August 8, 2010

Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson

Grant L Willis
Abstract: Since its inception the Security Council’s 1267 sanctions regime has come under fire from UN member states, listed individuals and entities, domestic and international courts and tribunals, human rights NGO’s and even other organs of the UN, that all claim the 1267 sanctions regime does not secure targeted individuals’ procedural due process rights, particularly the right to an effective remedy. For instance, in June 2009 a Canadian Federal Court Judge noted that the 1267 sanctions regime creates a situation for the listed individual that is “not unlike that of Josef K. in Kafka’s The Trial, who awakens one morning, and for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime”. Now some courts and governments of UN member states have decided that they will not comply with UNSC sanctions regime, which was adopted under Chapter VII, because it does not comply with procedural due process rights of targeted individuals. Such actions threaten to undermine the Security Council’s ability to secure international peace and security through its sanctions power. Thus, this Article raises the question of whether or not, given the Security Council’s exceptional status in international law, there are any legal bases for a Security Council obligation to ensure that rights of procedural due process are made available to individuals directly targeted with sanctions under Chapter VII of the UN Charter. After an in depth discussion of this question, it is contended that the Security Council does have a legal obligation to render the listing and delisting procedures of the 1267 sanctions regime consistent with fundamental norms of procedural due process and furthermore. Finally, the functions, powers, and independence of 1267 Ombudsperson, which was created by a December 2009 Security Council resolution, is analyzed to determine whether or not it’s establishment has rectified the 1267 sanctions regime deficiencies.
# Tabel of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Introduction</strong></td>
<td>4</td>
</tr>
<tr>
<td><strong>2. Background of Targeted Sanctions and the 1267 Sanctions Regime</strong></td>
<td>6</td>
</tr>
<tr>
<td>2.1. Security Council targeted sanctions</td>
<td>6</td>
</tr>
<tr>
<td>2.2. The Security Council’s 1267 sanctions regime</td>
<td>9</td>
</tr>
<tr>
<td>2.2.1. 1267 sanctions regime overview</td>
<td>9</td>
</tr>
<tr>
<td>2.2.2. Evolution of the 1267 sanctions regime’s listing and delisting procedures</td>
<td>11</td>
</tr>
<tr>
<td>2.3. Due process based legal challenges to the 1267 sanctions regime</td>
<td>18</td>
</tr>
<tr>
<td>2.4. 1267 sanctions, administrative or punitive in character?</td>
<td>24</td>
</tr>
<tr>
<td>3.1. In general, are international legal norms applicable to the Security Council?</td>
<td>27</td>
</tr>
<tr>
<td>3.2. Sources of international law that are applicable to the Security Council</td>
<td>35</td>
</tr>
<tr>
<td>3.2.1. The UN Charter</td>
<td>35</td>
</tr>
<tr>
<td>3.2.2. Jus cogens and the Security Council’s power to derogate from applicable law</td>
<td>38</td>
</tr>
<tr>
<td>3.3. Conclusions on the Security Council and the rule of law</td>
<td>42</td>
</tr>
<tr>
<td><strong>4. Is the Security Council Obliged to Ensure That Rights of Due Process Are Made Available to Individuals and Entities Directly Targeted with Sanctions Under Chapter VII of the UN Charter?</strong></td>
<td>44</td>
</tr>
<tr>
<td>4.1. Right of due process as customary international law and/or a general principle of law</td>
<td>44</td>
</tr>
<tr>
<td>4.2.</td>
<td>Implied duties doctrine</td>
</tr>
<tr>
<td>4.3.</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>4.4.</td>
<td>UN Charter</td>
</tr>
<tr>
<td>4.5.</td>
<td><em>Jus cogens</em></td>
</tr>
<tr>
<td>4.6.</td>
<td>Other legal bases</td>
</tr>
<tr>
<td>4.7.</td>
<td>Conclusions on possible legal bases for an obligation on the Security Council to comply with due process</td>
</tr>
<tr>
<td>5.</td>
<td><strong>Substantive Principles Inherent in the Right of Due Process</strong></td>
</tr>
<tr>
<td>6.</td>
<td>Does the Creation of the Ombudsperson Rectify the Regime’s Noncompliance with Due Process Standards?</td>
</tr>
<tr>
<td>7.</td>
<td>Conclusion</td>
</tr>
</tbody>
</table>
1. **INTRODUCTION**

This article proceeds in seven Chapters. The article will begin by examining the evolution of the Security Council’s non-military sanctions policy, from traditional collective sanctions to the recent use of targeted sanctions. Chapter 2 will continue by describing a few of the most recent and noteworthy legal domestic to the Security Council’s Taliban/Al-Qaeda sanctions regime.¹

Chapter 3 analyzes the preliminary question of whether the Security Council can ever be obligated to comply with an international legal norm or whether the Council has a unique status in the international legal sphere that provides it is unbound by international law when it exercises its Chapter VII powers. It is then explained that the Security Council can be obligated to comply with certain relevant international legal norms and holdings of the International Court of Justice support this conclusion. Chapter 3 also examines the sources of international law that are applicable to the Security Council. There it is claimed that the United Nations Charter and *jus cogens* norms are the most significant legal limitations to the Security Council’s Chapter VII powers, but other sources of international law, such as treaties, custom and general principles of law may bind the Council if certain conditions are satisfied.

To build on the conclusion that the Security Council may be obligated to comply with international legal norms, Chapter 4 discusses the most prevalent arguments with respect to legal bases that establish a Security Council obligation to ensure that rights of procedural due process are made available to individuals directly targeted with sanctions under Chapter VII of the UN Charter. Specifically, this Chapter scrutinizes such legal bases as the implied duties doctrine, the Universal Declaration on Human Rights, UN Charter provisions and due process as a *jus cogens* norm.

Chapter 5 brings together the discussions in the prior two Chapters by examining the substance of the Security Council obligation regarding procedural due process standards. This Chapter identifies the international legal principles implicit in an individual’s right to due process and the legal foundations of such a right. Chapter 5 concludes by indicating the substantive legal principles inherent in the right to procedural due process.

---

¹ See UN Doc. S/RES/1904 (2009), for the most recent overview of the Security Council’s Taliban/Al-Qaeda or ‘1267 sanctions regime’, which was adopted under the Council’s Chapter VII powers.
Working on the conclusion that the Security Council is under a legal obligation to comply with procedural due process standards when it directly targets individuals with sanctions, Chapter 6 explores the significance of the establishment of the Taliban/Al-Qaeda sanctions regime’s Ombudsperson. In particular, this Chapter evaluates whether the establishment of the Ombudsperson brings the sanctions regime into compliance with internationally accepted procedural due process standards discussed in Chapter 5 and thus the Security Council can be found to satisfy its obligation under international law to secure due process rights for targeted individuals. Specifically, Chapter 6 examines the Ombudsperson’s powers to ascertain whether this new body can provide targeted individuals with direct access to an independent decision-maker that is empowered to grant an effective remedy. This Chapter then concludes by arguing that the Ombudsperson is significant because it targeted individuals have direct access to it, it is independent from the Security Council and it is empowered to review delisting requests, then offer personal ‘observations’. However, it is further contended that the lack of power of the Ombudsperson to provide an effective remedy to affected individuals, means that the sanctions regime is still not fully in compliance with applicable due process standards.

In sum, the purpose of this article is to analyze whether or not, given the Security Council’s exceptional status in international law, there are any legal bases for a Security Council obligation to ensure that rights of procedural due process are made available to individuals directly targeted with sanctions under Chapter VII of the UN Charter. Upon establishing such legal bases, discusses whether or not the Security Council is in compliance with its legal obligation to respect the due process rights of individuals’ in the Taliban/Al-Qaeda sanctions regime now that it has established the Office of the Ombudsperson for that regime.
2. **BACKGROUND OF TARGETED SANCTIONS AND THE 1267 SANCTIONS REGIME**

2.1. **Security Council targeted sanctions**

In 1945 the United Nations was established as an international organization whose raison d’etre is the maintenance of international peace and security. The UN system of was formulated to deal with states, which are the principal subjects of international law and the United Nations Security Council (UNSC) was attributed the power to take actions, that are binding on states, in response to threats to international peace and security. Under Chapter VII of the United Nations Charter, the Security Council may take enforcement measures to maintain international peace and security. Such measures range from economic and/or other sanctions not involving the use of armed force to international military action. Articles 39\(^2\) and 41\(^3\) of the UN Charter cover the portion of the UNSC’s sanctions system that does not involve the use of armed force.\(^4\) Essentially, under this branch of the UNSC’s sanctions system the Security Council may utilize its enforcement powers under Chapter VII of the UN Charter to adopt resolutions that impose mandatory rules on all states.\(^5\) Such resolutions generally establish sanctions regimes that contain enforceable legally binding obligations on all states.\(^6\) Moreover, UN member states are obligated to comply with these Chapter VII resolutions under Articles 24\(^7\), 25\(^8\), and 103\(^9\) of the UN Charter.

---

\(^2\) "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Charter of the United Nations (1945), art. 39. [“UN Charter”].

\(^3\) UN Charter, art. 41: “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

\(^4\) UN Charter, art. 42. This article covers sanctions that allow for use of military force.


\(^6\) id.

\(^7\) UN Charter, art. 24: states that members of the UN “confer on the Security Council primary responsibility for the maintenance of international peace and security […].”

\(^8\) UN Charter, art. 25: states that “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. “This provision has been interpreted to mean that decisions taken under Chapter VII, which are not recommendations, are considered legally binding on all member states”. J. Genser and K. Barth, *When Due Process Concerns Become Dangerous: The Security Council’s 1267 Regime and the Need for Reform*, 33 B.C.Int’l & Comp.L.Rev. 1 at 8 (2010).
Typically non-military sanctions are directed at a state and are intended to apply pressure on that state to comply with the objectives set out by the Security Council without resorting to the use of force. The targeted state may then choose to comply with the Security Council demands to obtain a lifting of the sanctions. This traditional form of collective sanctions that target states, came under extensive condemnation after the Iraq sanctions regime in the early 1990s\(^\text{10}\), which was imposed with the purpose of weakening the Iraqi government, was widely alleged to have had devastating humanitarian effects on the Iraqi population.\(^\text{11}\) UNICEF and Save the Children contended that the Iraq sanctions regime “destroyed society in Iraq and caused the death of thousands, young and old”.\(^\text{12}\) The UN Secretary-General even recognized the problem with these collective sanctions in a statement to the Security Council that said, “the humanitarian situation in Iraq poses a serious moral dilemma… we are in danger of losing the argument… about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations”.\(^\text{13}\) This criticism of UNSC collective sanctions against Iraq, which was based on a widespread belief that this type of sanction unfairly harmed civilians and had an severe impact on the most vulnerable segments of the population, eventually led to a rethinking of the purposes and approaches of UNSC non-military sanctions regimes.\(^\text{14}\)

Consequently, the Security Council recently made a qualitative change in the way that it seeks to maintain international peace and security through the use of non-military sanctions.\(^\text{15}\) This new Security Council sanctions policy is based on two concepts. The

---

9 UN Charter, art. 103: “In the event of a conflict between the obligations of the Members of the United Nations under the […] Charter and their obligations under any other international agreement, their obligations under the […] Charter shall prevail”.


12 Id.

13 Id.

14 See T. Biersteker and S. Eckert, Addressing Challenges to Targeted Sanctions: An Update of the “Watson Report”, White Paper, Report for the Watson Institute for International Studies at Brown University (2009), at 9. [“Watson Report Update”]. “Comprehensive sanctions were criticized in the early 1990s for their adverse humanitarian impact. While they were to some extent developed in response to human rights concerns, targeted sanctions by definition also affect individuals’ rights.”

15 “All sanctions today are targeted sanctions.” Id., at 4. There are currently eleven sanctions regimes in place which have been imposed by the Security Council acting under Chapter VII of the UN Charter and eight of the eleven sanctions regimes have the purpose to designate individuals and entities as targets of sanctions. See http://www.un.org/sc/committees/, last visited (26 June 2010).
first concept is that individuals rather than states should be the targets of sanctions and the second one is that international terrorism should be characterized as a threat to international peace and security. While the issue of Security Council sanctions targeting non-state actors or individuals never came up during the San Francisco Conference, the Security Council has actually applied sanctions that target non-state actors since 1966. It may therefore be accepted that the power to direct sanctions at individuals and other non-state actors is an implied or customary power of the Security Council.

This new policy of ‘targeted’ or ‘smart’ sanctions has been put to frequent use in the Security Council’s struggle to counter the financing of international terrorism since 11 September 2001. The Security Council has argued that targeted sanctions regimes have the benefit of being less of a blunt instrument, which is a characteristic that traditional collective sanctions have been criticized for possessing in the past. It is true that targeted sanctions are not blunt instruments like traditional collective sanctions because they only apply to specific individuals and entities rather than states, which generally means a large number of blameless citizens are not harmed like they would be if the sanctions were to apply to the state as a whole. Essentially, the objective of targeted sanctions is to put “coercive pressure on transgressing parties, leaders and the network of elites and entities that support them, in order to change behaviour or prevent actions contrary to international peace and security”.

Nevertheless, this new breed of sanctions has also come under intense criticism from the international community, but for somewhat different reasons than the Iraq sanctions of the 1990’s did. Most of the criticism of targeted sanctions has been based on alleged

---

16 The Security Council first employed economic sanctions targeting individuals involved in terrorism in 1997 when it introduced travel and financial restrictions against the members of the UNITA (National Union for the Total Independence of Angola). See UN Doc. S/RES/1127 (1997).
17 See UN Doc. S/RES/731 (1992). Security Council Res. 731, which condemned the bombing of Pan Am flight 103, was the first time that the Security Council characterized international terrorism as a threat to international peace and security. The Security Council reiterated this characterization of international terrorism as a threat to international peace and security in Res. 1054 (in 1996, after the attempt on the life of the Egyptian President), Res. 1189 (in 1998, after the attacks against the US embassies in Kenya and Tanzania), and Res. 1267 (1999), which adopts sanctions against the Taliban regime.

non-compliance of the sanctions regimes’ procedures with internationally accepted standards of due process.\textsuperscript{20} Courts, legislative bodies, and executive bodies of UN member states have repeatedly pointed out that the sanctions regimes’ procedures used for listing individuals/entities and those subsequently provided for challenging listings do not secure rights of procedural due process for targeted individuals.\textsuperscript{21} Evidence of the validity of this allegation is that in practice “a number of member states have found themselves in the difficult position of being forced to choose between contravening the rulings of their domestic courts and decisions of their legislative bodies on the one hand, and their obligations to implement binding Chapter VII decisions of the UN Security Council, on the other”.\textsuperscript{22}

2.2. The Security Council’s 1267 sanctions regime

2.2.1. 1267 sanctions regime overview

The most prominent targeted sanctions regime that is still applicable today is the Security Council Resolution 1267 sanctions regime\textsuperscript{23} which is directed against any

\begin{flushright}
\textsuperscript{20} The most prominent example of criticism of targeted sanctions was from the UN General Assembly in its 2005 World Summit Outcome Document where the heads of State and Government of the United Nations called “upon the Security Council to...ensure fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions”. See World Summit Outcome Document, UN Doc. A/RES/60/1 (2005), at para. 109. Pursuant to the mandate of the 2005 World Summit Outcome Document the UN Office of Legal Affairs commissioned the Fassbender Study to answer the question: “Is the UN Security Council, by virtue of applicable rules of international law, in particular the UN Charter, obliged to ensure that rights of due process or ‘fair and clear procedures’, are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter?”

\textsuperscript{21} A coalition of like-minded states, emphasizing the human rights dilemmas inherent in listing/de-listing, urged the Security Council to consider a system of independent judicial review of listing/de-listing decisions. The like-minded states include Belgium, Costa Rica, Denmark, Germany, Finland, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland. See UN Doc. A/62/891 (2008) and UN Doc. S/2008/428 (2008).

\textsuperscript{22} Watson Report Update, supra note 14, at 4.

\end{flushright}
individuals or entities allegedly associated with the Taliban and/or Al-Qaida.\textsuperscript{24} In general, the 1267 sanctions regime requires all states to freeze funds and financial assets controlled directly or indirectly by the Taliban, Osama bin Laden or Al-Qaida.\textsuperscript{25} It also imposes a travel ban; arms embargo; and freeze of all assets, on individuals or entities that are alleged to be associated with the Taliban, Osama bin Laden or Al-Qaida.\textsuperscript{26}

The Security Council established the 1267 Sanctions Committee, a political body made up of Security Council members, to maintain a ‘blacklist’ of individuals and corporate entities that are to be subjected to the sanctions.\textsuperscript{27} States have the power to request the Sanctions Committee to list an individual or entity and the Sanctions Committee, which operates on consensus, has full discretion to grant the requests of states or not.\textsuperscript{28} Moreover, listed individuals and entities are not afforded prior notice to their listing and thus have no opportunity to prevent the listing from taking place by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolutions.\textsuperscript{29}

No effective opportunity is provided for a listed individual or entity to challenge a listing before a national court or tribunal, as UN member states are obliged, in accordance with the UN Charter, to comply with resolutions adopted by the Security Council under Chapter VII of the Charter.\textsuperscript{30} Targeted individuals and entities may submit a request for

\textsuperscript{25} See UN Doc. S/RES/1267 (1999), which imposed limited air embargo and funds and financial assets embargo on the Taliban; See UN Doc. S/RES/1333 (2000) at paras. 5, 8, 10 & 11, which established air and arms embargo, restricted travel sanctions and freezing of funds of Osama bin Laden and his associates. See also UN Doc. S/RES/1390 (2002), which modifies the sanctions regime originally imposed in Res(s). 1267 and 1333.
\textsuperscript{27} UN Doc. S/RES/1267 (1999). Security Council Res. 1267 established the 1267 Sanctions Committee to oversee the implementation by member states of the sanctions and to maintain a list of individuals and entities belonging or related to the Taliban, Osama bin Laden and the Al-Qaida network.
\textsuperscript{28} Under the Sanctions Committee’s December 2008 Guidelines, it considers new names based on submissions received from UN member states. Member states shall provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions. Then if no member of the Sanctions Committee objects, the name is included on the list. See Guidelines of the (1267) Committee for the Conduct of its Work (9 December 2008) , available at, http://www.un.org/sc/committees/1267/pdf/1267_guidelines.pdf. [“1267 Sanctions Committee Guidelines”].
\textsuperscript{29} id.
\textsuperscript{30} UN Charter, arts. 24(1), 25, 41, 48(2) and 103. See also Case T-315/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European
delisting to the Sanctions Committee through their state of residence or citizenship and they may personally petition the UN to be de-listed though the 1267 Ombudsperson.\textsuperscript{31} Now that the Ombudsperson has been appointed petitioners seeking delisting can “present their case to an independent and impartial Ombudsperson, who, after a period of information gathering and dialogue with the petitioner and relevant states, and with help of the Monitoring Team, will present a comprehensive report to the Sanctions Committee laying out the principal arguments concerning the delisting request based on an analysis of all the information available to the Ombudsperson and the Ombudsperson’s observations”.\textsuperscript{32} However, all final decisions on delisting requests are discretionary and taken by consensus\textsuperscript{33} of the 1267 Sanctions Committee so it may completely disregard the Ombudsperson’s findings.

\subsection*{2.2.2. Evolution of the 1267 sanctions regime’s listing and delisting procedures}

The Taliban/Al-Qaida targeted sanctions regime against individuals was first imposed in 1999 by Resolution 1267 and it obligates states to take certain measures against individuals.\textsuperscript{34} Security Council Resolutions 1267 (1999) and 1333 (2000) were adopted under the Council’s Chapter VII powers and established the core regulatory framework for the Taliban/Al-Qaida sanctions regime. Resolution 1267 introduced measures including a flight ban and a freeze of funds directly and indirectly owned or controlled by the Taliban to be effected if the Taliban failed to hand over Osama bin Laden.\textsuperscript{35} Then in

\begin{footnotesize}

\begin{itemize}
  \item \textsuperscript{31} UN Doc. S/RES/1730 (2006). UNSC Res. 1730 established a focal point within the Secretariat, to receive delisting requests directly from listed individuals. \textit{See} UN Doc. S/RES/1904 (2009), which created an ombudsperson to deal with delisting requests of individuals listed on the 1267 Consolidated list. Now that the Ombudsperson has been appointed, the focal point will no longer handle requests for delisting from individuals on the 1267 list, only the Ombudsperson will handle such requests. However, the focal point will continue to handle delisting requests from individuals on other targeted sanctions lists. On 7 June 2010 the Secretary-General of the UN, in close consultation with the 1267 Sanctions Committee, appointed Judge Kimberly Prost, of Canada, to serve as Ombudsperson pursuant to Security Council Resolution 1904 (2009). Judge Prost’s job will be to assist the Sanctions Committee in its consideration of delisting requests received from individuals and entities subject to the Security Council’s relevant sanctions measures against Al-Qaida and the Taliban, who seek removal from the Committee’s Consolidated List. \textit{See} UN Doc. SC/9947 (2010).
  \item \textsuperscript{32} UN Doc. SC/9947 (2010).
  \item \textsuperscript{33} \textit{See} 1267 Sanctions Committee Guidelines, \textit{supra} note 27, at 2(3.a). Delisting decisions of the Committee taken by consensus means that any Security Council member may block the delisting process.\textsuperscript{34} UN Doc. S/RES/1267 (1999).
  \item \textsuperscript{35} \textit{id.}
\end{itemize}

\end{footnotesize}
2000 the Security Council strengthened the sanctions set out in Resolution 1267 and introduced an asset freeze in respect of Osama bin Laden and individuals or entities ‘associated with’ him, including those in the Al-Qaida network.\(^{36}\)

Since Resolution 1333 was adopted in 2000 the 1267 sanctions regime has been modified by seven subsequent resolutions. The 1267 sanctions regime now requires all states to take the following measures in connection with any individual or entity associated with Al-Qaida, Osama bin Laden and/or the Taliban as designated by the 1267 Sanctions Committee:

1. freeze without delay the funds and other financial assets or economic resources of designated individuals or entities [assets freeze];
2. prevent the entry into or transit through their territories by designated individuals [travel ban]; and
3. prevent the direct or indirect supply, sale and transfer from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types, spare parts, and technical advice, assistance, or training related to military activities, to designated individuals and entities [arms embargo].\(^{37}\)

When Resolution 1267 was adopted the Sanctions Committee it did not have clear criteria on the basis of which individuals were put on the list. In 2002 the Security Council passed Resolution 1390 to build on Resolutions 1267 and 1333 by extending the financial measures, broadening the arms embargo and travel ban, and ending the requirement of a territorial link to Afghanistan, thus individuals of any nationality, residing anywhere in the world can be listed.\(^{38}\) Resolution 1390 also invites states to report to the Sanctions Committee on the results of all related investigations and enforcement actions.\(^{39}\) Furthermore, in Resolution 1390 the Security Council finally called on the Sanctions Committee to ‘promulgate expeditious guidelines and criteria’ necessary to implement the measures.\(^{40}\) Thus, the criteria for listing under the 1267 sanctions regime, after 2002, provides that individuals, group undertakings or entities

\(^{39}\) id., at para. 8.
\(^{40}\) id., at para. 5(d).
associated with Al-Qaida or the Taliban, or those controlled by their associates may be listed and sanctions measures apply to designated individuals associated with Al-Qaida, Osama bin Laden and/or the Taliban wherever in the world they may be located.\footnote{See UN 1267 Committee, \textit{supra} note 37.}

In 2003 the Security Council adopted Resolution 1452\footnote{See UN Doc. S/RES/1452 (2003).} as an amendment to the 1267 sanctions regime. This resolution introduced certain exemptions into the sanctions regime, such as humanitarian expenses.\footnote{id., at para. 1(a).} The 1452 amendment also provided for financial exemptions for ‘necessary extraordinary expenses’ when a state requests such an exemption and the Sanctions Committee approves it.\footnote{id., at para. 1(b).}

Next, the Security Council adopted Resolution 1526 in 2004 where it amended the 1267 sanctions regime’s procedures by calling upon states to provide identifying information and background information demonstrating to the greatest extent possible a link between an individual or entity and Osama bin Laden, Al-Qaida, or the Taliban when submitting a new name for listing.\footnote{UN Doc. S/RES/1526 (2004), at para. 17.} Then, in Resolution 1617 adopted in 2005 the Security Council finally gave clearer criteria as to what the term ‘associated with’ means. That being said the wording of the criteria set forth in Resolution 1617 was very broad and vague. Specifically, Resolution 1617 stipulated that ‘associated with’ included acts such as:

\begin{enumerate}
\item 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;
\item supplying, selling or transferring arms and related material to;
\item recruiting for; or
\item otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.\footnote{UN Doc. S/RES/1617 (2005), at para. 2. These criteria were reaffirmed in para. 2 of Res. 1822 (2008) and para. 2 of Res. 1904 (2009).}
\end{enumerate}

In 2006 the Security Council sought to quell some criticism that the regime’s delisting procedures were failing to respect listed individuals due process rights by establishing a focal point within the UN Secretariat that allows individuals to submit de-listing requests
directly to the UN and informs the petitioner of the final decision made by the Sanctions Committee.\textsuperscript{47} This was a nominal improvement to the right of access for the individuals listed because before the establishment of the focal point the only way an individual could have a petition lodged for de-listing was to get his/her state of nationality or residence to petition the Security Council on his/her behalf. The Security Council aimed to improve accessibility to listed individuals by creating the focal point, and it did because the focal point offered greater individual access to initiate delisting requests than the doctrine of diplomatic protection did. However the problem with the focal point is that it does not have the authority to conduct an independent review of listings, to provide effective remedies, nor to provide supplemental information and notification to listed persons.\textsuperscript{48} Therefore, it fell short of what critics of the regime called for, which was an independent and impartial review mechanism that was endowed with the power to offer listed individuals effective relief, such as a issuing a binding recommendation to the Security Council to delist a person.\textsuperscript{49}

Then, in December 2006 the Security Council adopted Resolution 1735, which was “aimed at further streamlining the listing and de-listing procedure”.\textsuperscript{50} First, Resolution 1735 established a procedure for notification of listed individuals and entities of their listing, which must include a summary of the reasons for being listing (if the reasons are available for public dissemination), through the UN Secretariat and member states.\textsuperscript{51} Still, targeted individuals and entities are not informed prior to their being listed and as a result they do not have an opportunity to prevent their inclusion on the list by demonstrating that such an inclusion is unjustified under the terms of the respective Security Council resolution(s). However, notification prior to listing could seriously undermine the economic sanctions system as it could give targeted individuals notice to

\textsuperscript{47} UN Doc. S/RES/1730 (2006), at para. 1.
\textsuperscript{48} “Although Resolution 1730 frees targeted individuals from reliance on a state’s initial espousal of a claim, it does not give targets and opportunity to hear the evidence against them or to present their own case to the Sanctions Committee. Additionally, Resolution 1730 does not require a state to explain why it chose to block an individual’s delisting request.” Genser and Barth, \textit{supra} note 8, at 5.
\textsuperscript{49} See generally Like Minded States Resolution, \textit{supra} note 21.
\textsuperscript{51} UN Doc. S/RES/1735 (2006), at para. 14. This requirement of notification to the listed individual or entity after listing decision is made was made mandatory by UNSC Res. 1822.
move their funds out of a state’s reach.52 Accordingly, the key to protecting targeted individuals from being wrongly listed would then have to be stronger evidentiary requirements for information that can be used to allow a listing to take place and a clearer definition of what ‘associated with’ actually means.

Secondly, Resolution 1735 built on the statement of case requirement from Resolution 1526 and provided that a state proposal for listing should include a detailed statement of the case that includes specific information supporting a determination that an individual or organization meets the criteria of Resolution 1617.53 In particular, the state that proposes that an individual or entity should be listed must indicate the nature of the information, i.e. as coming from intelligence services or other sources, that supports the determination that the criteria of Resolution 1617 is satisfied and if possible the state must provide any additional supporting evidence available to it.54

Another progressive change to the 1267 sanctions regime established under Resolution 1735 is that the proposing state must specify which parts of the statement of the case can be made public for the purposes of notifying the listed individual or entity.55 Lastly, Resolution 1735 clarified some issues relating to de-listing and explicitly stated that change of behavior can result in delisting.56 Resolution 1735 did finally provide listed individuals with notification of their listing and required slightly more detailed information from states requesting a listing but the regime still lacked delisting procedures that complied with due process standards.

Delisting requests submitted either by the individual through the Ombudsperson or by the state of residence or citizenship of the listed individual goes to the Sanctions Committee, which will then make the decision on whether or not to remove the individual from the Consolidated List by the consensus of its 15 Members.57 The Sanctions Committee, “in determining whether to remove names from the Consolidated List, may consider, among other things: (1) whether the individual or entity was placed

52 See Joined Cases C-402/05 P & C-415/05 P, Yassin Abdullah Kadi and the Al Barakaat International Foundation v the Council of the European Union and the Commission of the European Communities, ECR 2008, at paras. 338 – 339. [“Kadi case (ECJ)”].
55 id., at para. 6.
56 id.
57 id., at para. 14.
on the Consolidated List due to a mistake of identity; or (2) whether the individual or entity no longer meets the criteria set out in relevant resolutions, in particular resolutions 1617 (2005)” and 1822 (2008). Furthermore, when making an evaluation under (2) above, “the Committee may consider, among other things, whether the individual is deceased, or whether it has been affirmatively shown that the individual or entity has severed all association, as defined in paragraph 2 of resolution 1617” and reaffirmed in paragraph 2 of resolution 1822, “with Al-Qaida, Usama bin Laden, the Taliban, and their supporters, including all individuals and entities on the Consolidated List”.

Nevertheless, there is still no independent review body with the power to give an effective remedy to listed individuals at the UN level and no effective opportunity is provided for listed individuals or entities to challenge a listing before a national court or tribunal, as Member States are obligated, in accordance with Articles 25 and 103 of the UN Charter, to comply with resolutions of the Security Council under Chapter VII of the UN Charter. Moreover, even if a domestic legal order did allow individuals to take direct legal action against a Security Council resolution, the United Nations enjoys absolute immunity from every form of legal proceedings before national courts and authorities, as provided for in Article 105, paragraph 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations and other agreements.

In 2008 the Security Council sought to strengthen its review procedures for the List and it adopted Resolution 1822, which directed the Sanctions Committee to undertake a comprehensive review of all listed names by 30 June 2010 in order to ensure the Consolidated List is as updated and accurate as possible and to confirm that listing remains appropriate. Resolution 1822 also directed the Sanctions Committee conduct an annual review of all names on the Consolidated List that have not been reviewed in three or more years ensure the accuracy and appropriateness of the listed names. Lastly, Resolution 1822 provided that listed names must be made accessible on the 1267 Sanctions Committee website along a narrative summary of the reasons for the listing.

59 id.
60 UN Doc. A/RES/1/22 (1946).
63 id., at para. 13.
and states must notify or inform a concerned individual or entity of their delisting in a timely manner.\textsuperscript{64}

The most recent improvement to the 1267 sanctions regime’s compliance with relevant due process norms is the establishment of an independent and impartial Ombudsperson by Resolution 1904.\textsuperscript{65} In June 2010 the UN Secretary General, ‘in close consultation with the Sanctions Committee’, appointed Judge Prost to be the Ombudsperson, and she will now perform the mandated ‘tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government’.\textsuperscript{66} Resolution 1904 and its annexes are “directed at improving the gathering of relevant information pertaining to listings, expanding the flow of information between the Sanctions Committee and listed persons and entities, and ensuring that requests for delisting are more fully considered by the Sanctions Committee”.\textsuperscript{67} The Ombudsperson will replace the Focal Point as the only avenue for listed individuals to directly petition the UN to be de-listed under the 1267 sanctions regime but the Focal Point will still be available for individuals to directly petition the UN to be de-listed from other targeted sanctions regimes.\textsuperscript{68} The effect of the establishment of the Ombudsperson on the 1267 sanctions regime will be discussed in depth in Chapter 6, so for now it suffices to say that the sanctions regime still does not have an independent review mechanism with the power to provide an effective remedy to persons petitioning the UN to be delisted.

Finally, to evaluate state implementation of the sanctions regime and consequently strengthen state implementation the Security Council amended the 1267 sanctions regime was by establishing a Monitoring Group pursuant to Security Council Resolution 1526 (2004), which is still active today.\textsuperscript{69} The Monitoring Group is composed of independent experts appointed by the UN Secretary General and it assists the Sanctions Committee by evaluating the implementation of the sanctions regime by member states and reporting on developments that have an impact on the effectiveness of the sanctions regime. While, this 1267 sanctions regime body is worth noting, it is also important to understand that

\begin{itemize}
\item \textsuperscript{64} \textit{id.}, at para. 23.
\item \textsuperscript{65} UN Doc. S/RES/1904 (2009).
\item \textsuperscript{66} \textit{id.}, at para. 20.
\item \textsuperscript{68} UN Doc. S/RES/1904 (2009), at para. 21.
\item \textsuperscript{69} UN Doc. S/RES/1526 (2004).
\end{itemize}
the Monitoring Group lacks any real power in the listing/delisting process and has no authority to recommend the delisting of a name or require the Security Council to amend the sanctions regime to ensure that rights of due process are made available to individuals targeted with sanctions.

2.3. Due process based legal challenges to the 1267 sanctions regime

Since its inception the Security Council’s 1267 sanctions regime has come under fire from UN member states, listed individuals and entities, domestic and international courts and tribunals, human rights NGO’s and even other organs of the UN, that all claim the 1267 sanctions regime does not secure targeted individuals’ procedural due process rights, particularly the right to an effective remedy. Furthermore, over the past few years there have been a growing number of domestic and regional court challenges to the

---

70 In 2006 the UN Secretary General Secretary called on the Security Council to establish “fair and clear procedures” for the 1267 sanctions regime for listing and delisting individuals and entities and furthermore elaborated on the substance of these “fair and clear procedures”. See General Kofi Annan, non-paper written to United Nations Security Council referenced by Under-Secretary General for Legal Affairs Nicola Michel in his address to the United Nations Security Council, Proceedings of 5474th Meeting, UN Doc. S/PV.5474 (2006), at 5. See also Report of the High-level Panel on Threats, Challenges and Changes, A More Secure World, Our Shared Responsibility, UN Doc. 1/59/656 (2004), at para. 153, which noted that the “way entities or individuals are added to the [...] list [...] and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions.” In August 2006 the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, Martin Scheinin, called for proper procedural due process safeguards for the UNSC targeted economic sanctions regimes. UN General Assembly, Report of the Special Rapporteur, UN Doc. A61/27 (2006), at para. 34.

71 “It has been argued by leading scholars of international law that the present situation amounts to a ‘denial of legal remedies’ for the individuals and entities concerned and is untenable under principles of international human rights law” because “everyone must be free to show that he or she has been unjustifiably placed under suspicion and that therefore (for instance) the freezing of his or her assets has no valid foundation”. B. Fassbender, Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter, 20 March 2006, Study commissioned by the United Nations Office of Legal Affairs, Office of Legal Counsel, at 5. Available at: http://www.un.org/law/counsel/Fassbender_study.pdf (“Fassbender Report”). Furthermore, the Eminent Jurists Panel of the International Commission of Jurists said the 1267 sanctions regime procedures, are deemed to be “arbitrary” and discriminatory by numerous nations and international agencies. It also concluded that the system is “unworthy” of international institutions such as the United Nations. International Commission of Jurists, Assessing the Damage, Urging Action: Report of the Eminent Jurists panel on Terrorism, Counter-Terrorism and Human Rights (2009), at 116 – 17. See also Watson Study Update, supra note 14, at 10. “Currently the most pressing human rights concerns regarding targeted sanctions relate to the perceived difficulty for the individual to challenge the sanctions taken against him. The rights to a fair trial and effective remedy lie at the heart of the debate” on targeted sanctions violating individuals’ human rights.
listing/delisting procedures provided for in the 1267 sanctions regime. The legal challenges have not questioned the Security Council’s “authority to impose sanctions, but they have complicated implementation efforts, generating concerns about the legitimacy of targeted sanctions and the effectiveness of the tool”. Some of these legal challenges have garnered worldwide attention and clearly provoked the Security Council to take incremental measures to reform the 1267 targeted sanctions regime’s procedures so that they are more in line with the internationally accepted minimum standards for transparency and due process.

For instance, in June 2009, a Canadian Federal Court noted that the 1267 sanctions regime creates a situation for the listed individual that is “not unlike that of Josef K. in Kafka’s *The Trial*, who awakens one morning, and for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime”. The Canadian court stated that this sentiment was based on the fact that listed individuals have no real right to review the evidence against them because the state that requests their listings can keep such information confidential if it wishes and no right to a hearing before and independent and impartial body that is authorized to review the Sanctions Committee’s listing decisions and remove the listed individual from the list based on facts or law.

Upon assessing the impact of the Canada’s implementation legislation for the 1267 sanctions regime on a Canadian citizen who was listed in 2006, the Canadian Court concluded that the sanctions breached the petitioner’s rights under the Canadian Charter.

---

72 “Faced with the lack of any judicial remedies against Security Council decisions at both the international and national level, affected persons are resorting to domestic courts, attacking the domestic acts adopted in implementation of the relevant resolutions”. See A. Tzanakopoulous, *United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in Abdelrazik v. Canada*, 8 J.I.C.J. 249, at 250 (2010).
74 “[T]hese courts have implied that, should the Security Council provide a reasonable means for administrative review of a listing, they would consider the due process issue remedied.” Genser and Barth, *supra* note 8, at 6. See *Kadi case (ECJ)*, *supra* note 52, at para. 319, “[S]o long as the as under that system of sanctions the individual or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever.”
75 Abousfian Abdelrazik *v.* the Minister of Foreign Affairs and the Attorney General of Canada, 2009 FC 580, at para. 53.
76 *id.*
Furthermore, one federal court judge commented directly on the 1267 sanctions regime by saying:

I add my name to those who view the 1267 Committee regime as a denial of basic legal remedies and as untenable under the principles of international human rights. There is nothing in the listing or de-listing procedure that recognizes the principles of natural justice or that provides for basic procedural fairness […] The 1267 Committee listing and delisting processes do not even include a limited right to a hearing. It can be hardly said that the 1267 Committee process meets the requirement of independence and impartiality when, as it appears may be the case involving Mr. Abdelrazik, the nation requesting the listing is one of the members of the body (the Security Council’s Sanctions Committee) that decides whether to list or, equally important, to de-list a person. The accuser is also the judge.78

The 1267 sanctions regime was also the basis for an individual complaint against Belgium in the Human Rights Committee (HRC) that was decided in October 2008.79 The Sayadi & Vinck Case “exposed the problems of wrong listings and the glaring deficiency of the delisting procedure” for the 1267 sanctions regime.80 The case concerned a Belgian couple alleged to have provided financial and other assistance to and receiving funding from, individuals associated with Al-Qaida. The couple was added to the 1267 sanctions list in 2003 after Belgium proposed their listing. Following a judicial decision in their favor from the Brussels Court of First Instance and two unsuccessful delisting requests by the Belgian government on their behalf (one delisting request was based on an order by the Brussels Court), the targeted individuals filed a complaint with the HRC against Belgium.

Belgium argued that the HRC had no jurisdiction over the Complainants’ claim because the measures the complaint was based on were taken to implement UN anti-terror sanctions and such measures were dictated by its international legal obligation to comply with Security Council decisions adopted under Chapter VII of the UN Charter. Consequently, Belgium contended, the Complainants’ were not subject to their

77 id., at para. 153.
78 id., at para. 51.
jurisdiction within the meaning of Article 1 of the International Covenant on Civil and Political Rights (ICCPR) Optional Protocol and thus the Complainants’ could not challenge Belgium’s measures taken to implement its UN Charter obligations. The HRC disagreed with Belgium and concluded that while it could not rule on the legality of Security Council measures taken under the UN Charter, it was competent to consider whether a state party had violated rights set forth in the ICCPR, regardless of the source of the obligations implemented by the state party.

On the merits the HRC found Belgium breached its obligations under the ICCPR. The HRC’s reasoning was based on the conclusion that Belgium was not obligated to propose the Complainants’ names for listing. Accordingly, the HRC held Belgium had an obligation to provide the Complainants with an effective remedy, which entailed undertaking all that was in its power to have the Complainants’ names removed from the 1267 sanctions list as soon as possible and prevent similar violations from occurring in the future.

Most importantly though, the HRC held that Belgium could not legally violate the ICCPR human rights provisions even when it is implementing a Security Council Resolution adopted under Chapter VII of the UN Charter. Essentially, while the HRC clearly stated that it could not review Security Council resolutions, it was unambiguous in its holding that “State measures taken to give effect to Security Council Resolutions must respect human rights”, regardless of whether or not the Resolutions are per se consistent with human rights. This puts Belgium in a no win situation where they are forced to either respect the Security Council resolution and violate the Complainants’ human rights or comply with the HRC judgment and respect the Complainants’ human rights while not

---

81 Sayadi & Vinck case, supra note 79, at para. 6.1. Belgium’s argument was based on its obligations under arts. 25 (i.e. states must accept and carry put binding decisions of the Security Council taken pursuant to its Chapter VII powers) and 103 (sets out the primacy of a state’s Charter obligation vis-à-vis their other international obligations).

82 id., at para. 7.2.

83 First, the HRC concluded that Belgium violated the petitioners’ rights under the art. 12 of the ICCPR to liberty of movement by implementing the 1267 sanctions travel ban against them. id., at para. 10.8. Secondly, the HRC then held there had been an unlawful attack on the honor and reputation of the applicants under art. 17 of the ICCPR because of the stigmatization stemming from their listing. id., at para. 10.13.

84 id., at para. 12.

85 id.

86 Keller and Fischer, supra note 80, at 264.
upholding their obligations under the Articles 25 and 103 of the UN Charter. Obviously the HRC’s decision was only directed at Belgium, however “it ultimately sends a signal to the UN, namely the Security Council” that the current listing/delisting procedures of 1267 sanctions regime do not comply with the due process standards for such procedures in the ICCPR.\(^87\)

There was also, of course, the well-known \textit{Kadi} case from the European Court of Justice (ECJ) in 2008 that was based on the 1267 sanctions regime.\(^88\) In the \textit{Kadi} case judgment the ECJ claimed that is was not reviewing a Security Council Resolution but rather the European Union’s implementation regulation of the Council’s Resolution.\(^89\) However, since the implementation regulation was an exact replica of the Security Council Resolution the Court’s holding should be read as indirectly speaking to the Resolution’s compliance with internationally accepted due process standards. The Court held the listing procedure of the 1267 sanctions regime infringed upon the petitioner’s due process rights, in particular the right to be heard and the right to an effective remedy and consequently it annulled the European Council regulation that implemented the 1267 sanctions regime.\(^90\) Furthermore, the ECJ noted that the Sanctions Committee procedures lacked sufficient guarantees of judicial protection.\(^91\)

Most recently, the newly established Supreme Court of the United Kingdom addressed the issue of UK laws that implement the 1267 regime and their compliance with due process standards.\(^92\) The UK Court was charged with determining whether the UK’s implementation regulations, which placed asset freezes and travel bans on targeted individuals, were unlawful. While the Court did explicitly consider the ECJ’s holding in the \textit{Kadi} case and the Canadian Federal Court’s holding in the \textit{Abdelrazik} case, it eventually found that the \textit{Al-Jedda}\(^93\) case had established a precedent “that article 103 (of the UN Charter) leaves no room for any exception, and that the (European) Convention

\(^{87}\) \textit{id.}.

\(^{88}\) \textit{Kadi} case (ECJ), \textit{supra} note 52.

\(^{89}\) \textit{id.}, at para. 288.

\(^{90}\) \textit{id.}, at paras. 348 – 349.

\(^{91}\) \textit{id.}, at 322. \textit{See also} G. de Burca, \textit{The European Court of Justice and the International Legal Order After \textit{Kadi}}, 15 Harv.Int’l L.J. 1 at 25 (2010).


rights fall into the category of obligations under an international agreement over which obligations under the (UN) Charter must prevail.”\textsuperscript{94} However, the Court continued its analysis by concluding that \textit{Al-Jedda} “leaves open for consideration how the position may be regarded under domestic law”\textsuperscript{95} and in the end held that the targeted individual “is entitled to succeed on the point that the regime to which he has been subjected has deprived him of access to an effective remedy.”\textsuperscript{96} Consequently, the Court quashed the UK implementation regulations because it concluded that the regulations violated the 1946 United Nations Act.\textsuperscript{97}

What is even more important to the analysis of this thesis is that the majority opinion of the UK Court also considered whether the recently enacted Security Council Resolution 1904, which established the Ombudsperson, remedied prior due process concerns.\textsuperscript{98} In particular, the Court scrutinized the 1267 regime’s continuing problems regarding its lack of compliance with applicable due process standards before concluding that “[w]hile these improvements are to be welcomed, the fact remains that there was not when the designations were made, and still is not, any effective judicial remedy.”\textsuperscript{99} Essentially, the UK Court argued that the Security Council’s establishment of 1267 Ombudsperson did not remedy the sanction regime’s due process deficiencies.

Moreover, the judgment of this UK Court, as well as nearly all of the other recent regional and domestic court decisions relating to the Security Council’s 1267 targeted sanctions regime’s procedures, illustrate courts that “are more concerned with protection of individual rights than” their “potential violation of international law.”\textsuperscript{100} Accordingly, these holdings may reasonably be interpreted as evidencing an emerging trend in domestic and regional courts that establishes these courts believe a state’s obligation to comply with an individual’s fundamental right to due process should take precedence over its UN Charter obligations regarding Chapter VII decisions of the Security Council.

\textsuperscript{94} A v. HM Treasury, \textit{supra} note 92, at 411 – 12.
\textsuperscript{95} \textit{id.}, at 412.
\textsuperscript{96} \textit{id.}, at 414.
\textsuperscript{97} \textit{id.}, at 400. The UK’s 1946 United Nations Act provides the executive discretion to adopt regulations outside of parliamentary scrutiny when it acts to implement certain mandates of the Security Council. However, such regulations “must be either necessary of expedient to enable those measures to be applied effectively.” United Nations Act, 1946, 9 & 10 Geo. 6, c. 45, § 1.
\textsuperscript{98} A v. HM Treasury, \textit{supra} note 92, at 413 – 14.
\textsuperscript{99} \textit{id.}
\textsuperscript{100} Genser and Barth, \textit{supra} note 8, at 23.

23
So far criticism, such as that discussed above, of the Security Council’s 1267 targeted sanctions regime seems to have motivated the Council to take incremental steps to bring the sanctions regime closer to compliance with the applicable principles of justice and the rule of law. However, if the Security Council does not do more to respect at least the fundamental human rights accepted by the international community, the UN counter-terrorism efforts may backfire on them and leave the Security Council less influential than it was before it adopted the 1267 regime. This can happen if states begin to be reluctant to or outright refuse to comply with the 1267 sanctions regime and future Security Council resolutions. If states do begin to refuse to comply with Security Council decisions taken under Chapter VII of the UN Charter, this would significantly undermine the Council’s ability to fulfill its mandate to maintain international peace and result in such states not fulfilling their obligations under Articles 24, 25, and 103 of the UN Charter. In sum, “a further erosion and diminution of Security Council legitimacy to address critical problems of terrorism and proliferation could have highly undesirable consequences” and “should the current trajectory of court challenges continue without adequate response, the Security Council’s ability to take action against threats to international peace and security could be severely compromised”.

2.4. 1267 sanctions, administrative or punitive in character

Some, including the Security Council, have argued that the 1267 sanctions regime’s procedures do not have to comply with due process because they are not criminal or civil in nature but rather temporary administrative measures and thus due process rights are not applicable. No matter how these targeted sanctions are characterized the fact

101 See Watson Report Update, supra note 14, at 5.
102 See UN Doc. S/RES/1735 (2006), which states that targeted sanctions are characterized as being ‘preventive in nature and not reliant upon criminal standards set out under national law’. However the Watson Report Update noted that “the open-ended nature” of the sanctions application by the “UN sanctions committees, combined with the potential violation of elements of due process in their application to individuals, have led to legal challenges about their punitive nature”. See Watson Report Update, supra note 14, at 7. “Most proposals for meeting legal standards have been dismissed as politically infeasible by the permanent members of the Security Council (P5), while proposals that gain support from the P5 contain most of the same shortcomings on due process rights that led to the” ruling in the Kadi case by the ECJ. “The impasse results from fundamental differences between permanent members of the Council and many member states regarding the listing enterprise. The permanent members consider this an administrative political act, beyond judicial review, aimed at constraining potential terrorist actions. Member states consider that all Council actions to preserve peace and security, including listing for counterterrorism
remains that these “sanctions, which give rise to severe consequences of the targeted individuals, are imposed on them without any international legal mechanism for reviewing the accuracy of the information forming the basis for the state’s listing request or the proportionality of the measures adopted” thus there is still a substantial possibility that individuals might be listed based on mistaken identity. Moreover, the denial of financial assets and the indefinite duration of the 1267 sanctions constitute punitive actions that entitle those affected to legal and human rights protection. Consequently the rules of procedural due process must be applicable to such sanctions or innocent people may have their lives ruined while being left with no effective remedy under any legal order. Therefore, this Article will be constructed on the preliminary premise that regardless of how the 1267 sanctions are characterized, by the Security Council or member states for that matter, procedural due process standards must apply de facto to such sanctions because of their inevitable harmful effects on targeted individuals.

After reviewing the 1267 sanctions regime, some recent legal challenges to the regime and accepting the reality that procedural due process standards must apply to such sanctions, the question that arises is whether or not the Security Council, because of its unique nature as the primary political body of the UN, is even capable of being legally bound to comply with international law norms, such as those rules regarding procedural

proposes should be consistent with the highest standards or international law, especially human rights.” Lopez et al., supra note 73, at 2.

103 Keller and Fischer, supra note 86, at 259. See also Report of Special Rapporteur [Martin Scheinin], supra note 70, at paras. 32 – 40. Scheinin argued that the open-ended nature of UNSC targeted economic sanctions means that the sanctions may be equivalent to permanent measures. He also concluded that permanent sanctions, regardless of their actual classification by the Security Council, fall within the scope of criminal sanctions for the purpose of international human rights law and thus procedural due process safeguards should apply to them. Iain Cameron argued that the blacklisting, like that of the 1267 sanctions regime, is a technique that is so intensely punitive that it cannot be considered merely preventive. Iain Cameron, Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play, study prepared for the Subcommittee on Human Rights, European Parliament (2008), at 20 – 34.

104 “Some contend that sanctions are temporary administrative measures, but the denial of financial assets and the indefinite duration of the 1267 sanctions constitute punitive actions that entitle those affected to legal and human rights protections.” Lopez et al, supra note 73, at 3. “The longer an individual is on a list, the more punitive the effect will be.” Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/HRC/8/13 (2008), at paras. 47, 50. When an international organizations imposes sanctions that amount to a levying of fines, which “is a penal measure, an impartial tribunal is required to decide whether an infraction has been committed and, if so, how it should be dealt with”. The reasoning for such a rule is based on the principle that provides “[i]n the case of criminal charges an independent and impartial tribunal is required by the European Convention of Human Rights (art. 6), the Universal Declaration of Human Rights (art. 10), and the International Covenant on Civil and Political Rights (art. 14)”. H. G. Schermers and N. Blokker, International Institutional Law 979, n. 563, 4th ed. (2003).
due process, when it is exercising its Chapter VII powers to establish sanctions targeting individuals.
3. IS THE UNITED NATIONS SECURITY COUNCIL UNBOUND BY RELEVANT RULES OF INTERNATIONAL LAW WHEN ADOPTING TARGETED SANCTIONS PURSUANT TO ITS CHAPTER VII POWERS?

3.1. In general, are international legal norms applicable to the Security Council?

The preliminary question that must be answered is whether or not international law is applicable to the Security Council and as a result, the Council may be legally obligated to comply with functionally relevant norms of international law, when targeting individuals with sanctions.

The universal consensus among judges and legal scholars is that international organizations can be bound by international legal norms that are relevant to the functions, purposes and powers of each specific international organization. According to this rule, it is possible that the Security Council may have an obligation under international law to ensure that rights of due process are made available to individuals directly targeted with sanctions under Chapter VII of the UN Charter. However, an in depth analysis of the reasoning that establishes this rule must be undertaken to determine if there is a logical legal basis for it in international law.

The first line of reasoning that explains why the Security Council can be bound by international law relates to the UN’s status as an international legal person. Essentially, this argument contends that if an international organization possesses an international legal personality that organization can accordingly be bound by international law as an inherent result of possessing such legal personality.

Importantly, this rationale was adopted by the International Court of Justice (ICJ) in the

---

105 See Fassbender Report, supra note 71, at 6 – 7.
106 id., at 16. The UN Security Council is “a subject of international law” and consequently it “is bound by” certain applicable “rules of international law”. Furthermore, the Security Council “could be obliged to observe” certain applicable rules of international law, such as “standards of due process” by “virtue of international treaties (including the UN Charter as the constitution of the United Nations), customary international law, or general principles of law recognized by the members of the international community”.
107 See T. Dannenbaum, Translating the Standard of Effective Control into an System of Effective Accountability, 51 Harvard Int’l L. J. 114 at 135 (2010), and J. Paust, The UN is Bound by Human Rights Law Understanding the Full Reach of Human Rights, Remedies, and Nonimmunity, 51 Harvard Int’l L. J. Online 1 (2010), http://www.harvardilj.org/online. “There is good reason to find the United Nations… and its entities… legally bound to conform to human rights standards, since ‘it surely is a consequence of the UN’s legal personality at international law that it is bound by customary international law’ and ‘is constitutionally mandate to promote the advancement of human rights’ in Article 1(3) of the U.N. Charter”. 

27
Reparations for Injuries Advisory Opinion, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt Advisory Opinion, and in the 2006 Fassbender Report commissioned by the UN Office of Legal Affairs, among others.

In the Reparations for Injuries Advisory Opinion the ICJ famously stated that the United Nations, as an international organization, “is a subject of international law and capable of possessing international rights and duties”. In effect, the Reparations for Injuries Advisory Opinion applied this rule to come to the conclusion that the under international law the UN must be permitted to have the power to bring an international claim against a state for damage resulting from a breach by that state of its obligations under international law. A consequence of this rule, which recognizes the status of the UN and its organs as an international legal person, is that it implies the existence of a principle that provides that international law can be applicable to the UN because it is a subject of international law and UN member states have entrusted “certain functions to it, with the attendant responsibilities”.

This outcome is understandable because it would be contradictory to conclude that international organizations have the right under international law to bring claims for damages, breaches of obligations and violations of legal norms under international law but at the same time they cannot have a duty to comply with international law themselves. Therefore, one implied characteristic of the UN Security Council possessing an international legal personality is that it can have the duty to comply with international legal norms and it can be bound by certain international legal obligations, which are relevant to its constitutional purposes and functions.

---

110 Fassbender Report, supra note 71, at 21. “The development of international human rights law, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the UN itself, when its actions has a direct impact on the rights and freedoms of an individual, observes standards of due process, or ‘fair and clear procedures’, on which the person concerned can rely. This finding is in line with essential notions of the concept of international personality”.
111 Reparations for Injuries, supra note 108, at 179.
112 id.
113 “To be an international person means only to be capable of bearing rights and duties. No answer is given to the question of what rights and duties individual organizations have.” Moreover, “[s]ince the powers which fill or give substance to, the organization’s personality are limited and determined by the latter’s purposes and functions, frequent reference is made to the functional nature of personality, or functional personality of international organizations.” Schermers and Blokker, supra note 104, at 992 – 993.
The ICJ in the *Interpretation of the WHO-Egypt Agreement* Advisory Opinion further explained the principle of international legal personality of the UN when it held that “international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”. \(^{114}\) The ICJ clearly stated that international legal norms are applicable to the UN and its organs, as a result of their status as subjects of international law. Or put in another way, the UN can be subordinate to applicable international laws.

Moreover, “the subordination of international organizations to international law means that their legal orders are partly made up of international rules, which they will have to apply in both their internal and external relations”. \(^{115}\) Essentially the ICJ’s conclusion in its *Interpretation of the Agreement* opinion illustrates the existence of a principle of international law that holds UN organs are bound by the customary international law rules and general principles of law that are relevant to their constitutional functions. Accordingly, UN organs are obligated to comply with such legal norms when engaging in any internal or external actions that involve the exercising of their powers or performing their functions.

One point that must be made at this time is, that while international organizations and states are both subjects of international law the extent and nature of their rights and duties under international law are not identical and must be distinguished. \(^{116}\) For example, it does not follow from the fact alone that UN member states, or even an overwhelming majority of member states, have ratified certain treaties that an according obligation of the UN Security Council has come into existence. \(^{117}\) The reason for this rule is that the concept of international legal personality, or subjects of international law, is based on a distinction between particular subjects and their particular rights, duties or powers and

---

\(^{114}\) *Interpretation of the Agreement*, *supra* note 109, at 89-90.

\(^{115}\) Schermers and Blokker, *supra* note 104, at 996.

\(^{116}\) *Reparations for Injuries*, *supra* note 108, at 179. “This does not mean that the rights and duties” of the UN “are the same as those of a State.” *See also* Fassbender Report *supra* note 71, at 17 (which cited Schermers and Blokker, *supra* note 104, at 992 – 994), “The concept of international persons or subjects of international law, is based on a distinction between particular subjects and their particular rights, duties or powers”.

\(^{117}\) Fassbender Report, *supra* note 71, at 17.
the independence of international organizations from their member states. The extent and nature of each subject’s rights and duties under international law “depends on the needs of the community”. Thus it is not correct to conclude that the Security Council has an obligation to comply with all international treaty law that a majority of UN member states are party too.

The ICJ clarified the rule regarding the scope and nature of international norms that are applicable to international organizations by concluding “whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization (UN) must depend on upon its purposes and functions as specified or implied in its constituent documents and developed in practice”. Therefore, the UN and its organs are endowed with a certain amount of autonomy from UN member states and consequently the scope and nature of the obligations of any specific UN organ, which must be complied with under international law, are based on the functions and purposes of that organ. In essence, the holdings of the ICJ indicate that the Security Council is obligated to comply with the customary rules of international law and the general principles of law that are functionally relevant or necessary to the performance of the purposes, powers, duties and rights of the UN, while states are bound by all international legal norms.

This rule establishing the limited or conditional nature of Security Council obligations and duties under international law is logical because certain rules of international law “are not relevant for the international organizations, which have no territory, confer no nationality and do not exercise jurisdiction in the same sense as States” and consequently, in practice, they cannot complied with by organs of the UN. However, there are many rules of international law that are relevant to the purposes and functions of the Security Council and, moreover the Council is structurally capable of complying with these rules. Consequently, such international legal norms should be interpreted as being applicable to the Council as well as states. Furthermore, the Security

118 id.
120 id., at 180.
121 Schermers and Blokker, supra note 104, at 994.
Council has an obligation to comply with relevant international laws because such a duty is inherent in its possession of an international legal personality.

There is also issue of whether or not the fundamental principle that provides “the basis of international law is consent between states, express or tacit” also applies to international organizations. Schermers and Blokker contend, “there are several arguments why the position of international organizations differs from that of states and why their subordination to international law is clearer than that of states”. In their view, “these arguments may be the basis for considering international organizations bound by rules of international law even without their consent”.

The first argument is based on the principle of state succession, which provides “a new state is often bound by the obligations of its predecessor” and by analogy is applied to organizations. Accordingly, the first argument maintains, “an organization founded by states will be bound by the obligations to which the individual states were committed when they transferred posers to the organization”. The second argument reasons that because international organizations “are established under international law” and “their constitutional roots are in international law, no superiority over international law can be pleaded on their behalf”. Finally, the third argument declares, since “international organizations cannot participate in the creation of new rules on international law in the same way as states, […] their general abstention from” giving their consent to be bound by a rule “cannot therefore be interpreted as a desire not to be bound”.

As these arguments are largely based on fundamental principles of international law and/or practical necessities stemming from the nature of the international legal personality of international organizations, it is reasonable to conclude there is now an established principle of international law that provides international organizations can be considered bound by certain relevant international legal norms. Moreover, the ICJ’s

---

122 Schermers and Blokker, supra note 104, at 995.
123 \textit{id.}
124 \textit{id.}
125 \textit{id.}
126 \textit{id.}
127 \textit{id.}
128 \textit{id.}, at 996 – 995. “It will be often necessary to search for rules of international law which can bind an international organization, irrespective of its will.”
129 \textit{id.}, at 995. For example, organizations may be bound by certain relevant “treaties which they have not ratified” and/or obliged to apply germane “rules of customary law which they have not (at least tacitly)
conclusion in the *Interpretation of the Agreement* Advisory Opinion is consistent with the
interpretation that their is a general acceptance of this principle, that allows international
organizations to be bound by certain relevant rules of international law without their
consent, by the Court.  

At this point it is important to recognize the uniqueness of the Security Council and
address the arguments of some scholars that contend, as the primary political organ of the
UN, the Security Council’s enforcement powers are not limited by international law. It is
ture that the Security Council is a political organ and the UN Charter does not explicitly
require the Council to comply with international law when it takes actions under Chapter
VII of the Charter. However, customary international law and general principles of law
can apply to the Security Council, just as it can to other subjects of international law, thus
these sources of international law are clearly capable of limiting the Security Council’s
enforcement powers.  

Furthermore, some scholars reason that Security Council’s ability to act swiftly in the
face of a threat to international peace and security may be curtailed if it were obligated to
comply with international legal norms relevant to its actions and thus the Council is
unbound by law. However, this argument is not a legal argument, it is a necessity
argument, and as such it should not be recognized as a valid reason to override an
otherwise applicable obligation on the Security Council to obey international law.

Finally, a common argument is that Chapter V of the UN Charter confers on the
Security Council the power to place binding obligations on states and Article 103
provides for supremacy of these obligations over contradictory international agreements,

130 The ICJ considered that “international organizations are subjects of international law and, as such, are
bound by any obligations incumbent upon them under general rules of international law”. Interpretation of
the Agreement, *supra* note 109, at 90. This ICJ finding can reasonably be interpreted to be in harmony with
the existence of a legal maxim that allows international organizations to be bound by rules of international
law without their consent because in this Advisory Opinion the ICJ did not indicate that international legal
obligations applicable to organizations were based conditionally on the consent of the organization.
while Article 25 provides for supremacy of these obligations over customary international law. It is true that these arguments evidence the Security Council’s uniqueness, however it does not logically follow from this fact that there is a principle of international law that provides the Council is unbound by law. Moreover, this argument does not even claim that general principles of law, UN Charter provisions or *jus cogens* can be overridden by Security Council resolutions.

Essentially though, international legal scholars and the ICJ, as explained above, agree that the UN Security Council is obligated to comply with relevant rules of international law when taking actions with external effects, if for no other reason than all international organizations, that are subjects of international law, are obligated to comply with the rules in their constitution, decisions taken by the organization itself, and general principles of international law that are common to legal obligations of its member states. Thus, it is reasonable to conclude that, “it is accepted that the UN has rights and obligations in international law that are appropriate to its role.”

Accordingly, while the powers of the Security Council within the core field of activity, i.e. international peace and security are broad and flexible, as a matter of principle they cannot be unlimited. Moreover, many commentators argue maintain that even though the Security Council is the principal political organ of the UN, it is still bound by certain relevant norms of international law at all times and may never derogate from such norms. These commentators reason that the Security Council, like any other organ of the United Nations, must act “within a legal framework, under a constituent instrument that defines its powers and functions” even if it is a political organ. In the 1948 *Conditions of Admission Case* the ICJ articulated this rule when it held “the political character of an organ cannot release it from the observance of the treaty provisions established by the (UN) Charter when they constitute limitations on its powers and

---

132 Schermers and Blokker, *supra* note 104, at 723.
135 *id.*., at 2. Wood says that “it is widely accepted that, *first*, the Council is to act in accordance with the purposes and principles of the United Nations, and *second*, that the Council cannot contravene peremptory norms of international law (*jus cogens*)”.
136 *id.*
criteria for its judgment”.

The ICJ then reaffirmed this rule in the *Certain Expenses Case* when it acknowledged that the Security Council’s powers are not unlimited, however it did note that when the Council’s actions are necessary for the maintenance of international peace and security, the presumption should be that it is not acting *ultra vires*.

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic Case* also held that the Security Council was bound by international law. The ICTY stated that organs of international organizations are subjected to certain constitutional limitations and as such “neither the text nor the spirit of the (UN) Charter conceives of the Security Council as *legibus solutus* (unbound by law)”.

In sum, the Security Council acts within the general system of international law that governs all international legal persons and to the extent the Security Council operates within the general system of law, it is subject to appropriate principles of international law. Judge Lauterpacht stated this position clearly in his *Genocide Convention Case* opinion where he rejected the view that the Security Council was free to act without any international legal restraints. Moreover, there is not a single statement in any of the ICJ’s relevant *Lockerbie Case* judgments that indicate the Security Council is free to act without international legal restraints when it acts under its powers in Chapter VII of the UN Charter.

---

137 Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 ICJ Rep. 64.
140 Gardam, *supra* note 133, at 300. These principles can be legally based in the UN Charter, treaty law customary international law or general principles of law.
141 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures Order, 1993 ICJ Rep. 440 (Judge Lauterpacht, Separate opinion). *See also* Judge Fitzmaurice’s dissenting opinion in the *Namibia Case* where he states: “[L]imitations on the powers of the Security Council are necessary because of the all too great ease with which an acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to constitute one.” Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 294 (Judge Fitzmaurice, Dissenting opinion).
The sources of such international legal limitations on the Security Council are the UN Charter, *jus cogens*, certain treaties\textsuperscript{143}, customary law\textsuperscript{144} and general principles of law\textsuperscript{145}. The more difficult question to answer is which particular international legal norms apply to the Security Council, or more specifically, does the right to due process of individuals apply to it. This question will be taken up in Chapter 4 of the thesis.

Now, after establishing that the Security Council can be bound to comply with certain rules of international law that are relevant to its purposes and functions, it is subsequently important to further analyze what are the primary sources of international law applicable to the Council and accordingly to understand how the Council’s powers under the UN Charter allow it to set aside certain applicable rules of international law.

### 3.2. Sources of international law that are applicable to the Security Council

#### 3.2.1. The UN Charter

The constitution of an international organization, like the United Nations Charter for instance, is the primary source of international legal limitations on the organization’s powers and ability to act.\textsuperscript{146} A constitution “sets the pattern for the legal order of the international organization” by establishing the powers or competences and setting legal limitations for organizations and its organs.\textsuperscript{147} Essentially, this principle provides that all organs of an international organization are bound under international law to comply with the provisions and rules in its constituent treaty.\textsuperscript{148} Thus, the constitution of any

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{143} See generally Schermers and Blokker, *supra* note 104, at 999.
\item \textsuperscript{144} “Equally with other subjects of international law, international organizations are bound by customary law”. *id.*, at 834. “International custom will apply as much to international organizations as it does to states”. *id.*, at 1002. Also a trend can be seen international human rights law that holds customary international law may also apply to international organizations merely because they take actions that are “governmental” in nature and have direct effects of individuals. Essentially, when a core international customary norm protects human rights an international organization should be obligated to comply with those norms when its actions directly affect individuals. \textit{See} Fassbender Report, *supra* note 71, at 19 – 20.
\item \textsuperscript{145} General principles of law that bind the states that found an international organization are also applicable in the legal order of the organization. Schermers and Blokker, *supra* note 104, at 997. The binding nature of general principles of law on international organizations is also recognized by the ICJ in the \textit{Interpretation of the Agreement} Advisory Opinion. The Court held “international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law”. \textit{See} Interpretation of the Agreement, *supra* note 109, at 90.
\item \textsuperscript{146} Schermers and Blokker, *supra* note 104, at 722.
\item \textsuperscript{147} *id.*
\item \textsuperscript{148} Fassbender Report, *supra* note 77, at 24-25.
\end{enumerate}
\end{footnotesize}
international organization is the primary source of international legal duties and obligations applicable to an organization and as the ICJ ruled in the Reparations Case, the substance of an organization’s rights and duties “depend upon its purposes and functions as specified or implied in its constituent documents and developed through practice.” Consequently, this principle implies that an international organization may be found to take actions that are *ultra vires* when such measures are not necessary to perform the stated purposes and functions listed in or implied from that organization’s constitution and when such measures are not in line with an organization’s other legal limitations found in its constitution.

In practice, a constitution can codify certain norms of international law that an international organization is bound to comply with when taking actions under its attributed, implied or customary powers and which can accordingly invalidate certain actions that do not comply with them. An example of a constitution codifying an international legal norm as a limitation on an international organization’s power is Article 42 of the UN Charter. Article 42 qualifies the Security Council’s power to take military action by containing an express condition to the use of military force that limits the Council to taking such actions that are “necessary to maintain or restore international peace and security”. Therefore, the UN Charter provides a constitutional treaty basis for the requirement that the Security Council is bound by the international law norms of necessity and proportionality when taking Chapter VII measures that involve military force.

Moreover, constitutions can also require an international organization to make decisions in accordance with certain international law norms in a broad or general sense. An example of such a requirement in a constitution of an international organization is Article 1 paragraph 1 of the UN Charter. This provision expressly states that a purpose of the United Nations is to bring about the “adjustment or settlement of international disputes or situations which might lead to a breach of the peace” through measures that are “in conformity with the principles of justice and international law”. Therefore the

---

150 UN Charter, art. 42.
151 UN Charter, art. 1(1). *See also* Gardam, *supra* note 133, at 297-305, for an analysis of the scope and nature of art. 1, of the UN Charter.
in such circumstances the UN and the Security Council is obligated to take certain measures that are in accordance with international law.\footnote{152}

Generally, constitutions of international organizations codify the purposes and principles of the specific organization. Principles and purposes of an international organization expressed in its constituent treaty then act as international legal limitations to the powers of that organization and its organs. Accordingly, an international organization acts \textit{ultra vires} when its actions are not in conformity with its stated principles and purposes in its constitution. The UN Charter clearly illustrates this rule. Article 1 of the UN Charter articulates the purposes of the UN, such as, promoting and encouraging respect for human rights and fundamental freedoms and also the ‘adjustment or settlement of international disputes or situations which might lead to a breach of the peace’ in conformity with the principles of justice and international law.\footnote{153}

Correspondingly, Article 24(2) of the UN Charter obliges the Security Council to act in accordance with the principles and purposes of the Charter when discharging its duties pertaining to the maintenance of international peace and security.\footnote{154} Therefore, the Security Council is “subjected to certain constitutional limitations”\footnote{155} and as a result it is legally bound to promote and encourage human rights by taking actions that are at a minimum, in conformity with the general principles or customary norms of international human rights law.

However, it is worth noting this constitutional limit is too general to derive specific legal obligations, such as due process obligations, from it, which would be applicable to the Security Council. Therefore, the substance of any specific legal obligations, which

\footnote{152} This principle regarding the character of an international organization’s constitution is also supported by Professor Gardam in her conclusion that the reference to the promotion and encouragement of respect for human rights in art. 1(3) of the UN Charter, means that the principles and purposes of the UN, “provides the basis for the conclusion that the Security Council, in its […] enforcement powers, operates subject to restraints derived from relevant and appropriate general principles of law.” See Gardam, \textit{supra} note 133, at 305. Consequently, UN Charter law maintains that compliance with international human rights principles or other relevant legal norms, such as those of international humanitarian law, must be regarded as a prerequisite to valid Security Council action. Thus, the UN Charter is a basis for relevant, general international legal limitations on the power of the Security Council to take measures under Chapter VII. \footnote{153} UN Charter, art. 1.

\footnote{154} \textit{id.,} art. 24(2). \textit{See also} the Namibia case where the ICJ concluded that art. 24(1) of the UN Charter limits the Security Council’s powers in such a way that the Council decisions must comply with the fundamental principles and purposes found in Chapter I of the Charter. Namibia case, \textit{supra} note 141, at 52.

\footnote{155} Tadic case, \textit{supra} note 139, at para. 28.
stems from the general obligation on the Security Council to “promote and encourage respect human rights”, must come from other sources of law, such as customary law, general principles of law, or even certain treaties.\textsuperscript{156} On the other hand, such a general obligation established by the purpose of the UN can by interpreted as further support for the principle that the Security Council is not unbound by international law.

Essentially, the principles and purposes in the constituent treaty of an international organization act as constitutional limits that legally bind an organization when it is discharging its duties or taking actions under an attributed or implied power. In sum, the UN Security Council, like all organs of international organizations, is bound by the international law established or codified in its constitution and it is obliged to act in conformity with the purposes and principles stated in its constitution. However, if constitutional provisions are too broad or vague to extract substantive rules of conduct, such rules must be clarified by other relevant sources of international law that are applicable to international organizations.

3.2.2. \textit{Jus cogens and the Security Council's power to derogate from applicable law}

Many commentators have also argued that \textit{jus cogens} or peremptory norms of international law are binding on international organizations.\textsuperscript{157} The legal basis for such a rule is found in the Vienna Convention on the Law of Treaties, which states that treaties are void if they violate peremptory norms of international law.\textsuperscript{158} Furthermore, the ICJ definitively endorsed the concept of \textit{jus cogens} in a 2006 judgment.\textsuperscript{159} As a result, it is generally recognized that there are certain peremptory norms of international law, which must take precedence over other international rules and as such international organizations are obligated to comply with them just as states would be. For example, the prohibition of genocide is widely accepted as a \textit{jus cogens} norm and consequently the

\textsuperscript{156} For example, if the purposes of the UN are interpreted as a legal basis for an obligation on the Security Council to ensure that the right of due process is made available to individuals directly targeted with sanctions, any substantive rules flowing from this obligation must come from applicable treaty provisions providing for the right to due process, the international customary law of due process or general principles of law.

\textsuperscript{157} See Schermers and Blokker, \textit{supra} note 104, at 882-83.

\textsuperscript{158} Vienna Convention on the Law of Treaties (1969), arts. 53 and 64.

\textsuperscript{159} See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Judgment, 2006 ICJ Rep. 58.
Security Council cannot pass a resolution allowing UN peacekeeping forces or a member state to commit or contribute to genocide for any reason and if it did such a resolution would be void *ab initio*.

It is also commonly accepted that the Security Council cannot derogate or allow derogation from *jus cogens* and consequently its powers are limited by such international legal norms. This rules was articulated by Judge Lauterpacht in his separate opinion in the *Genocide Convention Case* when he said:

> The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.

According to this principle, the Security Council is legally bound to respect *jus cogens* at all times and “if the Council makes a decision that contravenes a peremptory norm, that decision should be considered void *ab initio*”. Furthermore, while Article 103 of the UN Charter could be said to override provisions of any international agreement there is an exception to this rule that holds the Security Council cannot use this power to set aside obligations under international law that have attained the status of *jus cogens*.

Moreover, just because in some cases the exercise of the Security Council’s powers may not be subject to judicial review, that does not mean that it is absolved from complying with the relevant international law. The ICJ has made this point in relation to

---

160 *See* Genocide Convention case, *supra* note 141, at 440. Judge Lauterpacht considered that the Security Council is obligated to comply with *jus cogens* norms of international law, specifically the prohibition against genocide.


162 Genocide Convention case, *supra* note 141, at 440. *See also* Paust, *supra* note 107, at 5. “In 1993, Judge Lauterpact affirmed that *jus cogens* limit the authority of the Security Council and must prevail over its resolutions.”


165 *But see* Lockerbie case, *supra* note 142 and Tadic case, *supra* note 139. Both cases may arguably be interpreted to evidence the existence of a principle that certain international judicial bodies may have cause to consider relevant legal questions touching on the powers of the Security Council.
states repeatedly, most recently in the *DRC v Rwanda Case*. In that case the ICJ held that “whether or not states have accepted the jurisdiction of the Court, they are required to fulfill their obligations under the Charter of the United Nations and other rules of international law”. As a subject of international law with related duties under international law, the same rule holds true for the Security Council.

On the other hand though, there is a consensus that the Security Council may derogate from applicable international law when it is acting under its Chapter VII powers. The reasoning underlying such a rule is that “the UN Charter and general international law are the sources of the powers and obligations of the UN Security Council” and as such, Article 24 of the UN Charter acts as a limitation on the power of the Security Council by expressly stating that the “Security Council shall act in accordance with the Purposes and Principles of the United Nations” when discharging its responsibility for the maintenance of international peace and security. Article 1(1) of the UN Charter then explains that a purpose of the UN is the maintenance of international peace and security and furthermore that “the Security Council must act in conformity with the principles of justice and international in the adjustment or settlement of international disputes”. However it is generally agreed that there is “no similar obligation” for the Security Council to act in conformity with justice and international law when it is acting under Chapter VII of the UN Charter. Moreover, the *travaux préparatoires* of the UN Charter confirm this interpretation” as amendments expressly stating that the Security Council must act in conformity with the principles of justice an international law when taking decisions under its Chapter VII powers were rejected. Therefore, Articles 24 and 1(1) do not require Chapter VII decisions to be in conformity with justice and international law, and as a result the Security Council may adopt a resolution under its Chapter VII powers that derogates from international law that would otherwise be applicable.

---

168 *id.*, at 759.
169 *id.*, at 760.
170 *id.*
171 Summary Report of the Ninth Meeting of Committee I/1, UN Doc. 742, I/1/23/ 1 June 1945, UNCIO Vol. 6 at 317.
Article 103 of the UN Charter further supports the principle that the Security Council may derogate from applicable international law when acting under its Charter VII powers because that Article provides that if obligations of UN member states under the UN Charter conflict with their obligations under another international agreement, those under the Charter prevail. Furthermore, the ICJ in its Order on Provisional Measures in the *Lockerbie Case* confirmed that obligations “under the Charter” include those obligations arising directly from provisions of the UN Charter and those arising from binding decisions of the Security Council.\(^{172}\) However, “Article 103 refers only to treaty obligations, not to obligations under customary international law”.\(^{173}\) Instead, Article 25 of the UN Charter is the legal basis for obligations under the Charter to prevail over customary international law obligations of UN Member States because that article expressly states that UN Member States agree to accept and carry out the decisions of the Security Council in accordance with the Charter and “there is no limitation in the article to decisions which are in conformity with customary international law”.\(^{174}\)

Still, as explained earlier, it is generally accepted that notwithstanding Articles 25 and 103 of the UN Charter, the Security Council is bound by *jus cogens* norms and must respect such norms at all times.\(^{175}\) In fact the European Court of First Instance in the *Kadi Case* held *jus cogens* are non-derogable and thus binding on all subjects of international law.

\(^{172}\) Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya Arab Jamahiriya v. United Kingdom), Provisional Measures, 1992 ICJ Rep. 17 (Judge Oda, Declaration). In fact Judge Oda stated in his declaration that “under positive law of the United Nations Charter a resolution of the Security Council may have binding force, irrespective of the question whether it is consonant with international law derived from other sources.” *See also* R (Al Jedda) case, *supra* note 93, where the House of Lords followed the decision of the ICJ in the *Lockerbie Case* Provisional Measures Order and held that the term “obligations… under the present Charter” in art. 103 of the UN Charter encompassed art. 25 of the Charter, i.e. all obligations following from binding resolutions of the Security Council and the House of Lords also agreed that art. 103 applied not only to ‘obligations’ under the UN Charter, but also to authorizations by the Security Council, which was accepted on the strength of supporting state practice and academic opinion. Lastly, the House of Lords accepted that art. 103 of the UN Charter applied to all conflicting treaty obligations, thus there was no exception for human rights treaties.

\(^{173}\) Zwanenburg, *supra* note 167, at 761.

\(^{174}\) *Id.*

\(^{175}\) *See* Kadi case, *supra* note 30, at para. 230, where the Court of First Instance held that “international law… permits the inference that there exists one limit to the principle that the resolutions of the Security Council have binding effect: namely, that they must observe fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States if the United Nations nor, in consequence, the Community”. Consequently, the CFI held that the Security Council is bound to act in a manner not inconsistent with norms of *jus cogens* and furthermore arts. 25 and 103 of the UN Charter do not apply to Security Council resolutions that are incompatible with *jus cogens*. 41
law, even the Security Council. Under this reasoning, a Security Council resolution based on Chapter VII of the UN Charter can provide the necessary legal basis for derogations from applicable international law and thus override certain rules of international law, such as IHL norms, on the basis of Article 103 of the Charter, but rules of international law of a *jus cogens* nature may not be overridden by a Security Council resolution based on Chapter VII of the Charter. Also the ordinary meaning of Articles 24 and 25 can reasonably be interpreted to establish a rule that provides for compliance with *jus cogens* as a condition precedent to a binding and valid Security Council action.

Essentially, Prof. Zwanenburg, as well as other eminent legal scholars, domestic courts and international courts have concluded that the Security Council cannot derogate from otherwise applicable international law that have the status of *jus cogens*. The more difficult question to find an agreed upon answer to, is whether or not the right to due process is a *jus cogens* norm of international law. As this question is relevant to a corresponding Security Council obligation and the possibility of the Council to derogate from such an obligation, it will be discussed in the next Chapter.

### 3.3. Conclusions on the Security Council and the rule of law

In sum, as a subject of international law the Security Council is bound by the international legal limitations of its constitution and by other relevant, extra-Charter sources such as general principles of law, customary international law, including *jus cogens*, and certain relevant treaties. While the Security Council can override many relevant norms of general international law via its powers implicit in Chapters V & VII of the UN Charter it is now generally accepted that this power is limited to allowing the Security Council to set aside only those legal provisions or norms that have not attained

---

176 *id.*, at paras. 226 – 232.
177 Zwanenburg, *supra* note 167, at 763.
178 M. Bothe, *Security Council’s Targeted Sanctions Against Presumed Terrorists*, 6 JICJ 541 at 543 – 544 (2008). “It is generally recognized that international organizations are bound by the customary law of human rights” when involved in peace enforcement actions, such as targeted sanctions. See also Committee on Accountability of International Organizations of the International Law Association, Report of the Seventieth Conference (2002), at 789, which stated “as part of the process of humanisation of international law, human rights guarantees are increasingly becoming an expression of the common constitutional traditions of States and can become binding upon IOs as general principles of law. The consistent practice of the UN General Assembly and of the Security Council points to the emergence of a customary rule to this effect.”
the status of *jus cogens* and of course the Security Council must always respect provisions of the UN Charter. Essentially, the Charter cannot be construed as authorizing any organ to act in violation of *jus cogens* and thus the obligation to comply with a Security Council resolution is conditional upon the resolution’s compliance with relevant *jus cogens* norms because when such a resolution is not in compliance with relevant *jus cogens* the resolution is considered *ultra vires*. Consequently, the Council does not operate free of legal constraint and in strict legal terms, the Council’s powers must always be exercised subject to the UN Charter provisions and norms of *jus cogens* because such rules of international law cannot set aside by the Council on the basis of Articles 25 and 103 of the UN Charter.179

Having now established that the Security Council is not unbound by international law it is important to examine possible legal bases for a Security Council obligation to ensure that rights of due process are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter. The next Chapter will discuss possible legal bases for such a Security Council obligation, like the implied duties doctrine, the Universal Declaration of Human Rights and the right of due process as a *jus cogens* norm of international law, among others.

---

4. **Is the Security Council Obliged to Ensure that Rights of Due Process Are Made Available to Individuals and Entities Directly Targeted with Sanctions Under Chapter VII of the UN Charter?**

After having established that there seems to be general consensus that the Security Council is not unbound by international law, it is now important to analyze whether or not the Security Council is specifically obligated to comply with the relevant norms of due process when it is acting under Chapter VII of the UN Charter to utilize targeted sanctions against individuals. Accordingly, this Chapter will offer an in depth survey, some possible legal bases for the application of due process norms to the Security Council, which would result in a legal obligation of the Security Council to comply with principles inherent in the right to due process. Following this discussion, Chapter 5 will proceed by identifying what the substance or elements of an international legal obligation of the Security Council to respect an individual’s right to due process should entail.

4.1. **Right of due process as customary international law and/or a general principle of law**

International human rights law and specifically the right to due process was primarily designed to protect human beings against their own state, thus due process standards initially addressed “obligations of states in the sphere of domestic law, and not obligations of international organizations”.\(^{180}\) The reason for this was, in practice “it was not considered necessary to secure protection against acts of ‘governmental’ power with a direct impact on individuals issued by organs of international organizations, as there virtually were not any such acts”.\(^{181}\) The traditional nature of international due process standards has resulted in “little room for a development of rules of customary international law about the obligation of international organizations to comply with standards of due process vis-à-vis individuals”. Consequently, it is reasonable to maintain that while the Security Council can be bound by customary international law, “at present customary international law does not provide for sufficiently clear rules which

---

\(^{180}\) Fassbender Report, *supra* note 71, at 19.

\(^{181}\) *id.*, at 20.
would oblige” the Security Council “to observe standards of due process vis-à-vis individuals because of a lack of relevant practice and opinio juris.\textsuperscript{182} However, there is now a trend developing in international law that can be perceived as a widening of the scope of customary law in regard to due process to include direct “governmental” action of international organizations vis-à-vis individuals”.\textsuperscript{183} In general, this crystallizing principle provides that customary obligations, such as those inherent in the right to due process, are “also binding on international organizations… to the extent that the organization engages in activities which are likely to affect the rights of individuals”.\textsuperscript{184} An example of this trend is the direct effect of European Union law, which is unique to the EU but “can be regarded as a precedent, which in the future will serve as a guide or pattern in analogous cases of direct ‘governmental’ action taken by international organizations vis-à-vis individuals”.\textsuperscript{185}

There are also many scholars that contend that the right to due process is a general principle of law and thus it is a binding rule in relation to the Security Council.\textsuperscript{186} For instance, the Fassbender Report found that because standards of due process have become rules of international law in the form of general principles of law it can now be concluded that the general principle of due process is also applicable to “international organizations as subjects of international law when those organizations exercise ‘governmental authority’ over individuals”, like the Security Council does in the Taliban/Al-Qaida targeted sanctions regime.\textsuperscript{187}

\begin{itemize}
\item \textsuperscript{182} A. Reinisch, \textit{Governance Without Accountability?}, 44 German Yearbook of International Law 270, at 282 – 286 (2001).
\item \textsuperscript{183} C. Tomuschat, \textit{Human Rights: Between Idealism and Realism} 87 (2003). Bothe, \textit{supra} note 178, at 543. Bothe comments on the evolution of this trend and concludes that it is now generally accepted that the customary international law of human rights binds international organizations, and their organs. Accordingly, Bothe argues that it is generally recognized that the customary international law of human rights binds the UN Security Council. Furthermore, he cites the 2002 ILA Report as evidence of the establishment of this principle. See Committee on Accountability of International Organizations of the International Law Association, Report of the Seventieth Conference (2002), at 772 – 806.
\item \textsuperscript{184} Reinisch, \textit{supra} note 182, at 281.
\item \textsuperscript{185} Fassbender Report, \textit{supra} note 71, at 20. The EU was endowed with the power to make regulations, issue directives and take decisions that produce binding effects for their individual addresses and “consequently, a system of judicial protection against EU acts was established which is by and large equivalent to the protection offered in EU member states at a national level, and in which established standards of due process are generally complied with”.
\item \textsuperscript{186} See Fassbender Report, \textit{supra} note 71, at 19, 21. See also D. Sarooshi, \textit{International Organizations and Their Exercise of Sovereign Powers} 16 (2005).
\item \textsuperscript{187} id., at 21.
\end{itemize}
That being said there are four other prevalent arguments, other than the general application of international law to international organizations as discussed above, that explain why principles of due process should apply to the UN Security Council when it employs targeted sanctions regimes that are directed at individuals, rather than states. These arguments are based on the implied duties or obligations doctrine, the universal application of the Universal Declaration of Human Rights, the UN Charter as a source of human rights obligations on the Security Council and the last one is based on the principles of due process having the status of *jus cogens* norms. These four bases for an international legal obligations binding on the Security Council will now be discussed, and the Chapter will conclude by mentioning a couple general arguments that are based on international institutional law.

**4.2. Implied duties doctrine**

The first popular argument, supporting the rule that the principles inherent in the right of due process are binding upon the Security Council, is based on the implied duties doctrine.\(^{188}\) The doctrine of implied duties or obligations is derived from the ICJ’s conclusions on international personality of international organizations in the *Reparations Case* where it held that “the rights and duties of an entity such as the (United Nations) Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice”.\(^{189}\) This holding clearly supports the implied powers doctrine\(^{190}\) in the law of international organizations, however some have argued that the ICJ’s holding also indicates that *duties* of an organization may be implied from the purposes and functions found in its constituent documents.\(^{191}\) Thus, based on the *Reparations Case* the contention is that a legal basis for obligations on an international organization can be found in the implied duties that correspond to a specific organization’s purposes and functions. Recently, the implied duties legal basis for

---

\(^{188}\) See Tomuschat, *supra* note 183, at 85; Reinisch, *supra* note 182, at 869; and Fassbender Report, *supra* note 71, at 23.

\(^{189}\) *Reparations for Injuries*, *supra* note 108, at 180.

\(^{190}\) The implied powers doctrine states that implied powers of an international organization are not explicit in an organizations constituent documents but rather founded on or implied from those powers attributed to the organization at its creation and furthermore such powers must be necessary or essential for the organization to perform its functions. *See* Schermers and Blokker, *supra* note 104, at 175 – 177.

\(^{191}\) See Fassbender Report, *supra* note 71, at 23.
obligations binding on the UN Security Council was endorsed by the Fassbender Report which stated, “if recognized practice of an organization develops in a way that it exercises direct authority over individuals, a corresponding duty of that organization to observe the standards of due process arises under international law”.

Under the doctrine of implied duties, there is a duty of the UN Security Council to respect due process standards when it is employing its Chapter VII targeted sanctions power against individuals. In accordance with the doctrine of implied duties, such an obligation is implied from the purposes and functions of the UN. The preamble of the UN Charter declares that a function of the UN is “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person” and “in the equal rights of men and women.” Furthermore, Article 1 paragraph 3 of the UN Charter defines one of the purposes of the UN is “to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion” and that Article 1 paragraph 4 explains that the UN shall be the “center for harmonizing the actions of nations in the attainment of these common ends”.

This argument would be relatively weak if it concluded that the Security Council was obliged to respect all human rights based on the implied duties doctrine because the UN Charter provisions discussed above are vague and not very detailed. However, this argument makes sense when applied to due process standards and targeted sanctions because member states have no discretionary rights with regard to implementing Security Council sanctions adopted under Chapter VII, thus they cannot act according to their own judgment when implementing these sanctions and they have no authority to review the names of individuals on a Security Council sanctions list. Such principles of the UN Charter leave affected individuals without the ability to seek an effective remedy from

---

192 Fassbender Report, supra note 71, at 23. See also Bothe, supra note 178, at 545, where he concluded that “if the binding character of Security Council resolutions is to be taken seriously, the lower levels(s) have no choice to take the measures against the listed individual. This is why the Security Council directly affects the legal position of the individual. The Security Council decision constitutes an exercise of public authority vis-à-vis the individual. Therefore, according to customary human rights standards, there must be a remedy against the Security Council’s decisions.”

193 UN Charter, Preamble.

194 Id., art. 1(3).

195 Id., art. 1(4).

196 See UN Charter arts. 24(1), 25, 41, 48(2) and 103.
state authorities and leave them with only the option to seek an effective remedy from the Security Council. Therefore, on the basis of necessity, which stems from the fact that the Security Council is exercising direct governmental authority over individuals while at the same time leaving the affected individuals without any avenues for redress other than the Council itself, the doctrine of implied duties should give rise to a duty of the Council to observe international standards of due process. To put this reasoning another way, when “rights of individuals are involved, the application of human rights standards” and especially the right of due process, “is a legal necessity”. In sum, because the “duties” of the Security Council “must depend upon its purposes and functions as specified or implied in its constituent document and developed in practice” the recognized practice of the Security Council which exercises direct authority over individuals gives rise to a corresponding duty of the Council to observe international standards of due process.

It follows from the foregoing that the more nuanced reading of the ICJ’s *Reparations Case* provides evidence for the implied duties doctrine and furthermore, such a doctrine establishes that there may exist an implied duty on the Security Council to observe principles inherent in due process rights when it directs targeted sanctions at individuals under its attributed, implied or customary powers found in the UN Charter. In the case of Chapter VII targeted sanctions against individuals this means there is a “legitimate expectation” that the Security Council act in accordance with standards of due process and fair and clear procedures, on which concerned persons can rely. If the UN Security Council rejected these standards of human rights as not applicable to its own actions vis-à-vis individuals it will violate the legal maxim of *venire contra factum propium*, “which is a general principle of law as defined by Article 38, para. 1, lit. c of the ICJ Statute”. While it may be self-evident that the UN is “obliged to pursue and try to realize its own purposes,” it is also clearly correct to conclude that the UN would contradict itself, if on the one hand, it constantly admonished its member states to respect human rights and, on the other hand, it refused to respect the same rights when relevant to

---

its own action”.

Contradicting oneself is obviously not a basis for legal responsibility, however not complying with duties that are implied by necessity from an organization’s purposes and functions is, consequently it seems there is a solid argument for the contention that the Security Council is bound by principles of due process when it employs its targeted sanctions powers under Chapter VII of the UN Charter.

4.3. **Universal Declaration of Human Rights**

A second legal basis that has been put forth for an obligation of the UN and its organs to respect principles of due process is the Universal Declaration of Human Rights (UDHR), which has accordingly been said to have a scope that reaches beyond the performance of states. Accordingly, the argument contends that UDHR can be a legal basis for an obligation on the UN because the drafters of the UDHR intended the Declaration to be respected and observed by States and “other bodies and institutions exercising governmental authority, including international organizations” as they anticipated that in the future international organizations would also exercise such authority. It is argued that a legal obligation to respect the provisions of the UDHR is either directly applicable to the Security Council or the Security Council is obligated to comply with the general principles of law, including those relating to due process, that are inherent in the UDHR. Evidence of this fact can be seen in the broad language of

---


203 See Fassbender Report, *supra* note 71, at 24. See also Schermers and Blokker, *supra* note 104, at 999 which notes that international organizations have no ground to “to claim the right to abstain from applying” treaties that were “drafted by representatives from all states with the intent to create universal law” and they will be required to apply “the main substantive provisions of” these “general law-making treaties”. “Even though the Security Council is not formally bound by human rights law, the Council is bound by the principles inherent in these treaties. Developments in practice with regard to economic sanctions demonstrate – as in the case of peace-keeping – an increased tendency to take these principles into account.” *id.*, at 1001.

204 Fassbender Report, *supra* note 71, at 23. See arts. 5, 6, 7, and 9 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UN General Assembly Res. 56/83 (2001). See also Schermers and Blokker, *supra* note 104, at 1000, “Reference in other treaties or public statements may also reinforce the view that a particular treaty contains general principles of law, binding not only on states but also on international organizations.” See Vienna Declaration and Programme for Action, UN Doc. A/CONF.157/23 (1993), for a UN Declaration regarding the UDHR that explicitly adopts the view that the UDHR “constitutes a common standard of achievement for all” and thus applies to the UN and its organs.

205 See generally Schermers and Blokker, *supra* note 104, at 999 – 1002, for clarification on the rule that provides the Security Council can be bound by treaties it has not ratified and the example of the Geneva Conventions as universal treaties where the Security Council is bound by the principles inherent in it.
the UDHR, which permits the interpretation that the rights therein apply to “official acts of international organizations, such as the United Nations”. An example of this broad language is the preamble, which states in general terms that “human rights should be protected by law”. The UN General Assembly supported the applicability of the UDHR to relevant international organizations and their organs when it proclaimed that the Declaration pertains to “every individual and every organ of society” and that “by progressive measures, national and international” the “universal and effective recognition and observance” of human rights and freedoms shall be secured.

Moreover, Article 2 of the UDHR provides that “everyone is entitled to all the rights and freedoms set forth in this Declaration”, and “no distinction shall be made on the basis of political, jurisdictional or international status of the country to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”. This provision appears broad enough to interpret as providing that the UDHR sets a minimum standard of human rights which must be observed at all times by all subjects of international law, including the UN. Article 28 of the UDHR supports this interpretation of Article 2 by declaring, “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

Finally, the individual rights proclaimed in the UDHR are formulated in a way that does not limit their application to states, but rather makes them applicable to “every body or institution exercising governmental authority vis-à-vis individuals” because the expansive language in the provisions do not mention ‘States Parties’, ‘Contracting States’ or otherwise put conditions on the rights that limit their applicability to states like most other international human rights treaties do.

It is also possible that the specific provisions of the UDHR, like those providing for due process rights, are not formally binding on the Security Council but nevertheless the

---

206 *id.*, at 24.
207 Universal Declaration of Human Rights (1948), Preamble.
209 *See* UDHR art. 2.
210 *id.*, at art. 28.
211 Fassbender Report, *supra* note 71, at 24. For instance art. 3 of the UDHR states that “everyone has the right to life, liberty and the security of person” and art. 6 of the UDHR provides “the right to recognition everywhere as a person before the law”.

50
Council must respect such provisions because under international institutional law the Council is bound by the principles inherent in “general law-making treaties”.\footnote{212} Furthermore, the core provisions of the UDHR, which includes the due process provisions, are generally recognized as representing customary international human rights law, which is binding on international organizations due to the intended scope of the treaty.

Some commentators have argued that the UDHR does not create international legal obligations, as it was not the drafters purpose to do so and they evidence the ICCPR which they claim elaborated upon the UDHR by establishing legal obligations on subjects of international law that have ratified it. This argument is flawed however, because while it may be true it does not refute the common claim that the UDHR provisions are now recognized as customary international law representing a minimum standard of human rights, including the right to due process, that must be respected by states and international organizations.\footnote{213} Therefore, there seems to be a strong argument for finding the UDHR is either a treaty creating binding international legal obligations, which are applicable to states and international organizations alike\footnote{214} or the principles inherent in the UDHR, such as the principle due process, are recognized principles of customary international law or accepted general principles of law applicable to the Security Council.

In sum, there is a strong argument that provisions of the UDHR were written broadly enough and with the intent to apply to states and international organizations alike. More specifically they were meant to apply to any body or institution exercising elements of governmental authority. As such, at the least the principles inherent in the UDHR, including those guaranteeing due process rights\footnote{215}, are binding on the UN Security Council and thus applicable to it when it employs targeted sanctions regimes directed at individuals, rather than states.\footnote{216}

\footnote{212} Schermers and Blokker, \textit{supra} note 104, at 999.
\footnote{213} Fassbender Report, \textit{supra} note 71, at 24.
\footnote{214} See Schermers and Blokker, \textit{supra} note 104, at 999.
\footnote{215} See UDHR art. 6 – 8 and 10.
\footnote{216} The 1993 Vienna Declaration affirmed this interpretation of the UDHR. Vienna Declaration, \textit{supra} note 204. Furthermore the Vienna Declaration can be interpreted as tacit consent that the UDHR provisions are applicable to the United Nations and its organs.
4.4. UN Charter

The third commonly noted source of due process obligations applicable to the United Nations is the UN Charter. As explained earlier, there is a fundamental rule of international institutional law that provides that all international organizations and their organs are bound to comply with the rules found in their constituent documents and as such the Security Council is obliged to respect the rules expressly stated in the UN Charter. Based on this rule, many contend that the UN Charter obliges the organs of the UN, including the Security Council, to respect human rights and fundamental freedoms of individuals to the greatest extent possible when exercising the functions assigned to them. Accordingly, it is contended that the UN Charter provides a legal basis for a Security Council obligation to ensure the rights of due process are made available to individuals directly targeted with sanctions.

While the UN Charter does define “promoting and encouraging respect for human rights for fundamental freedoms for all” as one of the UN’s primary purposes, the founders of the UN did “not find it necessary to make human rights directly binding on the Organization, and to define such binding rules in the Charter” because they did not expect that the UN “to exercise power or authority over individual persons in a way that their rights and freedoms would be directly affected”. However, since the UN Charter is a constitution it should be interpreted and applied as a “living instrument” and examples of the changing nature of the UN Charter is “expansion of the concept of peace and security in the practice of the UN Security Council” and the “development of peacekeeping operations”. Upon this legal basis it can now be argued that due process norms are applicable to the Security Council by way of the UN Charter and the Council is obliged to respect due process rights to the greatest possible extent when it exercises

---

217 Fassbender Report, supra note 71, at 25. “Despite not being a party to international human rights instruments, the United Nations is undeniably subjected to its own constituent document, the UN Charter. The Charter emphasizes the promotion of human rights and takes noted of this as one of the main purposes of the organization. Hence, the United Nations and the Security Council would not fulfill its purposes if these entities were to violate human rights through its targeted sanctions regime.”
218 id., at 26.
219 UN Charter, art. 1(3).
220 Fassbender Report, supra note 71, at 25.
222 Fassbender Report, supra note 71, at 25.
governmental authority that may affect individuals’ human rights and fundamental freedoms.\textsuperscript{223}

Such a transformation in the interpretation of the rules of the UN Charter that obligates the UN respect the relevant human rights norms is evidenced by the work of the UN since its inception in 1945 to promote human rights and “the coming into existence of a firmly recognized body of human rights” norms in international law, which can be credited to the work of the UN.\textsuperscript{224} The foundation of this progressive development is in the establishment and work of the UN Commission on Human Rights, the creation of the two international human rights Covenants of 1966\textsuperscript{225}, which “have become part of the constitutional foundation of the international community”\textsuperscript{226} and many resolutions of the UN General Assembly and Security Council that recognize the need for States and international organizations to “ensure the full and effective enjoyment of human rights”\textsuperscript{227}.

Essentially, the work of the UN in promoting compliance with human rights norms coupled with the “expansion of functions of the UN into new areas resulting in acts with a direct impact on the rights of individuals” has resulted in the provisions of the UN Charter referencing human rights, and mentioned above, developing into “rules embodying direct human rights obligations of the organs of the United Nations”.\textsuperscript{228} Furthermore, the Fassbender Report argues correctly in this author’s opinion that “in the absence of a specification of such rights and freedoms in the Charter itself, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights serve, first and foremost, as a relevant standard”.\textsuperscript{229} This conclusion is also supported by Professor Brownlie who concluded that even though the Security Council

\textsuperscript{223} id., at 24 – 27. See Yusuf Case, supra note 30, paras. 279 \emph{et seq.}: “The Security Council’s powers of sanction… must therefore be wielded in compliance with international law, particularly with the principles and purposes of the United Nations.” \textit{See also} Dannenbaum, \textit{supra} note 107, at 324. The UN and the Security Council “is constitutionally mandated to promote the advancement of human rights”.

\textsuperscript{224} Fassbender Report, \textit{supra} note 71, at 26.

\textsuperscript{225} \textit{See} International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966).

\textsuperscript{226} Fassbender Report, \textit{supra} note 71, at 26.

\textsuperscript{227} \textit{See} Vienna Declaration, \textit{supra} note 204, and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (1999).

\textsuperscript{228} Fassbender Report, \textit{supra} note 71, at 26.

\textsuperscript{229} id.
has a wide margin of appreciation in deciding to take measures to maintain and restore international peace and security, “it does not follow that the selection of the modalities of implementation is unconstrained by legality” and consequently when individual human rights are involved “the application of human rights standards is a legal necessity” because such norms now “form part of the concept of the international public order”.\(^{230}\)

The principle that human rights norms relevant to powers of the Security Council should be application to the Council on the basis of the UN Charter provisions referencing human rights has been recognized in practice with regard to UN Peacekeeping Operations and UN Interim Administration Operations.\(^{231}\) The UN Secretary General’s 1999 Bulletin did this for peacekeeping operations when it promulgated “fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control”.\(^{232}\) With regard to UN Interim Administrations, the UN Interim Administration in Kosovo (UNMIK) proclaimed the applicability of human rights standards to all UNMIK functions and persons undertaking public duties.\(^{233}\) While such internal documents indicate a UN commitment to complying with human rights norms they do not establish that the UN is under a legal obligation to uphold human rights.\(^{234}\) However, such documents can be interpreted as evidence that the UN consents to being bound to comply with human rights norms that are relevant to the powers it is employing and when its actions have the ability to affect individuals.

Based on UN practice and nature of the UN Charter as a living instrument the contention, that all UN organs are bound to comply with the UN Charter, which thus


\(^{231}\) Fassbender Report *supra* note 71, at 26 – 27.


\(^{234}\) *See* Dannenbaum, *supra* note 107, at 135.
obliges such organs to respect the relevant human rights norms of individuals when exercising their functions under the Charter, seems legally defensible.\textsuperscript{235} In particular this rule would mean that the UN Security Council must respect and guarantee the rights of due process and fair and clear procedures whenever it takes any action that adversely affects or has the potential to adversely affect the rights and freedoms of individuals.\textsuperscript{236}

However it should be noted that while the Security Council is under a Charter based obligation to respect human rights to the greatest extent possible, the scope and intensity of these rights of due process are “not generally predefined”.\textsuperscript{237} Therefore, the Fassbender Report concluded that the determination of the appropriate, applicable due process standards is a responsibility of the organ that takes the action that directly affects individuals’ human rights but the appropriate standards must be determined based on the circumstances of particular situation, on the nature of the affected human rights, and on the extent to which the UN action is likely to affect those rights.\textsuperscript{238}

Article 24 paragraph 2 of the UN Charter is claimed to be another Charter based limitation on the Security Council’s targeted sanctions powers, that can require it to respect due process rights. As explained above, it is apparent from Chapter 1 of the UN Charter that encouraging respect for human rights and fundamental freedoms is a purpose of the UN. Furthermore, Article 24 paragraph 2 of the UN Charter provides that when the Security Council is discharging its duties under its primary responsibility for the maintenance of international peace and security, it is obligated to “act in accordance with the Purposes and Principles of the United Nations”.\textsuperscript{239} Accordingly, the ICJ has recognized that “a denial of fundamental human rights is a flagrant violation of the purpose and principles of the Charter” a recognition that must also necessarily apply to

\begin{footnotesize}
\begin{enumerate}
\item See generally Bothe supra note 178.
\item Fassbender Report, supra note 71, at 27. This conclusion was also reached by the Institut de droit international in a 1957 resolution that demanded “that for every decision of an international organ or organization that affects private rights or interests, appropriate procedures should be provided in order to settle, by judicial or arbitral methods, any juridical differences that might arise from such a decision”. See Annuaire de l’Institut de droit international 488, Vol. 47(2) (1957). See also Bothe, supra note 178, at 541, where he argues that the Security Council is under a legal duty to render UN listing/delisting procedures consistent with due process requirements.
\item id., at 27.
\item id.
\item See UN Charter, art. 24(2).
\end{enumerate}
\end{footnotesize}
violative conduct of the UN and the Security Council. Using this same reasoning the European Court of First Instance [CFI] in the Yusuf case concluded that the Security Council, when using its sanctioning powers under Chapter VII of the UN Charter, must wield its powers in compliance with international law, particularly with the purposes and principles of the UN Charter. Consequently, on the basis of Article 24 paragraph 2 and the purposes and principles of the UN Charter, the CFI held the Security Council must comply with the relevant human rights norms of due process, when it takes targeted sanction measures against individuals. This holding seems to be in line with the generally accepted rule discussed above, however the CFI’s holding was vague and did not clarify exactly what are the substantive rules that can be extracted from the purposes and principles of the UN Charter, nor did the Court explicitly find a Security Council obligation to respect due process rights to be inherent in the UN Charter. Nevertheless, this vague holding still articulates the general rule that relevant human rights norms are binding on the Security Council when the Council’s actions are intended to interfere with individuals’ human rights and fundamental freedoms.

It has also been argued that, “a major constitutional mandate appears in Article 55(c) of the UN Charter” that “expressly requires that ‘the United Nations shall promote… universal respect for, and observance of, human rights and fundamental freedoms for all,’ a provision of the Charter that necessarily incorporates customary human rights by reference”. This express obligation of the UN “must also condition on the authority of its entities, such as the Security Council”. Based on this reasoning some scholars have concluded that Article 55(c) should be read as a limitation on the Security Council’s powers that requires it to comply with relevant human rights norms, such as due process, when it is employing targeted sanctions against individuals.

---

240 Namibia case, supra note 141, at 57. See also Paust supra note 107, at 3. “No UN entity can have a lawful purpose to deny human rights, as their violation would be a violation of the Charter. Similarly, no order or authorization to violate human rights could be lawful.”
241 Yusuf case, supra note 30, at paras. 279 et seq.
242 Bothe, supra note 178, at 555. Bothe concludes that the Security Council’s powers are inherently limited, under the UN Charter, by procedural due process norms applicable to individuals in international law.
243 Paust, supra note 107, at 2.
244 id.
Moreover, under Article 25 of the UN Charter “the Members of the United Nations” must “carry out the decisions of the Security Council in accordance with the present Charter”. Therefore, some contend that if a Security Council decision violates human rights and requires states to do the same that decision is consequently requiring the member states to violate its obligations under the Charter to observe human rights and thus the decision is void. The problem is that the Security Council cannot violate the Charter and that is exactly what it is doing if it requires or allows member states to not observe human rights. In sum, there is a general acceptance that the Security Council is obligated to respect due process rights of individuals’ when it directs targeted sanctions at them. Some believe that “it is clear that the Security Council has independent Charter based obligations to respect and observe human rights”, such as the right to due process, “under Articles 1(3), 24(2), and 55(c)”.\(^{245}\) Others find the Council obligation to comply with due process standards implied from the purposes and principles of the Charter. Thus, it seems while the exact UN Charter provisions that bind the Council are debatable, the resulting rule that the UN Charter obligates the Council to ensure that rights of due process are made available to individuals directly targeted with sanctions seems to be accepted as legally sound.

4.5. *Jus cogens*

*Jus cogens*\(^{246}\) is another possible legal basis for due process rights to be found binding on the Security Council when it is employing targeted sanctions directed at individuals.\(^{247}\) Specifically, it has been argued that certain due process rights, like the right to be heard and right to an effective remedy, may also belong to *jus cogens* and thus no derogation from these rules by the Security Council under the UN Charter will be

---

\(^{245}\) Paust, *supra* note 107, at 5 and 11. “[T]his constitutional obligation places limitations on the authority and lawful purposes and functions of the UN and its entities”, furthermore “relevant human rights include the customary human right to an effective remedy.”

\(^{246}\) See also discussion above in Chapter 3 on *jus cogens*.

\(^{247}\) See Paust, *supra* note 107, at 5. “As noted in prior writings, peremptory norms *jus cogens* must condition the competence of the UN entities and personnel, since norms *jus cogens* are part of the universally accepted customary international law that is binding on all actors and prevails over inconsistent treaty”. Furthermore, there are also “certain *obligatio erga omnes* that are owing by and to all humankind and, as recognized by the ICJ, they include basic human rights.”
permitted because they are “core rights directly related to human existence”. These arguments are also based on the contention that the ordinary meaning of Articles 24 and 25 establishes compliance with *jus cogens* as the necessary condition for a binding and valid Security Council action.

While it is generally agreed that there are norms of international law that have the status of *jus cogens*, the answer to the question of which rules of international law have attained the status of *jus cogens* is one that is not generally agreed upon in the writings of international law scholars and holdings of judges. Furthermore, the question of who gets to decide if a *jus cogens* norm has been violated by a Security Council resolution has not been definitively answered. One reason for the divergence of opinions on the subject may be the lack of judicial decisions by the ICJ that are based on norms of *jus cogens*. In practice, lack of agreement on which norms are *jus cogens* logically leads to the determination that at this time other legal bases for the Security Council’s obligation to comply with due process standards are stronger arguments.

However, principles of due process do form a foundation for the protection of other human rights, so because due process rights are so vital to the enjoyment of nearly all human rights, it is possible that these principles have achieved the status of *jus cogens*. Accordingly, if principles of due process do have such a status, the Security Council would not be permitted to derogate from such norms under its Chapter VII powers. But this argument may be moot because the Security Council can also never derogate from its Charter limitations, such as respect for human rights, as discussed above, so their would be no real need to base the Council’s obligation to respect principles of due process on

---

248 Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on International Law*, 281 Recueil de Cours 10 at 35 (1999). See also Kadi case, *supra* note 30, at para. 226, which holds *jus cogens* are binding on “the bodies of the United Nations, and from which no derogation is possible.” However, the CFI found the Security Council Resolution had not breached *jus cogens*. *id.*, at para. 275. Specifically, the Court held the alleged breach of the right to be heard did not violate *jus cogens* as the Sanctions Committee offered a mechanism for the re-examination of individual cases, albeit only through national espousal. *id.*, at paras 261 – 62. Regarding the breach of the right to effective judicial review, the court found the right of access to courts is not absolute and thus not a right guaranteed by *jus cogens*. *id.*, at paras 287, 291.

249 See Armed Activities on the Territory of the Congo, *supra* note 159, at 32, where the ICJ authoritatively endorsed the concept of *jus cogens*. See also R. Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, at 1, Report for the Coalition for the International Criminal Court (2001).
such a norm’s possible status as a *jus cogens*, especially since there is little agreement at this time in international law on what norms are *jus cogens*.

### 4.6. Other legal bases

Some scholars have recently argued that the Security Council “is bound ‘transitively’ by international human rights standards as a result and to the extent that its members are bound”.

An example of this principle in practice is the EU which has made “both human rights treaty obligations of EU member states as well as constitutional traditions common to the member states sources of Union law from which direct obligations of the Union itself arise”. Therefore, if this principle is applied to the UN and the Security Council it could accordingly be held that that UN organs are required to ensure that rights of due process are made available to individuals and entities directly targeted with sanctions under Chapter VII of the UN Charter.

Also following the fundamental principle of attributed powers that the UN and all international organizations and their organs are founded on, it is established that states can not delegate to the UN or the Security Council an authority or power that they did not already possess under international law themselves, i.e., an authority to violate customary human rights law. Therefore, the principle of attributed powers could be interpreted as implicitly supporting the rule that the Security Council does not have the power to violate individuals’ due process rights because the states that created the UN and its organs never had such a power and consequently they could not attribute such a power to any international organization they establish. So essentially, the fundamental principle of attributed powers substantiates the argument that the Security Council is bound to comply with the right of due process when it takes ‘governmental’ actions that affect individuals.

---


4.7. Conclusions on possible legal bases for an obligation on the Security Council to comply with due process

In sum, certain UN Charter provisions have been the legal basis for the contention that the Security Council is obligated to respect due process norms when it exercises governmental authority over individuals because respect for these rules is implied from the express purpose of the UN that references respect for individuals’ human rights. While these provisions are sometimes worded very broadly and cannot be said to expressly require the Council to ensure that rights of due process are made available to individuals it directly targets with sanctions, the UN Charter should be interpreted as requiring the Council to respect the right of due process of individuals to the greatest extent possible, while filling in the substantive rules from other sources of international law.

A couple of other legal bases for such an obligation are supported by persuasive arguments, these include, the doctrine of implied duties and the UDHR’s applicability to the UN. Furthermore, a case may be made for the principles inherent in the right to due process having attained the status of *jus cogens*, but in general there seems to be a lack of agreement on this assertion to clearly say there is a Security Council obligation stemming from such a legal basis.

This being said, the strongest argument regarding a possible obligation of the Security Council to respect rights of due process is founded on the UN Charter as the legal basis for such a rule. Moreover this argument, if accepted, would logically lead to the conclusion that Security Council resolutions that do not comply with the purposes of the UN Charter, like those employing targeted sanctions regimes against individuals without providing for due process, should be considered *ultra vires* and void.253

Therefore it is essential that the Security Council amends its targeted sanctions regimes against individuals to provide for, at least, the minimum standards of due process recognized under international law.254 Lastly, it is worthwhile to note that this conclusion

---

253 Paust, *supra* note 107, at 4. “[A] decision of the Security Council to violate customary human rights law would be without authority or *ultra vires*.”

254 Bothe, *supra* note 178, at 550, argues that “the standards to which the decisions of the Security Council should live up are classical requirements of due process formulated in many national constitutions, in the Universal Declaration of Human Rights, in the ICCPR and in regional human rights treaties, as these “constitute a solid body of customary human rights law.”
was also adopted by the member states of the UN at the 2005 World Summit when they called upon the Security Council to ensure that ‘fair and clear’ procedures exist for the listing and delisting of individuals and entities on targeted sanctions lists.\textsuperscript{255}

The next Chapter will analyze what the substantive principles of the international norms of due process are, now that possible legal bases for the application of these particular norms to the Security Council have been discussed. In particular, the following Chapter will discuss whether there is universal acceptance on what principles are inherent in an individual’s right to due process under international law and identify what are the substantive elements that the right to due process entails.

5. **Substantive Principles Inherent in the Right of Due Process**

The question now being addressed is what are the applicable rules of international law that ensure individuals’ rights of due process. This analysis will provide an understanding of what the substantive legal norms are that the Security Council should comply with when establishing targeted sanctions against individuals.

The primary human rights principles that are affected by the 1267 sanctions against individuals are procedural due process rights. In order to protect individuals from arbitrary or unfair treatment by the Security Council’s targeted sanctions, it is most important that affected individuals have access to a body that has authority to effectively review the measures and offer a remedy to individuals that have been targeted but do not satisfy the criteria in the relevant resolutions. If the Security Council ensures these rights are made available to individuals directly targeted by sanctions, the Council will have satisfied the substantive principles inherent in the right to due process.

Rights of due process or “fair trial rights” have been generally recognized in international law to protect individuals from arbitrary or unfair treatment by state organs on the basis of constitutional or statutory rules and practices common to a great number of states of all regions of the world and also as guaranteed by numerous universal and regional human rights instruments.\textsuperscript{256} These commonly recognized due process rights include the right to every person to be heard when an individual measure that affects him

\textsuperscript{255} 2005 World Summit Declaration, UN Doc. A/RES/60/1 (2005), at para. 109.

\textsuperscript{256} Fassbender Report, \textit{supra} note 71, at 9.
or her adversely is taken and “the right of a person claiming a violation of his or her rights or freedoms by a state organ to an effective remedy before an impartial tribunal or authority”. Moreover, the sources of law for such rights are international customary law and general principles of law, within the meaning of Article 38, paragraph 1 of the International Court of Justice Statute (ICJ Statute).

Principles of due process are of the utmost importance because they are fundamental to the protection of human rights. The reasoning underlying such an assertion is human rights “can only be protected and enforced if the citizen has recourse to courts, tribunals or other impartial institutions which enjoy a sufficient measure of independence from the governmental or administrative organs of a State, and which resolve disputes in accordance with fair procedures”. In fact it has been said, correctly in this author’s view, that “the protection of procedural due process is not, in itself, sufficient to protect against human rights abuses but it is the foundation stone for ‘substantive protection’ against state power”.

The commonly accepted substance of the right due process is discernible through a comparative analysis of many human rights treaty provisions codifying this right. In 1948 Articles 8 (right to an effective remedy), 10 (the right to a fair trial), and 11 of the Universal Declaration of Human Rights (UDHR) became the first treaty provisions to provide universal recognition of due process rights in international law and moreover this treaty has been universally ratified. Article 8 provides for the right to an effective remedy for acts violating a wide range of fundamental rights as long as a constitution or law grants them. In the case of UN sanctions international human rights laws can be the trigger for an Article 8 to apply. Importantly Article 10, which provides for a fair trial,

---

257 id.
258 id.
261 Clayton and Tomlinson, supra note 259, at 550.
262 Art. 8 of the UDHR provides: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.
263 Art. 10 of the UDHR provides: “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.
264 Art. 11 of the UDHR elaborates on what is considered to be a fair trial in the case of criminal charges and, in the perspective of the common law; the article defines standards for procedural due process and substantive due process.
applies to not only criminal charges but also to the determination of individual’s rights, hence targeted sanctions should come within the realm of this provision.

Then in 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) became the first international human rights treaty to set out fair trial rights in detail and now forty-six States have ratified it.265 Article 14 paragraph 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which was modeled after the Article 6 of the ECHR, also provides for international recognition of due process and fair trial rights.266 Article 2(3) of the ICCPR and Article 13 of the ECHR holds the right to an effective remedy when any other human right provided for in the treaty is violated.267 Finally, other regional human rights treaties, such as the American Convention on Human Rights (1969)268, the African Charter on Human and People’s Rights (1981)269, and the Arab Charter on Human Rights (1994)270 all guarantee due process rights and principles under international law. In principal these conventions grant the right to a fair trial where civil rights or obligations or criminal charges are at stake.

One question that arises upon readying these treaty provisions covering procedural due

265 Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which provides that: “in the determination of his civil rights and obligations… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.
266 Art. 14 (1) of the International Covenant on Civil and Political Rights provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.
267 Art. 2(3) of the ICCPR states, “each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.” Art. 13 of the ECHR states, “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”
268 See Arts. 7 [right to personal liberty], 8 [right to a fair trial], 10 [right to compensation] and 25 [right to judicial protection] of the American Convention on Human Rights (1969). See also the American Declaration on the Rights of Man (1948), Arts. I [right to life liberty an personal security], XVII [right to recognition of judicial personality and civil rights], XVIII [right to a fair trial], XXV [right of protection for arbitrary arrest], XXVI [right to due process of the law].
270 See Arts. 7, 8, and 9 of the Arab Charter on Human Rights (1994).
process rights is what qualifies as an effective remedy. First, it is important to note that the remedy provided for is not required to be judicial in character, consequently “nonjudicial procedures may also qualify as long as they constitute effective remedies”. Secondly, the factors that should be assessed when determining whether a certain remedy is effective are “powers, procedural guarantees and authority of the institution involved”. Furthermore, whether a certain remedy can be accepted as effective depends on the context of each specific case.

The Committee of Ministers of the Council of Europe has also offered specific guidelines as to what constitutes an effective remedy under international law. The Committee held that a remedy before a national authority is considered effective when: “that authority is judicial; or, if it is quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence; that authority has competence both to decide on the existence of the conditions [...] and to grant appropriate relief; and the remedy is accessible.” Consequently, it can be concluded that the right to an effective remedy leaves room for different kinds of remedies, “as long as they are as effective as possible in the context of the situation in which they apply”.

Furthermore, “the right of access to court in order to have disputes determined in...”

\[\text{\textsuperscript{271}} \text{See Watson Study Update, supra note 14, at 15.}\]
\[\text{\textsuperscript{272}} \text{id.}\]
\[\text{\textsuperscript{273}} \text{id. For the purposes of this analysis, two cases may be of particular relevance: the Klass case and the Leander case. In the Klass case concerning secret surveillance, the ECtHR held that the remedy should be as “effective as could be having regard to the restricted scope for recourse inherent in any system of secret surveillance.” In the Leander case concerning security checks, the court further held that even if no single remedy under the national system might be effective on its own, the aggregate of remedies as a whole might still qualify as effective. See Klass v. Germany, no. 5029/71, ECHR 1978, at para. 69, and Leander v. Sweden, no. 9248/81, ECHR 1987, at para. 84.}\]
\[\text{\textsuperscript{274}} \text{Recommendation of the Committee of Ministers to member states on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Art. 3 of the European Convention on Human Rights, Recommendation (98) 13, adopted during the 641st meeting, 18 September 1998. While, these guidelines for an effective remedy were provided for the case of rejected asylum seekers against decisions of expulsion and are thus not directly applicable. However, as the Watson Report noted the Committee’s recommendations “may still provide useful guidance as to what is required” at least under Art. 13 of the ECHR and correspondingly to other similar treaty provisions concerning an effective remedy. Watson Report Update, supra note 14, at 15.}\]
\[\text{\textsuperscript{275}} \text{Recommendation (98) 13, supra note 274.}\]
\[\text{\textsuperscript{276}} \text{Watson Report Update, supra note 14, at 16. The Watson Report also concluded that “it is likely that the right to an effective remedy is applicable” to Security Council targeted sanctions. The Watson Report concluded that “the right to an effective remedy traditionally entails three elements: (1) an independent and impartial authority; (2) the power to grant appropriate relief; and (3) procedural guarantees such as accessibility for individuals or entities affected.” id., at 44.}\]
accordance with the law is deeply rooted in the common law”. 277 General fair trial rights have also been recognized in common law for many years. Specifically the fair trial principles of the right to an independent and impartial tribunal, the right to a fair hearing, the right to a public hearing, the right to a hearing within a reasonable time and the right to a reasoned judgment are all fundamentals of the common law legal system. 278

In the civil law system rights of due process and fair trial are also “regarded as inherent in the idea of the rule of law”. 279 Particularly, the right of access to a court and the right to be heard before a court are generally recognized as fundamental to all civil law jurisdictions. 280

Furthermore, the Fassbender Report defined the universally recognized rights of due process applicable to individuals and entities targeted by the Security Council as containing the following elements:

(a) the right of a person or entity against whom measures have been taken to be informed about those measures by the Council, as soon as this is possible without thwarting their purpose;
(b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time;
(c) the right of such a person or entity of being advised and represented in his or her dealings with the Council; and
(d) the right of such a person or entity to an effective remedy against an individual before an impartial institution or body previously established. 281

Notwithstanding the national and regional differences in the definition of due process rights the Fassbender Report concluded that “international law provides for a minimum standard of due process which includes, firstly, the right of every person to be heard” when a measure which affects him or her adversely is taken, and “secondly, the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority”. 282 The Report also defined the term “remedy” as requiring the right to appeal before an impartial body previously

277 Fassbender Report, supra note 71, at 11.
278 Clayton and Tomlinson, supra note 259, at 574.
279 Fassbender Report, supra note 71, at 12.
280 Clayton and Tomlinson, supra note 259, at 552.
281 Fassbender Report, supra note 71, at 28.
282 id., at 15.
established and “impartiality” is defined as decision making that is based on facts and the law and free from political influence or restrictions.\textsuperscript{283}

In a 2006 non-paper presented to the Security Council and based on the outcome document of the 2005 World Summit and the Fassbender Report, Secretary General Kofi Annan defined the human rights legal foundation of due process in a very similar fashion to that of the Fassbender Report and set out his position concerning the listing/de-listing of individuals and entities on targeted sanctions lists.\textsuperscript{284} Former Secretary General Annan concluded that the minimum standards required to ensure that the procedures are fair and transparent include: notification to the person against whom measures have been taken of the case against them; the right of such a person to be heard within a reasonable time by the relevant decision-making body; the right of such a person to review by an effective, independent and impartial review mechanism; and review by the Security Council of its targeted sanctions against individuals in order to mitigate the risk of violating human rights.\textsuperscript{285}

As evidenced above, the rights of due process and fair trial “are widely guaranteed in universal and regional human rights treaties”.\textsuperscript{286} There is also a strong argument that these principles are established as “part of the corpus of customary international law and general principles of law within the meaning of Article 38, paragraph 1 of the ICJ Statute” and the Security Council can be obliged to observe these standards by virtue of international treaties (including the UN Charter), customary international law or general principles of law recognized by the members of the international community.\textsuperscript{287} Based on this analysis it seems “one of the most important legal developments of the modern era – both nationally and internationally – has been the opening of avenues of complaint for private citizens against oppressive action by government agents and agencies and the

\textsuperscript{283} Id., at 6 – 7. See also Cortright and de Wet, supra note 67, at 2.


\textsuperscript{285} Fassbender Report, supra 71, at 5.

\textsuperscript{286} Id., at 15. See also the treaty provisions listed in notes 99 – 106.

\textsuperscript{287} Id., at 15, 19 – 20. There is also a “broad agreement” amongst scholars of international law that “many of the rules of enunciated in the Universal Declaration of Human Rights have crystallized as customary international law” and these customary obligations, including the right to due process, “are also binding on international organizations, as subjects of international law, to the extent that the organizations engage in activities which are likely to affect the mentioned rights of individuals”.
affording of remedies when violations are found” and as such, these principles apply to Security Council’s ‘governmental’ measures that affect individual’s fundamental human rights.288

In sum, a comparative analysis of the substantive provisions underlying commonly accepted international due process standards leads to the conclusion that “effective due process relies on three principal concerns: the independence of the decision-maker, accessibility of the decision-maker to the individual, and the power of the decision-maker to grant effective relief.”289 More generally, the right of due process provides that any individual directly targeted with Security Council Chapter VII sanctions is entitled to be heard by an independent and impartial decision-maker that is empowered to grant an effective remedy.

289 Genser and K. Barth, supra note 8, at 31.
6. **DOES THE CREATION OF THE 1267 OMBUDSPERSON RECTIFY THE REGIME’S NONCOMPLIANCE WITH DUE PROCESS STANDARDS?**

Now that the issue of the possible legal bases for the Security Council obligation to comply with standards of due process when employing targeted sanctions regimes against individuals has been discussed this Chapter will proceed by assessing the role of the newly created Ombudsperson, to determine whether or not the 1267 listing/delisting procedures comply with the due process principles introduced in Chapter 5. Specifically, this Chapter will analyze whether or not the Ombudsperson will ensure targeted individuals have direct access to an independent review body empowered to grant effective relief.

The primary functions of the Ombudsperson will be to investigate delisting requests, gather and compile new information to present to the Sanctions Committee, engage in dialogue and questioning of the petitioner, and draft a report based on personal observations, which includes a summary of the principal arguments concerning the delisting request, to the Sanctions Committee after the investigation and dialogue is complete.\(^290\)

These new procedures established under Resolution 1904 are an improvement on the old 1267 sanctions regime procedures because they show a “willingness by the Security Council to make incremental adjustments that allow petitioners to engage in dialogue with the Ombudsperson and possibly receive more detailed information concerning their designation”.\(^291\) However, as will be explained, the new procedures do not satisfy the international legal standards guaranteeing the listed individual full due process rights, “which includes the right to be heard, the right to an independent judicial review and the right to a remedy”.\(^292\)

The most significant power given to the Ombudsperson is the power to give observations and analysis of delisting requests.\(^293\) In practice, such a power allows the Ombudsperson to provide an independent review of a Security Council decision, which is an unprecedented power. This power of the Ombudsperson is special because the

---

\(^{290}\) UN Doc. S/RES/1904 (2009), at Annex II.

\(^{291}\) Cortright and de Wet, *supra* note 67, at 10.

\(^{292}\) *id.*

\(^{293}\) UN Doc. S/RES/1904 (2009), at Annex II, para. 7(c).
Security Council has traditionally refused to allow any independent body to review the substance of a decision related to the maintenance of international peace and security. Essentially, the Ombudsperson for the 1267 sanctions regime is now the first and only independent body that the Security Council has given its consent to review specific decisions of the Council.

Furthermore, the review power of the Ombudsperson focuses “solely on review of the application of the targeted resolution to an individual’s case and not on the validity of the resolution itself.” Consequently, the Ombudsperson’s powers do not undermine the Security Council’s primacy in the maintenance of international peace and security.

This being said, the Ombudsperson has no direct decision making authority on delisting requests, as his/her formal role is limited to the gathering and presenting of information to the Sanctions Committee. Essentially, while the Ombudsperson does have the power to independently review a delisting request and analyze its principal arguments, it has no power to grant any sort of remedy to the listed petitioner. Not only that but the text of Resolution 1904 does not even provide the power to issue recommendations, binding or otherwise, to the Sanctions Committee. Thus, the Ombudsperson does not have the power grant an effective remedy, i.e., to lift measures imposed on individuals that she determines do not satisfy the Security Council’s listing criteria.

Consequently the first reason that the establishment of the Ombudsperson for the 1267 sanctions regime does not rectify the regime’s noncompliance with international due process norms is that the Ombudsperson has no authority to make binding decisions on delisting requests thus the Sanctions Committee is not required to adopt the findings of the Ombudsperson’s report regarding whether or not to delist an individual, and therefore the Ombudsperson is not competent to grant relief. In general this means that the creation of the Ombudsperson still does not bring the 1267 sanctions regime into compliance with the right of due process that guarantees a person or entity an effective remedy against an individual measure before an impartial institution or body previously

---

294 Genser and Barth, supra note 8, at 36.
295 “Most importantly in the context of delisting, the reviewing body must have the power to issue binding decisions, as a mere recommendation to the Sanctions Committee cannot guarantee the petitioner’s rights will be safeguarded”. id., at 33.
296 UN Doc. S/RES/1904 (2009), at Annex II.
established because while the Ombudsperson is independent and impartial the 1267 Sanctions Committee is still the only body empowered to offer an effective remedy and it is not impartial or independent, but rather the same political body that makes listing decisions.

All the Security Council is required to do is remedy this shortcoming is grant the Ombudsperson the power to make a binding recommendations to the Council to delist individuals. Accordingly, there is no need for the Ombudsperson to be empowered to review Council resolutions to determine if they are unlawful under international law. The reason for this is “the right to an effective remedy extends only so far as the target’s rights are infringed”. Since the right to an effective remedy does not provide that individuals are allowed to challenge a Security Council resolution, but rather only requires that they can seek their personal delisting, the primacy of the Council’s power to maintain international peace and security would not be undermined if the Council complied with due process standards by giving the Ombudsperson the power to grant an effective remedy, i.e. order an individual to be delisted.

Moreover and as mentioned above, under international law an effective remedy is only available when a decision is based on facts and the law and free from political influence or restrictions; and under the 1267 sanctions regime there are still no legal rules that would oblige the Sanctions Committee to grant a request for delisting if specific conditions are met. It therefore seems that the establishment of the independent and impartial Ombudsperson does not offer listed individuals the right to benefit from an effective remedy because the Ombudsperson lacks the power to issue binding decisions and in general the regime lacks clear legal criteria that if satisfied would require a reviewing body to delist an individual.

In fact Resolution 1904, makes such a conclusion clear because it states that delisting decisions are still taken confidentially and by consensus of the Sanctions Committee, which means a Security Council member state may veto a delisting request for any reason. Accordingly, a delisting decision by the Sanctions Committee will never be free from political influence or required to be completely based on facts or law as long as

---

297 Genser and Barth, supra note 8, at 36.
Committee members can veto a request for any. Moreover, delisting decisions are entirely within the Committee’s discretion and no legal rules exist that would obligate the Committee to grant a request if specific conditions are met. This means that while the Ombudsperson may play a key role in the compilation of factual information to and from the listed persons or entities, the Sanctions Committee is the only body that has the power to provide an effective remedy to listed individuals. In sum, since the Sanctions Committee is the only reviewing body with the power to provide an effective remedy but it is not independent and the Ombudsperson is the only reviewing body that is independent but it does not have the power to provide an effective remedy, the 1267 sanctions regime still falls short of satisfying due process standards.

The second deficiency in the 1267 sanctions regime’s compliance with international norms of due process after the creation of the Ombudsperson is based on accessibility because affected individuals still do not have the right to be heard by the decision making body that is empowered to delist individuals. The right to be heard or ‘accessibility element’ of due process will only be satisfied if the body that hears the individual or entity is the same body that has the power to make a binding decision based on the complaint of the affected individual or entity. Under the 1267 sanctions regime the individual or entity that is the target of the sanctions only has the ability to be heard by the Ombudsperson and as noted above the Ombudsperson does not have the authority to take a binding decision regarding delisting, rather the Ombudsperson is only empowered to compile a report to the 1267 Sanctions Committee, which will then take decision on the delisting request based on politics, not law or facts. Essentially, the Ombudsperson does not satisfy the accessibility element of due process because even though the Ombudsperson can accept delisting requests from targeted individuals, these individuals “are not allowed to present their own case; rather they must simply wait for termination of the investigation and issuance of a recommendation”.

299 Targeted individuals “must be allowed to directly challenge the decisions that affect their rights” in order for the regime to satisfy the accessibility element of due process. “[C]ommentators have consistently called for this kind of accessibility, as it is the key to due process reform”. Genser and Barth, supra note 8, at 32.

300 id., at 33. If the due process element of accessibility is to be satisfied, “targets must be afforded as full an opportunity as possible to defend their rights” and directly challenge decisions that affect their rights before a body empowered to grant an effective remedy.
While the creation of the Ombudsperson does not allow the 1267 sanctions regime to fully comply with the norms of due process it is an improvement in the regime’s compliance with due process standards. The primary enhancement of the regime’s compliance with due process is that the Ombudsman does offer substantive review of the listing decision by an independent and impartial body. This fact is clearly established by resolution 1904 because it states that the Ombudsperson shall perform its ‘tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government’.\(^{301}\) This wording in the Security Council resolution is in line with principle of independence and impartiality of international civil servants.\(^ {302}\)

Furthermore, the UN Secretary General and not the Security Council will appoint the Ombudsperson for a set time period, which grants the Ombudsperson further independence from the Security Council.\(^{303}\) This being said, the independence of the Ombudsperson can be strengthened if she is appointed for “fixed and lengthy terms, as is the case with judges of special tribunals created by the Security Council”.\(^{304}\) Right now the Ombudsperson has only been given a mandate for a period of 18 months so extending the time length of her mandate would increase her objective independence.\(^{305}\)

Consequently, Security Council Resolution 1904, which established the Ombudsperson, is a step in the right direction towards compliance with the internationally accepted principle of due process because it does provide for an individual’s right to access an independent and impartial review mechanism. Even if this review mechanism lacks authority to take a binding decision and it certainly cannot be defined as judicial review, it may turn out to be more powerful than first expected if the Sanctions Committee pays substantial deference to the suggestions of the Ombudsperson or if the public nature of the Ombudsperson’s “observations” work to shed light on the ongoing problems with the 1267 sanctions regime compliance with international due process rights norms.

---

\(^{301}\) UN Doc. S/RES/1904 (2009), at para. 20.

\(^{302}\) See Scheremers and Blokker, supra note 104, at § 524 – 527.

\(^{303}\) UN Doc. S/RES/1904 (2009), at para. 20. Review “mechanisms that lack an independent decision-maker will not pass due process muster. For example any panel of experts or judicial body entirely chosen by, dependent on, or easily replaced by the Security Council probably would not pass the bar of providing effective due process”. Genser and Barth. supra note 8, at 31 – 32.

\(^{304}\) Genser and Barth. supra note 8, at 32, n. 195.

\(^{305}\) UN Doc. S/RES/1904 (2009), at para. 20.
Another limitation to the Ombudsperson’s powers is that UN member states will be able to withhold any information from the Ombudsperson that they prefer to keep confidential, which can essentially preclude the Ombudsperson from effectively reviewing a delisting request and offering observations. Furthermore, Ombudsperson will not play a role in de-listing petitions from member states because the Sanctions Committee retains the sole power to hear delisting requests from member states. Thus, a state can deny the Ombudsperson the chance to give personal observations on a delisting request by requesting the Committee to delist an individual before the individual contacts the Ombudsperson.

The establishment of the Ombudsperson will also benefit listed individuals or entities in the area of information transfer and accessibility because it will allow for them to engage in dialogue with the Ombudsperson. Consequently, the establishment of the Ombudsperson gives targeted individuals access to more information on the reasons for their listing, the denial of their delisting request and most importantly it allows them to have their side of the story compiled and forwarded to the Sanctions Committee. This improvement in the 1267 sanctions regime does not mean that it now complies with the right of due process but it may allow for more efficient dissemination of information between the Sanctions Committee and the listed individual or entity. This may be accomplished through the Ombudsperson’s procedures that allow for him/her to question the petitioner, receive fact based assessments from the petitioner regarding the delisting request, inform the petitioner on de-listing request procedures, explain the Sanction Committee’s statement of the case against him/her and if the de-listing request is denied the Ombudsperson will give the petitioner an clarification as to why the delisting request was denied. These enhancements to the 1267 sanctions regime de-listing procedures will clearly benefit the petitioner by allowing for a greater transmission of information between him/her and the Sanctions Committee and direct accessibility to an independent UN review body, regardless of the lack of a right to an effective remedy.

Thirdly, the establishment of the Ombudsperson will allow an opportunity for the petitioner to be heard by an independent and impartial body that can review the delisting

\[306 \text{id.}, \text{ at Annex II.}\]
\[307 \text{id.}\]
procedure and offer a recommendation as to whether or not the petitioner should be de-listed. Of course, the only way that the petitioner would enjoy the right of due process is if the Ombudsperson was empowered to take a binding decision on the delisting request. However, at least the petitioner has the right to be heard by a body that can come to a fact-based conclusion, even if it is only a non-binding report. Also this is an improvement from the Focal Point that used to hear from the individual petitioner because the Focal Point was a political body that was not even empowered to engage in dialogue with the petitioner or to give a fact-based opinion on the substance of delisting requests.

In sum, the establishment of the 1267 regime’s Ombudsperson is another small step towards the regime’s compliance with international due process standards. The most important amendment to the 1267 sanctions regime under Resolution 1904 is that it now allows for a greater transmission of information between the listed individual and the Sanctions Committee. However, the fact that listed individuals still do not have the right to an effective remedy, to judicial review of listing/de-listing decisions and to be heard by the decision-making body under the 1267 regime leaves the regime not in compliance with commonly accepted international due process standards.
7. CONCLUSION

For at least the last five years national and regional courts have begun reviewing implementation legislation for the Security Council’s 1267 sanctions regime. In general, these courts have agreed that the listing/delisting procedures established for the Council’s targeted sanctions regime do not respect the fundamental human right of due process. The establishment of the Ombudsperson for the 1267 regime evidences the Security Council’s understanding that changes to the regime’s listing/delisting procedures are necessary, if not legally required, because many member states and their courts have argued that Council targeted sanctions regimes must respect due process standards. Furthermore, upon an examination of the judgments regarding domestic and regional legal challenges of the Security Council’s 1267 sanctions regime there is a clear indication that states are willing to choose compliance with due process rights of targeted individuals over compliance with their UN Charter obligations that are relevant to Council sanctions regimes. Moreover, these cases have shown that states are willing ensure due process standards are available to targeted individuals if the Security Council does not.

The preceding analysis of international law’s applicability to the UN Security Council leads to the conclusion that the Council is actually obliged to comply with international legal norms that are relevant to its purposes and principles. This rule is legally based on the principles of international legal personality and attributed powers, among others. The primary sources of such binding international law are the UN Charter and *jus cogens*, however the Security Council can also have international legal obligations stemming from treaties, customary law, and general principles of law.

Moreover, the UN Charter, implied duties doctrine and the Universal Declaration of Human Rights all can be reasonably interpreted as legal bases for a principle of international law that provides that the UN Security Council is obliged to ensure that rights of due process are made available to individuals directly targeted with sanctions under Chapter VII of the UN Charter.

Furthermore, international human rights law recognizes a right to procedural due process that is applicable to a state or international organization anytime it is taking a ‘governmental’ action that adversely affects the rights or freedoms of individuals. This
fundamental human right is guaranteed by numerous international agreements, customary international law, general principles of law and arguably has the status of a *jus cogens*. A comparative analysis of the substantive provisions of these different sources of the right to due process establishes the common elements inherent in such a right. Accordingly, the right of due process entails that individuals targeted by Security Council Chapter VII sanctions must be provided with an opportunity to be hear before an independent and impartial decision-maker that is empowered to grant an effective remedy.

Finally, while the creation of the Ombudsperson to handle de-listing requests from individuals under the 1267 sanctions regime is a step in the right direction by the Security Council, it is not enough to bring the 1267 regime into compliance with internationally accepted procedural due process standards. The Ombudsperson does improve compliance with the accessibility element of due process because targeted individuals can directly engage in dialogue with the Ombudsperson. However, the Ombudsperson does not satisfy the element requiring an independent decision-maker because it is only empowered to give ‘observations’ and not empowered to make ‘decisions’. The Sanctions Committee is still the only with the power to be the ‘decision-maker’ and it lacks independence and impartiality. Most importantly, the Ombudsperson does not satisfy the effective remedy element of due process because the Ombudsperson lacks any authority to take binding decisions on de-listing requests. Thus the Security Council has not secured the right to an effective remedy to targeted individuals by establishing the Ombudsperson.

As the May 2008 report of the 1267 Monitoring Team clearly observed, the Security Council’s 1267 sanctions regime’s non-compliance with procedural due process standards in the listing/de-listing procedures pose challenges that can “seriously undermine implementation” of the sanctions regime and unless these “defects are remedied, “the sanctions regime will continue to fade”.\(^{308}\) After the creation of the Ombudsperson the 1267 regime is still not in compliance with procedural due process standards. Consequently, the possibility remains for the sanctions regime to be undermined by its defects and continue to fade.

---

BIBLIOGRAPHY

BOOKS


DOMESTIC COURT JUDGMENTS


INTERNATIONAL COURT JUDGMENTS, DECISIONS AND ADVISORY OPINIONS


DOCUMENTS, REPORTS, RESOLUTIONS AND DECISIONS OF INTERNATIONAL ORGANIZATIONS

12. Summary Report of the Ninth Meeting of Committee I/1, UN Doc. 742, I/1/23 (1945).
30. UN Doc. SC/9947 (2010).
36. World Summit Declaration, UN Doc. GA/RES/60/1 (2005).

**INTERNATIONAL CONVENTIONS**

3. American Declaration on the Rights of Man (1948).
7. International Court of Justice Statute (1945).

80
JOURNAL ARTICLES AND SCHOLARLY REPORTS


**NEWSPAPER ARTICLES**


**SCHOLARLY REPORTS AND STUDIES**


WEBSITES