United States.¹²¹ Under the bifurcated 1988 Sanctions Regime, the Security Council articulated the following listing criteria:

“Decides that the acts or activities indicating that an individual, group, undertaking or entity is eligible for listing under paragraph 1 include:

- a. Participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- b. Supplying, selling or transferring arms and related materiel to;
- c. Recruiting for; or
- d. Otherwise 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.”¹²²

In this regard, individuals designated on the 1988 Sanctions Regime have been included under vast categories of actions, separate from individual criminal acts of terrorism, and by nomination of Member States using imprecise listing criteria that fails to be accompanied by robust independent review and due process guarantees.¹²³ Notably, individuals listed under the regime do not have the remedy of accessing the Office of the Ombudsperson; a continued deficit in the regime.¹²⁴ The 1988 Regime acknowledges that some individuals and entities that meet the criteria for listing under the 1988 regime for relevant engagement with the Taliban, may also meet the criteria for listing under the ISIL (Da’esh) and Al-Qaida regimes. As with other regimes, there is no sunset clause and such measures may be indefinitely applied subject to the political will of the Council. The

narrative descriptions of listed individuals and entities provide limited, logistic, and personal details, largely noting their positionality in Taliban governance and leadership structures. For example, the limited information provided in relation to the listing of the Taliban's top military commander, Mullah Baradar, states simply that he is the "senior Taliban military commander and member of Taliban Quetta Council as of May 2007."¹²⁵ In addition, Sirajuddin Haqqani, the newly appointed Minister of Interior Affairs, also states "heading the Haqqani Network."¹²⁶ Both of these individuals remain suspected of gross violations of human rights, yet those violations or specificity around their listing remain out of view. To date, several Member States, United Nations entities, and civil society organizations have urged the Council to review listing criteria (specifically category (d)) with a holistic understanding of the threats to international peace and security, emphasizing the impact of gross violations of human rights and the proliferation of impunity for such violations as a threat to international peace and security.



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In the most recent Informal Experts Group meeting on women and peace and security held on 19 August 2021, for example, UN Women recommended that listing criteria should be amended to consider the restriction and violations of human rights, "in particular women's rights as protected under international human rights law, including conflict-related sexual violence, in the name of or on behalf of the Taliban;" and consider "requesting the Analytical Support and Sanctions Monitoring Team to integrate gender as a cross-cutting issue across its investigations and reporting; and requesting the Monitoring Team to include the necessary gender expertise."¹²⁷ The Special Rapporteur emphasizes the need for substantial due process and human rights reforms of UN targeted sanctions regimes, while also emphasizing Member States' commitments and obligations on human rights, gender equality and the women, peace and security agenda. She notes that Member States committed to advancing sustainable peace must consider how administrative and other legal measures, apart from criminal justice measures, can only be effective when conducted in compliance with international human rights, humanitarian, and refugee law.

The mandate notes that the latest renewal of the 1988 Sanctions Regime was adopted in December 2020. The preceding months through July and August of 2021 were marked by record targeting of civilians and civilian casualties in Afghanistan, including record deaths among women and children. The Special Rapporteur joined the statement presented to the Human Rights Council through the Special Procedures Coordination Committee noting "the gravity of civilian harms that have been caused by the latest military offensive by the Taliban," and the well-founded fears of the Afghan people" as "rooted in the onslaught of fighting during this offensive, as well as over the course of the last 18 months."¹²⁸ **Most recently, in June 2021, the U.N. Monitoring Team in its report to the Sanctions Committee and Security Council was clear-eyed and unambiguous in its statement.¹²⁹ Al-Qaida is present in "at least 15 Afghan provinces ... and, according to Member States, Al-Qaida maintains contact with the Taliban but has minimized overt communications with Taliban leadership in an effort to "lay low" and**

not jeopardize the Taliban’s diplomatic position...” The team also reported that it was “impossible to assess with confidence that the Taliban will live up to its commitment to suppress any future international threat emanating from Al-Qaida in Afghanistan. Al-Qaida and like-minded militants continue to celebrate developments in Afghanistan as a victory for the Taliban’s cause and thus for global radicalism.”¹³⁰

Over the last months, the world has again witnessed the brutal and arbitrary nature of the methods used by the Taliban in its unrelenting assault on a democratic government and its institutions. Civilians have been indiscriminately targeted; summary executions are routine; the targeted, deliberate, and gleeful killing of human rights defenders, civil society actors, journalists, and educators has not only shown no sign of abating, but has increased in regularity and brazenness.

Women in Afghanistan have cautioned and warned the international community of the realities for women and girls in Taliban controlled areas for years. Afghan women’s organizations have set in place mechanisms and research with the ability to monitor such rights situations, including in Taliban controlled areas, which now remain more relevant than ever.¹³¹ Early data from those on the ground in areas under Taliban control is incontrovertible and has included forced and early, and child marriage; forced burka wearing and restrictions on women’s attire; prohibitions against working outside the home; and restrictions on women’s freedom of movement, including the requirement of traveling with a husband or other male relative.¹³² **The Special Rapporteur calls on Member States and the United Nations Security Council to meaningfully consider threats to international peace and security and use evidence and international human rights complaint approaches in efforts to resolve the current crises in Afghanistan.**

The Special Rapporteur highlights that the juxtaposition between the violations of international human rights and humanitarian law in the context of UN sanctions regimes, particularly the lack of adequate due process guarantees and the gross violations of human rights perpetrated on the ground in Afghanistan not only symbolize, but define the primary discrepancies between international counter-terrorism frameworks and compliance with international law. This dilemma has been articulated by Mariam Safi, Executive Director of the Organization for Policy Research and Development Studies (DROPS) in a briefing to Member States during the General Assembly on Afghanistan in 2019 focused on peacebuilding and women’s rights advocacy. She stated that

“in 2019, women’s voices were constantly side-lined in the US-Taliban talks. The Taliban, implicitly, were portrayed as the “local,” giving them agency to shape an agreement, despite continuing to kill scores of innocent Afghans. While, on the other hand, women and their organizations, were treated as “spoilers.” When women demanded preservation of their Constitutional rights, they were pacified, and told this issue was outside the prerogative of such talks, and when they cautioned against quick fixes, they were criticized for not taking ownership of their future. These are the dynamics we know are the pitfall of liberal peacebuilding – that when it matters most, those in positions of power adopt illiberal approaches and justify them through promises of liberal outcomes.”¹³³

The mandate considers these dynamics as applicable to the United Nations Security Council and Member States and urges their consideration in the context of counter-terrorism sanctions regimes, specifically the 1988 Regime. **The Security Council, including in the context of Afghanistan will need to take human rights compliant, rule of law focused efforts to reform the 1988 Sanctions Regime as demanded by international law standard for due process guarantees, while also ensuring the Council plays its role in maintaining international peace and security through the promotion and protection of the rights of the Afghan people, including the right to self-determination and the full scope of women’s rights.**

These due process considerations will also require more detailed analysis of the impact of counter-terrorism sanctions through the 1988 Sanctions Regime on the humanitarian situation in Afghanistan. The Secretary-General in 2001 had already begun to document the legacy of negative impacts of sanctions regimes on the overall situation in Afghanistan, as well as the ability of humanitarian actors to deliver humanitarian assistance amidst unprecedented need.¹³⁴ It is imperative that the United Nations Security Council, Member States and supporting entities such as the Analytical Support and Monitoring Team recognize and draw on the breadth of observations and practices that are available since 2001 prioritizing evidence-based approaches and lessons learned on sanctions to prevent a regressive conversation around the efficacy and human rights, due process, rule of law, and humanitarian concerns surrounding their use. Although the nuances remain, the similarities of dilemmas remain remarkably similar between 2001 and today where the Secretary-General underscored the “unprecedented humanitarian need” paired with “humanitarian agencies’ [concern] about their ability to continue to render assistance.”¹³⁵ The 1988 Committee will require expert advice on the compounding humanitarian crises in Afghanistan related to conflict, COVID-19 and climate change in order to prevent the passing of another 20 years that result in a similar repetition of history.¹³⁶ The Committee will also require engagement with women’s civil society organizations to ensure that the efforts, both aimed at promoting and protecting human rights and rule of law equally benefit women and girls. Immediate efforts, recommendations, and concrete reporting will need to be informed by unprecedented engagement with non-governmental actors, civil society and women’s civil society and rights defenders. **In Afghanistan, questions have already arisen about access to humanitarian funds (including the role of exemptions, general licensing,¹³⁷ and other means), the status of development and humanitarian aid with the appointment of UN-listed individuals to key ministries, such as the Ministry of Finance and Foreign Affairs, and the cautioning from actors on the ground on overburdening humanitarian actors through convoluted, costly and time-consuming processes for licensing or other measures that they continue to lack the capacity to meaningfully access and engage.**



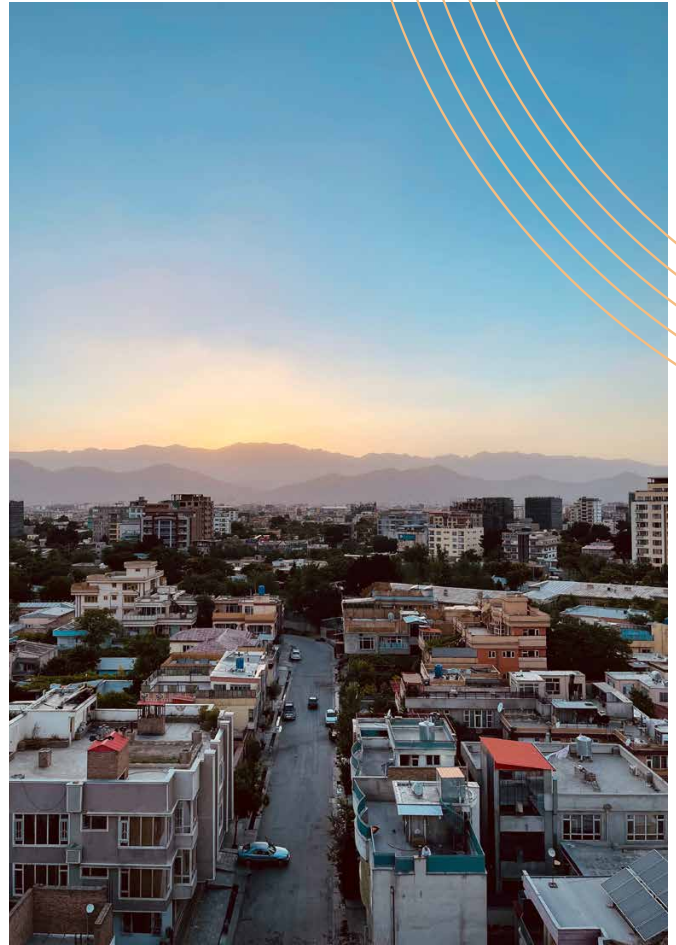
PHOTO BY SOHAIB GHYASI

D. Recommendations

The 1988 Sanctions Regime is more relevant than ever, which ultimately makes the need for due process reforms more urgent and compounded. The mandate reiterates its recommendations as noted above on sanctions as applied to the 1988 Sanctions Regime and its impact on the promotion and protection of human rights and rule of law in Afghanistan. The mandate offers further recommendations to the United Nations Security Council, Member States, the 1988 Sanctions Committee, and the Analytical Support and Monitoring team specific to the 1988 Regime as follows:

- 1. Recognize that human right and rule of law compliance within sanctions regimes remain the only effective way to counter-terrorism in the long-term** and that by implementing rights protections, due process safeguards and measures to promote adherence to international humanitarian law and preserve the ability for international, national and local agencies, programmes and non-governmental organizations to provide humanitarian relief and assistance humanitarian assistance, sanctions regimes can better contribute to the solution rather than fuel the grievances, deprivation, human suffering, and rights violations that perpetuate the production of violence. Sanctions regimes should include independent oversight, such as a reformed and dedicated ombudsperson role,¹³⁸ and provisions on the promotion and protection of human rights and humanitarian assistance of the requisite detail to ensure Member States are acting consistent with the obligations under international law.
- 2. Address the need for overarching reform of UN sanctions regime practice to establish independent forms of oversight and guarantees of due process under international law can be achieved across all sanctions' regimes aimed at countering terrorism.** The mandate notes that such considerations may be more widely applicable to the full scope of sanctions measures undertaken by the Council and the required role of an Ombudsperson across all sanctions regimes implemented. This remains the only pathway to ensuring that the system does not violate the fundamental customary international law standard of *nemo debet esse iudex in propria sua causa* (no one may be a judge in his own cause).
- 3. Ensure the United Nations maintains its ability to monitor, report and address the human rights situation in Afghanistan,** including through dedicated and inclusive briefings and the establishment of a dedicated mandate within the United Nations system for the systemic monitoring of human rights violations, documentation, and preservation of critical evidence to prevent long-term impunity for such violations. Such capacity will play a determining role in the ability of Afghanistan to achieve long-term and sustainable peace and the prevention of future conflicts in the country, region, and the world.

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4. **Approach the issue of listing or exempting with great caution.** The mandate cautions the Security Council against the lifting of any sanctions on or issuance of any exemption or exception, out of political expediency, to any individual deemed responsible for serious violations of international criminal law, international humanitarian law and international human rights law. Such lifting or exemption should be predicated upon meaningful verifiable commitments to respect international human rights and humanitarian law with the understanding that failing to meet such commitments will result in a reimposition of such measures.
5. **Consider ways to build greater transparency within the work of the Sanctions Committee for counter-terrorism regimes, including through immediate steps to foster engagement with civil society.** The mandate recognizes the increased engagement of the Analytical Sanctions Support and Monitoring Team with civil society, which must continue to be built, but also notes that greater inclusion of civil society in Counter-Terrorism Committee briefings and other dialogues with Member States must be made possible to facilitate greater transparency and reflection on the impact of UN counter-terrorism sanctions on the ground and the downstream harms on individual rights, and civil society. This includes dedicated engagement of women civil society leaders and gender equality advocates in line with the Security Council's commitments to women, peace and security and is particularly relevant in the context of Afghanistan and the ongoing violations of human rights, particularly for those who defy restrictions imposed by the Taliban such as restrictions on freedom of expression, restrictions on women's rights, restrictions on religious freedom and beyond.
6. **Secure and facilitate increased engagement of humanitarian expertise on the complex humanitarian crises in Afghanistan, including through international and Afghan humanitarian actors working to deliver assistance and medical care.** The mandate urges the Security Council to proactively address the predictable barriers to the delivery of humanitarian assistance already impacting Afghanistan, including through the immediate measures already experienced by Afghan citizens, such as the freezing of funds by the International Monetary Fund and the World Bank in August of 2021.¹³⁹ Member States must ensure that human rights, rule of law, and long-term accountability measures, even those taken through the designation of individual sanctions are effective and therefore also conform to the requirements of international humanitarian law, and to ensure that much needed financial and political support for the humanitarian response is supported, including safeguarding the ability of front-line humanitarian organizations to safely conduct their work. The mandate makes these recommendations, while also reiterating the call of the Standing Committee to fully fund and support humanitarian operations in Afghanistan. A total of US\$1.3 billion is required to reach almost 16 million people with humanitarian assistance in Afghanistan; only 37 per cent of required funds have been received, leaving a shortfall of almost \$800 million.¹⁴⁰



Endnotes

- ¹ For the purposes of this paper, the mandate limits the scope of inquiry to United Nations targeted sanctions regimes related to the purpose of countering terrorism, including the following six sanctions regimes: (1) Security Council Committee pursuant to resolution 751 (1992) concerning Somalia; (2) Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities; (3) Security Council Committee established pursuant to resolution 1636 (2005) (Lebanon); (4) Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan; (5) Security Council Committee established pursuant to resolution 1970 (2011) concerning Libya; and (6) Security Council Committee established pursuant to resolution 1988 (2011) (Taliban). For ease of practitioner reference and consistency, the mandate draws on categorizations included through the UN Sanctions App, acknowledging the complex variances between rationales, mandates, scope and contemporary relevance and/or impact. See Biersteker, Thomas, Zuzana Hudakova, and Marcos Tourinho, *UN SanctionsApp: An Interactive Database of UN Sanctions*, August 2020, available at <https://unsanctionsapp.com>.
- ² Basic Human Rights Reference Guide: Proscription of Organizations in the Context of Countering Terrorism, Working Group on Protecting and Promoting Human Rights, the Rule of Law and Supporting Victims of Terrorism (June 2021)
- ³ Statement by Sweden on behalf of the Group of Like-Minded States on Targeted Sanctions UN Security Council open debate on Security Council Working Methods, "Agility and innovation: lessons for the future from the COVID-19 Pandemic" 16 June 2021.
- ⁴ For a full list of sanctions committees and their mandates, see the Department of Peacebuilding and Political Affairs, Subsidiary Organs of the United Nations Security Council, Fact Sheets (2021).
- ⁵ A/HRC/RES/40/16.
- ⁶ Cockayne, James and Rebecca Brubaker, *Due Process in the UN Targeted Sanctions: Olg Challenges, New Approaches*, United Nations University (2019), page 4.
- ⁷ Biersteker, T., L. van den Herik, and R. Brubaker, 2021. *Enhancing Due Process in UN Security Council Targeted Sanctions Regimes*. Geneva: Global Governance Centre, Graduate Institute of International and Development Studies (detailing the full scope of United Nations sanctions practice, and the dynamics that may warrant approaches alternative to counter-terrorism aims to prevent, resolve, and negotiate settlements of conflict, in particular).
- ⁸ The mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (SR CT & HR) has commented on the use of targeted sanctions since the mandate's establishment. See e.g., A/HRC/40/52, paras 20-22, A/HRC/46/36, paras 14-17, A/75/337, A/HRC/34/61, A/67/396.
- ⁹ <https://www.undocs.org/S/2020/106>.
- ¹⁰ *Supra* note 4.
- ¹¹ The official resignation letter of Mr. Daniel Kipfer Fasciatis is available at: https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/20210603_letter_to_secretary-general_0.pdf. See also, Lynch, Colum. *How a Dream Job Became a Bureaucratic Nightmare for a Top U.N. Lawyer* Chief advocate for alleged terrorists sanctioned by the United Nations announces his resignation citing red tape, rule-of-law issues. *Foreign Policy* (July 27, 2021) available at: <https://foreignpolicy.com/2021/07/27/un-terrorism-lawyer-resigning-ombudsperson-bureaucracy/>.
- ¹² The mandate underscores the primacy of international treaty obligations and reiterates her concern upon the United Nations Security Council's quasi-legislative actions in the context of counter-terrorism measures that situate Member States in contradictory positions to the implementation of their obligations under international law. See e.g., *infra* note 32 (references to national level litigation).
- ¹³ A/67/396, para 17, citing See CCPR/C/94/D/1472/2006 ("*Sayad and Vinck v. Belgium*"), Separate Opinion of Sir Nigel Rodley; European Court of Human Rights, *Al-Jedda v. United Kingdom*, Application no. 27021/08, Judgement, 7 July 2011 (Grand Chamber), paras. 101-102.
- ¹⁴ A/HRC/40/52, paras 20-22, A/HRC/46/36, paras 14-17. Former SR: BS: A/HRC/34/61, (A/67/396)
- ¹⁵ A/67/396 (2012).
- ¹⁶ A/67/396 (2012).
- ¹⁷ The breakdown is as follows: 18 individuals and 1 entity designated under the Somalia Sanctions Regime, 262 individuals and 83 entities designated under the ISIL (Da'esh) and Al-Qaida Sanctions Regime, 3 individuals designated under the Sudan Sanctions Regime, no individuals or entities designated under the 1636 Sanctions Regime, 28 individuals and 2 entities inscribed under the Libya Sanctions Regime, and 135 individuals and 5 entities designated under the 1988 Sanctions Regime (Taliban).
- ¹⁸ 262 individuals and 84 entities are designated under the ISIL (Da'esh) and Al-Qaida Sanctions Regime. The Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings, and entities is the only sanctions regime with more substantial measures, e.g., the establishment of an Ombudsperson, to strengthen oversight.
- ¹⁹ The Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings, and entities is the only sanctions regime with more substantial measures, e.g., the establishment of an Ombudsperson, to strengthen oversight.
- ²⁰ See Department of Peacebuilding and Political Affairs, Subsidiary Organs of the United Nations Security Council, Fact Sheets (2021), pages 7 (Somalia), 15 (Sudan), 16 (1636), 20 (Libya), 23 (1988).
- ²¹ This violates customary international law standards that are central to due process – *nemo debet esse iudex in propria sua causa* (no one may be a judge in his own cause). A/67/396, para. 15.
- ²² The Focal Point system was a reform effort aimed at creating greater alignment of sanctions regimes with due process requirements under international law. However, the focal point function falls considerably short of an effective judicial procedure. See the example offered in the analysis of the European General Court in *Kadi v. European Commission*. In its decision, the Court revoked the European Commission sanctions regime as applied to Mr. Kadi on due process violations, specifically noting that Mr. Kadi's right to effective judicial review had been violated due to the lack of proper access to the information and evidence used against him. The Court acknowledged the earlier findings of the European Court of Justice despite the creation of a focal point and an Office of the Ombudsperson, underscoring that these measures "cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee." European Union, Court of Justice (Grand Chamber), *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and others* (joined cases Nos. C-402/05 P & C-415/05 P), judgment of 3 September 2008.
- ²³ A/67/396 (2021), para 59 (a)-(iii).
- ²⁴ A/HRC/46/36.
- ²⁵ See Security Council resolution 1390 (2002).
- ²⁶ According to the guidelines for the conduct of the work of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities, a criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature (para. 6 (d)). See also A/61/267, para. 31.
- ²⁷ See e.g., 1373 (2001), 1456(2003), 1566 (2004), 1624 (2005), 2178 (2014), 2242 (2015), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017); as well as Human Rights Council resolution 35/34 and General Assembly resolutions 49/60, 51/210, 72/123 and 72/180
- ²⁸ Report of the Eminent Jurists Panel on terrorism, counter-terrorism and human rights, International Commission of Jurists (2009) ("The UN sanctioning lists is seen as arbitrary, and this then causes difficulties for Member States if they try to abide by UN procedures. On the one hand, States have their domestic and international human rights obligations, and on the other hand, their obligations to implement decisions under Chapter VII of the UN Charter. The contradiction leaves States open to legal challenge.").
- ²⁹ E/CN.4/2006/98, A/HRC/16/51 and A/73/361.
- ³⁰ See e.g., Security Council resolution 2170 (2014).
- ³¹ Security Council resolution 2178 (2014).
- ³² See e.g., Reply of the Government of the Arab Republic of Egypt to the joint communication from special procedures mandate holders of the United Nations Human Rights Council concerning various laws and their application in practice (wherein the "approach" is justified as supported by Security Council resolutions 1988 (2011) and 2253 (2015).

- ³³ See e.g., research conducted by the mandate of the Special Rapporteur as of 2012 alone: A/HRC/16/50, paras. 17–22 and 44; A/63/223, para. 16; A/65/258, paras. 55–57; Bardo Fassbender, “Targeted sanctions: listing/de-listing and due process”, study commissioned by the United Nations, Office of Legal Affairs (2006); Council of Europe, Parliamentary Assembly, resolution 1597 (2008), para. 7; 2007 Marty Report, document 11454 (Council of Europe, Parliamentary Assembly); I. Cameron, “The European Convention on Human Rights, due process, and the United Nations Security Council counter-terrorism sanctions”, report commissioned by the Council of Europe (2006); David Cortright and Erika de Wet, “Human rights standards for targeted sanctions”, (Sanctions and Security Research Program, January 2010); I. Johnstone, “The United Nations Security Council, counter-terrorism and human rights”, in *Counter-terrorism: Democracy’s Challenges*, Andrea Bianchi and Alexis Keller, eds. (Oxford, Hart Publishing, 2008); Josiane Auvret-Finck, “Le contrôle des décisions du Conseil de sécurité par la Cour européenne des droits de l’homme”, and Constance Grewe, “Les exigences de la protection des droits fondamentaux”, in *Sanctions ciblées et protections juridictionnelles des droits fondamentaux dans l’Union européenne Équilibres et déséquilibres de la balance*, Constance Grewe et al., eds., (Brussels, 2010); Dire Tladi and Gillian Taylor, “On the Al Qaeda/Taliban Sanctions Regime: Due Process and Sunsetting”, 10 *Chinese Journal of International Law* (2011); Security Council Cross-Cutting Report on the Rule of Law, No. 3 (28 October 2011), available at www.securitycouncilreport.org; Anthony Aust, “The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner’s View”, in *Review of the Security Council by Member States*, Erika de Wet and Andre Nollkaemper, eds.; Eric Rosand, “The Security Council’s Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions”, 98 *American Journal of International Law*, 745 (2004). See also later compilations produced by the Office of the High Commissioner for Human Rights, A/HRC/16/50, note 13: “Council of Europe Parliamentary Assembly resolution 1597 which found the 1267 sanctions regime to “violate the fundamental principles of human rights and the rule of law”; Council of Europe, Commissioner for Human Rights, “Arbitrary procedures for terrorist black-listing must now be changed” (2008), available from www.coe.int/t/commissioner/viewpoints/081201_en.asp; Case T-85/09, *Kadi v. European Commission*, European General Court (Seventh Chamber), 30 September 2010; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; communication No. 1472/2006, *Sayadi and Vinck v. Belgium*, Views adopted by the Human Rights Committee on 22 October 2008. At the national level see the resolution adopted by the Parliament of Switzerland, which provides for notification to the Security Council that the Government of Switzerland will not apply the sanctions required under the 1267 regime against individuals who have not been “brought to justice” after three years of being placed on the Consolidated List; who do not have the right of judicial review of their listing; who have not been charged by any judicial authority; and against whom no new evidence has been produced since being included on the List: *Les fondements de notre ordre juridique court-circuités par l’ONU* (adopted 4 March 2010).”
- ³⁴ The mandate recognizes over twenty years of work of academia, civil society organization and United Nations reporting on sanctions regimes. Most recent reviews on the basis of due process concerns can be found through the following sources: Cockayne, James and Rebecca Brubaker, *Due Process in the UN Targeted Sanctions: Olg Challenges*, New Approaches, United Nations University (2019).
- ³⁵ Report of the Eminent Jurists Panel on terrorism, counter-terrorism and human rights, International Commission of Jurists (2009).
- ³⁶ The Report of the Eminent Jurists Panel was released in 2009. Following the report, the Office of the Ombudsperson was established and subsequently several mandate revisions minimally strengthened the ability of the Office to support greater adherence to due process requirements under international law.
- ³⁷ Gavin Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (Cambridge University Press, 2020). During the first 45 years of the existence of the United Nations, sanctions were only imposed twice (Security Council resolutions 232 (1966) (Southern Rhodesia) and 418 (1977) (South Africa)). See also European Union, action plan on human rights and democracy, 2020–2024, para. 1.6 (a).
- ³⁸ *Infra* note 29. See also, Federal Court of Canada, *Abdelrazik v. Canada*, decision of 5 June 2009; and European Court of Human Rights (Grand Chamber), *Al-Dulimi and Montana Management Inc. v. Switzerland* (application No. 5809/08), judgment of 21 June 2016.
- ³⁹ *Infra* note 29.
- ⁴⁰ ISIL (Da’esh) and Al-Qaida Sanctions Regime was established by resolution 1904 (2009). As of 16 July 2021, in the 87 cases fully completed through the Ombudsperson process, 59 individuals and 28 entities have been de-listed, one entity has been removed as an alias of a listed entity and 23 de-listing requests have been refused.
- ⁴¹ The procedure was updated through Security Council resolution 1989 (2011), although it was not substantially improved from a due process perspective.
- ⁴² The Special Rapporteur concurs with the previous mandate holder that the mechanism is as fair as possible within the limits of its mandate, but the structural flaws of the regime remain despite the appearance of independence. A/67/396, para. 34.
- ⁴³ See www.un.org/securitycouncil/ombudsperson/approach-and-standard.
- ⁴⁴ For example, the lack of mandate for the Ombudsperson to review the Committee’s original decision to list; the lack of equality of arms regarding information available to petitioners; the lack of formal judicial independence for the Ombudsperson and the scope and nature of the terms of appointment (in practice and contractually, given that the term is for a period of approximately one year); the lack of entitlement to a United Nations laissez-passer; the less favourable contract terms than those that apply to comparable judicial positions, despite being formally described as a mandate; and the failure of States to allow for reasoned (if redacted, as necessary) opinions to explain the reasoned decisions of the Ombudsperson.
- ⁴⁵ Concerns include breach of article 10 of the Universal Declaration of Human Rights and articles 2 and 14 of the International Covenant on Civil and Political Rights and incompatibility with the Basic Principles on the Independence of the Judiciary.
- ⁴⁶ A/HRC/16/50, paras 16–27.
- ⁴⁷ A/HRC/16/50, para. 18.
- ⁴⁸ *Ibid.*
- ⁴⁹ For detailed analysis on proscription, human rights, and the developments across the Office of the Ombudsperson, see Basic Human Rights Reference Guide: Proscription of Organizations in the Context of Countering Terrorism, Working Group on Protecting and Promoting Human Rights, the Rule of Law and Supporting Victims of Terrorism (June 2021), pp. 14.
- ⁵⁰ A/HRC/16/50, note 12: “Individual cases have nonetheless been heard in national courts in Belgium, Canada, Germany, Italy, the Netherlands, Pakistan, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland and the United States of America. One example is the decision by the Supreme Court of the United Kingdom in January 2010 which struck down the domestic legislation implementing the 1267 regime in that country (consolidated cases *HMT v. Mohammed Jabar Ahmed and others*; *Mohammed al-Ghabra and HMT v. Hani El Sayed Sabaei Youssef*).”
- ⁵¹ Human Rights Committee, General Comment on Article 12 (ICCPR).
- ⁵² A/67/396 (2021), para 13.
- ⁵³ Somalia, ISIL (Da’esh)/Al-Qaida, Sudan, 1636, Libya, 1988 (Taliban).
- ⁵⁴ Somalia, ISIL (Da’esh)/Al-Qaida, Libya, 1988 (Taliban).
- ⁵⁵ S/RES/2368 (2017).
- ⁵⁶ A/67/396, para 13, citing Her Majesty’s Treasury (Respondent) v. Mohammed Jabar Ahmed and others (FC) (Appellants) [2010] UKSC 2, [2010] 2 AC 534, para. 60.
- ⁵⁷ Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and article 23 of the Universal Declaration of Human Rights (UDHR)
- ⁵⁸ Article 11 of the ICESCR and Article 25 of the UDHR.
- ⁵⁹ Article 13 and 14 ICESCR. See also General Comment No. 13 (E/C.12/1999/10, 8 December 1999) and article 26 of the UDHR.
- ⁶⁰ Human Rights Council resolution 29/22.
- ⁶¹ A/HRC/31/37.
- ⁶² S/2021/676, para. 54.
- ⁶³ *Ibid.*
- ⁶⁴ *Ibid.*
- ⁶⁵ Adapted from the most recent report of the Special Rapporteur, A/HRC/46/36, para. 16 on the human rights impact of counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls, and the family.
- ⁶⁶ Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015).
- ⁶⁷ As of 21 December 2020, only four women were listed, all under the ISIL (Da’esh) and Al-Qaida Sanctions Regime.
- ⁶⁸ A/61/267, paras. 32–37; and A/67/396, paras. 33–35.

- ⁶⁹ See www.sueddeutsche.de/politik/dick-marty-bericht-zu-terrorlisten-zivile-todesstrafe-1.344886 (in German), citing Dick Marty, Rapporteur for the Council of Europe.
- ⁷⁰ See, e.g., Security Council resolutions 1267 (1999), para. 4 (a), and 1591 (2015).
- ⁷¹ See www.hlr-unsanctions.org/HLR_WG3_report_final.19.115.pdf.
- ⁷² Drawn from the mandate's report to the General Assembly, A/75/337.
- ⁷³ see A/74/371, paras. 31–44, and A/HRC/40/52
- ⁷⁴ Such operations include visits and material assistance for detainees (including family visits), first aid training, war surgery seminars, dissemination of information on international humanitarian law to weapons-bearers, delivery of aid to meet the basic needs of the civilian population in areas that are hard to reach and medical assistance for wounded and sick fighters.
- ⁷⁵ Dustin A. Lewis, Naz K. Modirzadeh, and Gabriella Blum, *Medical Care in Armed Conflict, International Humanitarian Law and State Responses to Terrorism Legal Briefing, Legal Briefing + Compendium* (2015).
- ⁷⁶ See United States, Supreme Court, *Holder v. Humanitarian Law Project*.
- ⁷⁷ These include rules governing humanitarian operations, including the entitlement of impartial humanitarian actors to offer their services.
- ⁷⁸ Alice Debarre, "Safeguarding medical care and humanitarian action in the United Nations counter-terrorism framework", *International Peace Institute*, September 2018; and the Madrid Guiding Principles (S/2015/939, annex II, sect. III.C).
- ⁷⁹ Gillar, Emanuela-Chiara, *IHL and the humanitarian impact of counterterrorism measures and sanctions: Unintended ill effects of well-intended measures*, Research paper, 3 September 2021.
- ⁸⁰ Debarre, "Safeguarding medical care and humanitarian action".
- ⁸¹ See General Assembly resolution 72/284, para. 74; S/2016/722, annex, para. 10 (recommendation 3.1); and S/2018/462, para. 22.
- ⁸² See, for example, the submissions of Sweden and Switzerland.
- ⁸³ In numerous submissions to the Special Rapporteur on this issue, confidentiality was requested on the basis of fear of retaliation by States against humanitarian organizations working in conflict-affected areas.
- ⁸⁴ *Supra* note 76, pp. 55 detailing the inconsistency with Common Article 3 of the Geneva Conventions, as well as the exclusion from counter-terrorism instruments, as well as guidance from the European Union.
- ⁸⁵ United Nations University, "Briefing on United Nations sanctions: nine points on designing United Nations sanctions to better protect humanitarian activities", July 2020.
- ⁸⁶ See the exemptions in Security Council resolutions 1452 (2002), para. 1 (a), 2253 (2015) and 2368 (2017). See also A/64/258, A/67/396, A/73/361 and A/HRC/34/61.
- ⁸⁷ Notably in Australia and the United States (see A/70/371, para. 34, and A/73/314, para. 51).
- ⁸⁸ United States, Court of Appeals, Second Circuit, *United States v. Farhane*, case No. 634 F.3d 127, Decision, 4 February 2011.
- ⁸⁹ The Special Rapporteur expresses her concern in that regard in relation to paragraph 3 of Security Council resolution 2532 (2020), in which the extension of a "humanitarian pause" to "military operations against Islamic State in Iraq and the Levant" is expressly prohibited.
- ⁹⁰ A/70/371, para. 32.
- ⁹¹ Norwegian Refugee Council, "Principles under pressure" (2018).
- ⁹² A/73/314, para. 52. Exemptions exist but can be limited. See also A/70/371 and A/73/314, para. 51.
- ⁹³ A/HRC/40/52.
- ⁹⁴ *Ibid.*
- ⁹⁵ Resolution 1624 (2005) referred to the important role of, inter alia, civil society in efforts to enhance dialogue and broaden understanding, and in promoting tolerance and coexistence.
- ⁹⁶ A/HRC/40/52, paras 20–22, A/HRC/46/36, paras 14–17, A/75/337, A/74/335, A/HRC/34/61, A/67/396
- ⁹⁷ A/67/396, paras 59 (a)–(iii).
- ⁹⁸ S/2021/676, paras. 38–49.
- ⁹⁹ Relevant mandate renewals, specifically for the 1988 Sanctions Regime are available here: reporting_and_mandate_cycles.pdf.
- ¹⁰⁰ A/73/314, para. 52. Exemptions exist but can be limited. See also A/70/371 and A/73/314, para. 51.
- ¹⁰¹ S/2021/676, para. 41.
- ¹⁰² A/67/396, paras 59 (i)–(ii).
- ¹⁰³ S/2021/676, para. 44.
- ¹⁰⁴ S/2021/676, paras, 45, 53.
- ¹⁰⁵ List established and maintained pursuant to Security Council res. 1988 (2011), available at: <https://scsanctions.un.org/zvz35en-taliban.html> [last accessed 8 September 2021].
- ¹⁰⁶ The Council reiterated this call in its recognition of the US–Taliban deal through S/RES/2513 (2020).
- ¹⁰⁷ https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organ_factsheets.pdf
- ¹⁰⁸ The sanctions originally imposed by S/RES/1267, were bifurcated in 1999, through S/RES/1989 and S/RES/1988. The 1988 sanctions regime includes S/RES/1988 (2011)(Establishes Committee and 1988 List), S/RES/2082 (2012)(Invites the Islamic Republic of Afghanistan to participate in providing names to be considered for travel with the purpose of peace and reconciliation), S/RES/2160 (2014)(publication of list in all official languages of the United Nations), S/RES/2255 (2015) (adds access to Focal Point established under 1730 (2006) for exemptions to asset freeze and travel ban and publication of list in all official languages of the United Nations and Dari and Pashtu), S/RES/2501 (2019), S/RES/2557 (2020).
- ¹⁰⁹ From 2010 to 2011, the Government of Afghanistan advanced a range of measures aimed at negotiating peace with the Taliban. See S/2011/381 (detailing the continued work of the peace architecture in Afghanistan in June 2011, and support from the Secretary-General of the decision to bifurcate the regimes as a confidence building measure). See also previous years reports on the situation in Afghanistan, including the Report of the Secretary-General pursuant to paragraph 40 of resolution 1917 (2010) S/2010/318, para. 6 (detailing the identified issues with the sanctions regimes and calls from the Consultative Loya Jirga to adjust such mechanisms). *Infra* note 102.
- ¹¹⁰ S/2010/318, para. 6.
- ¹¹¹ See S/2010/318, para. 6.
- ¹¹² S/2010/318, para. 6 ("16-point final communiqué, the participants endorsed the initiative of President Karzai to convene a national dialogue on ways to restore peace and recommended that the Government of Afghanistan draw up a multilateral peace programme as a national strategy for sustainable peace. The communiqué further requested the Government of Afghanistan and the international forces to release Afghans detained on "unreliable reports and unproved accusations"; to remove the names of the Afghan opposition from the sanctions list established pursuant to Security Council resolution 1267 (1999); and to guarantee the safety and security of those who join the peace process. The jirga expressed appreciation to the international community for its cooperation in the rebuilding of Afghanistan, welcoming the continued support for the Afghan-led peace and reconciliation process. The draft peace and reintegration programme contains various approaches, including a review of the list established pursuant to Council resolution 1267 (1999), political accommodation, exile to a third country, transitional assistance to individually reconciled insurgents, community development projects, the creation of an agricultural and conservation corps, job training and de-radicalization programmes.").
- ¹¹³ During this time, engaged victim's associations were also advocating for plans for peace to include justice and reconciliation, as well as "concrete measures to end impunity, repeal the amnesty Law and include victims' voices in the peace and reconciliation process." *Id.*, para. 59.
- ¹¹⁴ S/RES/2255 (2014).
- ¹¹⁵ S/RES/2082 (2012) ("invites the Government of Afghanistan, in close coordination with the High Peace Council, to submit for the Committee's consideration the names of listed individuals for whom it confirms travel to such specified location or locations is necessary to participate in meetings in support of peace and reconciliation.")
- ¹¹⁶ S/RES/2513 (2020).
- ¹¹⁷ *Ibid.*
- ¹¹⁸ *Ibid.*
- ¹¹⁹ SC/14592, 3 August 2021,
- ¹²⁰ The Prime Minister, both Deputy Prime Ministers, and the Ministers of Defense, Interior, Foreign Affairs, and Information are each designated under the 1988 Sanctions Regime.
- ¹²¹ S/RES/1267 (1999).
- ¹²² S/RES/2255 (2014), para. 2.
- ¹²³ E/CN.4/2006/98, A/HRC/16/51 and A/73/361.
- ¹²⁴ Biersteker, T., L. van den Herik, and R. Brubaker, 2021. *Enhancing Due Process in UN Security Council Targeted Sanctions Regimes*. Geneva: Global Governance Centre, Graduate Institute of International and Development Studies, note 16 ("There was a brief period after the appointment of the first Ombudsperson (2010 to 2011) when the Taliban were technically eligible for access to the Office of the Ombudsperson, but that ended when the regime was split into two in 2011.").
- ¹²⁵ See. The List established and maintained pursuant to Security Council res. 1988 (2011).

¹²⁶ *Ibid.* Other details for listed individuals include effective areas of control and provincial leadership for the Taliban, among other activities, such as military, financial or propaganda activities. One of the four listed entities, Rahan Inc., also states “Rahat Ltd. was used by Taliban leadership to transfer funds originating from external donors and narcotics trafficking to finance.”

¹²⁷ S/2021/770.

¹²⁸ *Statement by Anita Ramasastry*, Chair of the Coordination Committee of Special Procedures, Thirty-first Special Session of the Human Rights Council on the serious human rights concerns and situation in Afghanistan.

¹²⁹ Paul Cruickshank, et. al., *UN sounds alarm over threat posed by emboldened Taliban*, still closely tied to al Qaeda, June 3, 2021.

¹³⁰ S/2021/486.

¹³¹ See e.g., DROPS Bishnaw Project and Data on Taliban controlled areas, Afghan Women’s Network’s latest report Women’s Perspectives on the Prospect of Peace Afghan Women’s Network (2020), Afghanistan’s Independent Human Rights Commissions most recent report on Gender Responsive Ceasefires and Ceasefire Agreements (2020), briefs on ceasefires and women’s rights, and Afghanistan’s Research and Evaluation Unit’s latest reports on gender.

¹³² DROPS Bishnaw Project and Data on Taliban controlled areas.

¹³³ Statements of Mariam Safi, Executive Director of the Organization for Policy Research and Development Studies (DROPS), United Nations General Assembly 74 Side Event on “Advancing Women’s Meaningful Participation in Peace to Resolve Conflict and Build Sustainable Peace in Afghanistan” 25 September 2019.

¹³⁴ S/2001/695.

¹³⁵ S/2001/695, para. 15.

¹³⁶ United Nations Press Conference, Alison Davidian on the situation in Afghanistan (9 September 2021).

¹³⁷ For example, the United States Treasury Department issued a general license authorizing the U.S. Government and its contractors to deliver humanitarian assistance in Afghanistan. Daphne Psaedakis, U.S. Treasury issued new license to ease flow of aid in Afghanistan, 31 August 2021.

¹³⁸ See recommendation 3 above urging consideration as to how: “*independent forms of oversight and guarantees of due process under international law can be achieved across all sanctions’ regimes aimed at countering terrorism.*”

¹³⁹ <https://www.bbc.com/news/business-58263525>; <https://www.bbc.com/news/business-58325545>.

¹⁴⁰ Statement by Principals of the Inter-Agency Standing Committee on Afghanistan, 18 August 2021.

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