

2007

## Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights

Andrew Hudson

---

### Recommended Citation

Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L LAW. 203 (2007).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol25/iss2/4>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights

By  
Andrew Hudson\*

## I. INTRODUCTION

The Security Council, as the organ charged with “primary responsibility for the maintenance of international peace and security,”<sup>1</sup> has been the principal architect of the United Nations’ (UN) response to terrorism. Through a series of resolutions, the Security Council has established a comprehensive counter-terrorism regime.<sup>2</sup> This regime represents a departure from traditional Security Council action in a number of ways.<sup>3</sup> It is part of a broader trend in international law toward the regulation of non-state actors and the demise of the public/private distinction. By expanding the interpretation of a “threat to international peace and security,” the counter-terrorism regime also exemplifies the debate concerning the Security Council’s role in remaking international law and its ability to act as a global legislator. The counter-terrorism regime provides the clearest evidence of the Security Council’s transformation from enforcer of collective security to global law maker.<sup>4</sup> The regime’s existence also raises serious concerns about whether an inter-state body such as the Security Council can legitimately target individuals with sanctions. Such targeted

---

\* B.A. (Hons) (Melbourne); L.L.B. (Hons) (Melbourne); L.L.M (NYU School of Law). 2005/6 Global Public Service Law Scholar, NYU School of Law; 2006/7 Arthur Helton Fellow at Human Rights First, New York. I would like to thank the following people for their helpful comments on this article: Professors Philip Alston, Eyal Benvenisti and Simon Chesterman from NYU School of Law, and the participants in the 2006 Center for Human Rights and Global Justice Emerging Human Rights Scholarship Conference.

1. U.N. Charter art. 24, para. 1.
2. See discussion *infra* Part II.
3. See discussion *infra* Part II.D.
4. See, e.g., Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

sanctions risk violating universally recognized legal rights of individuals.<sup>5</sup>

This paper is an advocacy piece, which does not purport to undertake a comprehensive review of custom or jurisprudence on the subject. Rather, it argues from broad principles and draws upon various legal instruments to construct a tripartite thesis: firstly, that the Security Council's sanctioning regime is bound by core aspects of the right to a fair hearing; secondly, that the regime breaches those same aspects of the right to a fair hearing, principally by failing to provide for an effective mechanism of review; and thirdly, that the regime should be amended to incorporate minimum fair hearing safeguards and bring the Security Council into conformity with its obligations. The paper concludes by explaining how the Security Council can act decisively in tackling terrorism without violating its human rights obligations.

Part II outlines the Security Council's counter-terrorism regime, focusing on the direct economic sanctioning of individuals established by Security Council Resolution 1267.<sup>6</sup> Such direct sanctioning of individuals is a key element in the Security Council's response to terrorism. Part III examines the restraints that international human rights law places on the Security Council in its efforts to combat terrorism. Part IV argues that the counter-terrorism regime breaches those restraints in relation to the right to a fair hearing and scrutinizes the recent European Court of First Instance decision, the first major international case to address these issues.<sup>7</sup> The court decision is used to construct an argument that the counter-terrorism regime breaches *jus cogens*. Focus is placed on this case, despite the court's relative obscurity, because it is the only court to have considered the legality of the counter-terrorism regime and because the decision contains revolutionary findings. Ultimately, however, the court's overall holding is rejected.<sup>8</sup> Part V considers whether the 1267 regime represents a larger trend in Security Council action toward the denial of individual human rights, especially with regard to recent sanctioning regimes. Part VI briefly discusses how the 1267 sanctioning regime could be amended to conform to fundamental human rights standards.

---

5. Erika de Wet, *The Role of Human Rights in Limiting the Enforcement Power of the Security Council: A Principled View*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 7*, 7 (Erika De Wet & Andrew Nollkaemper eds., 2003).

6. See S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

7. Case T-306/01, *Yusuf v. Council* (Sept. 21, 2005), <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=t306%2F01&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=10>.

8. It is outside the scope of this paper to address the considerable question of whether Security Council decisions can be reviewed and if so by which institutions. For further discussion regarding this question, see, e.g., Thomas Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992); Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?*, 10 EUR. J. INT'L L. 517 (1999); Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996); Eric Zobel, *The Lockerbie Controversy: Tension between the International Court of Justice and the Security Council*, 5 ANN. SURV. INT'L. & COMP. L. 259 (1999).

## II.

AN OUTLINE OF THE SECURITY COUNCIL'S  
COUNTER-TERRORISM SANCTIONING REGIME

The Security Council's counter-terrorism regime consists of four elements: (1) condemnation of terrorist acts; (2) imposition of obligations on all states; (3) capacity building; and (4) imposition of sanctions on individuals.<sup>9</sup> The fourth element, individual economic sanctions, is the focus of this paper and the other elements will only be analysed to the extent that they relate to it. In Resolution 1267, the Security Council determined that the Taliban's actions in Afghanistan constituted a threat to international peace and security by "providing sanctuary and training for international terrorists and their organizations, and [in failing to] cooperate with efforts to bring indicted terrorists to justice."<sup>10</sup> The interpretation of a state's failure to stop providing support to a non-state actor as a threat to international peace and security represented a significant decision by the Security Council. Acting under Chapter VII of the UN Charter, the Security Council established a sanctioning regime to freeze any financial resources destined for the Taliban.<sup>11</sup> It also established a committee (the "1267 Committee") to monitor state compliance with the obligations contained in the resolution.<sup>12</sup>

After the Security Council determined that there was a threat to international peace and security under Article 39 of the UN Charter, it passed non-forcible measures pursuant to Article 41 in order to maintain or restore international peace and security. Economic sanctions have traditionally been used under Article 41 as a measure to coerce states or non-state actors to comply with Security Council resolutions prior to the use of force.<sup>13</sup> The sanctions used by the Security Council in Resolution 1267 are a form of recently developed "smart sanction" which directly target supposed violators of international law instead of innocent populations.<sup>14</sup> The rationale behind such sanctions is to target the most culpable parties rather than sanctioning the state as a whole.

---

9. As to the first element, *see* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sep. 12, 2001) (after the September 11 terrorist attacks); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004) (after the Beslan school siege in Russia); S.C. Res. 1611, U.N. Doc. S/RES/1611 (Jul. 7, 2005) (after the London bombings). As to the second and third elements, *see* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sep. 28, 2001); S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 23, 2004). *See generally* Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AM. J. INT'L L. 745 (2004).

10. S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998), ¶ 13, cited by S.C. Res. 1267, *supra* note 6, at ¶ 2.

11. S.C. Res. 1267, *supra* note 6, ¶ 4.

12. *Id.* ¶ 6.

13. *See* Vera Gowlland-Debbas, *Sanctions Regimes under Article 41 of the UN Charter*, in NATIONAL IMPLICATIONS OF UN SANCTIONS 1, 3 (Vera Gowlland-Debbas ed., 2004).

14. *See, e.g.*, Chantal De Jonge Oudraat, *The Role of the Security Council*, in TERRORISM AND THE UN: BEFORE AND AFTER SEPTEMBER 11 151, 165 (Jane Boulden & Thomas Weiss eds., 2004) (explaining that, in addition to freezing of assets, other smart sanctions include suspension of aid, the denial and limitation of access to foreign financial markets, trade embargoes on arms and luxury goods, flight bans and the denial of international travel, visas and educational opportunities.)

Sanctioning the entire population has, in the past, had dramatic humanitarian consequences for civilians.<sup>15</sup>

The counter-terrorism sanctioning regime has now been modified by various resolutions. Resolutions 1333, 1390, 1455, 1526 and 1617 require all states to impose a travel ban and arms embargo on, and freeze the assets of, individuals and entities listed as being “associated with” the Taliban, Osama bin Laden, Al-Qaeda or their affiliates (henceforth referred to as the 1267 regime).<sup>16</sup> The 1267 Committee is now mandated to maintain an updated list of individuals and entities who are associated with these groups and whose assets are therefore to be frozen.<sup>17</sup> States are to submit reports to the 1267 Committee on the implementation of the measures contained in the resolutions. Resolution 1526 established a Monitoring Team to report on how the sanctions are being implemented and to recommend new measures to improve them.<sup>18</sup>

#### *A. Operation of the 1267 Committee*

Although previous sanction regimes have had committees to oversee them, the powers of the 1267 Committee are unprecedented. To appreciate these powers, it is necessary to analyse its procedural guidelines closely. The Committee consists of all current Security Council members. Its principal mandate is to maintain “an updated list based on information provided by States. . . of the individuals and entities designated as being associated with Usama bin Laden . . . .”<sup>19</sup> All member states are required to freeze the assets of individuals placed on this list. Thus, an individual on this list faces grave consequences. Not only is this individual stigmatized by being labelled a terrorist, but all of his or her formal means of employment and ability to derive income are removed.

#### *B. Listing Procedures*

Given the serious consequences, the manner in which individuals are placed on the list deserves close scrutiny. By October 2006, the list contained approximately four hundred individuals.<sup>20</sup> The vast majority of these individuals

---

15. Consider the well-known consequences of the following use of state-wide sanctions: S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6 1990) (imposing broad economic embargo on Iraq); S.C. Res. 757, U.N. Doc. S/RES/757 (May 30 1992) (imposing same on the former Yugoslavia); S.C. Res. 841, U.N. Doc. S/RES/841 (Jun. 16 1993) (imposing same on Haiti).

16. S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005).

17. S.C. Res. 1390, *supra* note 16, ¶ 5.

18. S.C. Res. 1526, *supra* note 16, ¶ 2.

19. S.C. Res. 1333, *supra* note 16, ¶ 16(b).

20. U.N. Security Council, Comm. Established Pursuant to Resol. 1267 (1999), *The New Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organisation as Established and Maintained by the 1267 Committee*, <http://www.un.org/Docs/sc/committees/1267/pdflist.pdf> [hereinafter 1267 Comm.] (last visited Oct.

were submitted by the United States shortly after September 11, 2001.<sup>21</sup> Until the Committee adopted its guidelines in November 2002<sup>22</sup> pursuant to Resolution 1390, new listing proposals contained minimal personal information, and no explanation was given about their alleged association with terrorism. The Committee has therefore accepted proposals without considering any evidence against individuals and without the ability to substantively evaluate the proposals.<sup>23</sup>

Some procedural changes have been implemented since November 2002. New proposals for the list should include personal information to both facilitate identification and provide a narrative that forms the basis for taking action.<sup>24</sup> Since Resolution 1526 in 2004, when proposing names for the list, states are also required to provide information demonstrating the individual's association with Al-Qaeda, the Taliban or Osama bin Laden.<sup>25</sup> States have also been encouraged to inform the individual of their inclusion on the list.<sup>26</sup>

Despite these procedural changes, the Committee still lacks criteria stipulating how it determines whether an individual should be listed in the first place. Until Resolution 1617 in 2005, there were no guidelines on how closely affiliated an individual must be to Al-Qaeda or how far the concept of "associated with" could stretch through inadvertent and indirect funding or otherwise. Resolution 1617 now provides a very broad definition of "associated with" Al-Qaeda, Osama bin Laden, or the Taliban which extends to "otherwise supporting an affiliate" of these three groups.<sup>27</sup> Moreover, the Committee still makes decisions on the basis of the "no-objection" procedure, whereby a name will be added to the list if no member objects to the listing within forty-eight hours.<sup>28</sup> The default assumption, therefore, is that a proposal will be added to the list unless a member objects. Finally, while states are encouraged to inform individuals of their inclusion on the list, these individuals are still not presented with reasons for their listing or with any details of the proposed case against them.

### C. De-listing Procedures

Before November 2002, there was no formal process to allow for

---

4, 2006).

21. Eric Rosand, *The UN Security Council's Counter-Terrorism Efforts* 7 (Apr. 7, 2005) (unpublished comment to American Society of International Law Regional Centennial Meeting, on file with author).

22. 1267 Comm., *Guidelines of the Committee for the Conduct of its Work*, [http://www.un.org/Docs/sc/committees/1267/1267\\_guidelines.pdf](http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf).

23. Elin Miller, *The Use of Targeted Sanctions in the Fight Against International Terrorism – What about Human Rights?*, 97 AM. SOC'Y INT'L L. PROC. 46, 47 (2003).

24. 1267 Comm., *supra* note 22, ¶ 6.

25. S.C. Res. 1526, *supra* note 16, ¶ 17.

26. *Id.* ¶ 18.

27. S.C. Res. 1617, *supra* note 16, ¶ 2.

28. 1267 Comm., *supra* note 22, ¶ 9(b).

individuals to be removed from the list. In November 2002, the Committee adopted the following guidelines for the de-listing of individuals:<sup>29</sup>

- The individual must petition his or her government of residence or citizenship to request a review of the case;
- The government of residence or citizenship, if it wants to support the petition, should approach the government that originally proposed the individual's listing;
- The government which designated the individual can seek information from any other government;
- If the government of residence or citizenship wishes to pursue a de-listing request, it should seek to persuade the designating government; and
- The government of the individual's residence or citizenship may then submit a request to the Committee. However, the Committee makes all decisions on the basis of consensus, so any one member of the Committee effectively has the ability to veto a request for de-listing.<sup>30</sup> Meetings are also private, and members are not required to provide reasons for their objections.

#### *D. Significance of the 1267 Regime*

The 1267 regime is unprecedented in its scope in three important ways. Firstly, as with any action taken under Chapter VII, the regime is binding on all states. As opposed to the formulation of customary international law or treaty law, where a state can opt out of the regime,<sup>31</sup> the UN Charter obliges all states to abide by Security Council decisions. Article 25 of the UN Charter states that "members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>32</sup> Article 103 operates to ensure that these obligations are superior to any other conflicting obligations that a state may have under an international agreement or customary international law.<sup>33</sup> Resolution 1267 makes this explicit by requiring states to

---

29. *Id.* ¶ 7.

30. *Id.* ¶ 9(a).

31. See generally HELEN DUFFY, *THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW* (2005) (explaining that, in relation to custom, a state may act as a persistent objector and refuse to be bound while in relation to treaty law, a state may refuse to ratify or ratify with significant reservations).

32. U.N. Charter art. 25.

33. *Id.* art. 103. Article 103 merely states that Charter obligations take precedence over obligations derived from international agreements. However, the International Court of Justice has recognized that the Charter also contains customary obligations which are difficult to distinguish from purely Charter-based obligations. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S)* 1986 I.C.J. 14 (June 27). Moreover, Article 38 of the Statute of the International Court of Justice does not recognize a hierarchy of sources of international law. Statute of the International Court of Justice art. 38, para. 1 (the Statute is an integral part of the U.N. Charter). Therefore, a reference to international agreements in Article 103 should also be read as including custom.

“act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted . . . .”<sup>34</sup> Consequently, a state’s failure to implement the obligations embodied in the 1267 regime may, subject to limits discussed below, constitute a breach of the Charter irrespective of the circumstances. Moreover, given that Resolution 1267 was passed under Chapter VII, a failure to strictly implement its far-reaching obligations could itself be deemed a threat to international peace and security and therefore lead to enforcement action, such as provisional measures under Article 40 or sanctions under Article 41.

Secondly, the Security Council has devolved unprecedented law-making powers to a committee. While the Security Council has established other sanctions committees,<sup>35</sup> few have been charged with applying sanctions to individuals. Indeed, the 1267 Committee is charged with continually deciding which individuals should face sanctions.<sup>36</sup> Its determinations must be implemented in domestic law by all states. This gives a subsidiary body of the Security Council the ability to determine which individuals are involved in terrorism and demand that all states freeze their assets.

I would query whether this power to demand state compliance irrespective of customary or treaty obligations can be delegated to a subsidiary body such as the 1267 Committee. Arguably, this power is reserved exclusively to the Security Council itself.<sup>37</sup> Certainly, the Security Council cannot delegate the power to determine threats to international peace and security.<sup>38</sup> In addition, the Committee’s capacity to sanction is especially potent because, unlike previous sanction regimes, these sanctions do not apply to a particular country, but instead apply on a global level.<sup>39</sup> The responsibility for imposing sanctions on individuals who may be located anywhere around the world is clearly a serious one.

Thirdly, the scope of the obligations that the 1267 regime places on states is

34. S.C. Res. 1267, *supra* note 6, ¶ 7.

35. See S.C. Res. 661, *supra* note 15; S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (Libya); S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992) (Somalia); S.C. Res. 864, U.N. Doc. S/RES/864 (Sep. 15, 1993) (Angola); S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994) (Rwanda); S.C. Res. 985, U.N. Doc. S/RES/985 (Apr. 13, 1995) (Liberia); S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997) (Sierra Leone); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998) (Kosovo); S.C. Res. 1298, U.N. Doc. S/RES/1298 (May 17, 2000) (Eritrea and Ethiopia); S.C. Res. 1343, U.N. Doc. S/RES/1343 (Mar. 7, 2001) (Liberia).

36. Peter Guthrie, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 495 (2004).

37. See generally Jose Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES, *supra* note 5, at 119, 135.

38. DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 33 (1999).

39. Jane Stromseth, *The Security Council's Counter-Terrorism Role: Continuity and Innovation*, 97 PROC. AM. SOC'Y INT'L L. 41, 43 (2003).

beyond that of a standard sanctions regime. It extends the Security Council's growing trend toward regulating interactions within states and intruding upon domestic jurisdiction.<sup>40</sup> When combined with the obligations monitored by the Counter-Terrorism Committee, states are faced with open-ended duties, often without temporal limitation and accompanied by demands to criminalize conduct which may not have been previously criminal.<sup>41</sup> States are required to modify domestic laws, punish non-state actors, ratify treaties and regularly report to subsidiary committees of the Security Council.<sup>42</sup> These are onerous demands and represent a significant enlargement in Security Council power.<sup>43</sup>

Finally, an often misunderstood aspect of the 1267 regime is that it remains in force indefinitely. Although originally established with a twelve month review period, Resolution 1390 ensured that the regime is in effect permanent. It states that after twelve months the Security Council "will either allow these measures to continue or decide to improve them. . . ."<sup>44</sup> Consequently, the regime will continue until the Security Council decides otherwise. In each year since the regime began, the Security Council has sought to improve and strengthen the sanctions.<sup>45</sup> It cannot be said, therefore, that the 1267 regime is temporary.

### III.

#### HUMAN RIGHTS RESTRAINTS ON THE 1267 REGIME

Given the unprecedented nature of the 1267 regime, it is appropriate to ask whether the Security Council is limited in any way in framing the 1267 regime. Does the Security Council have unfettered discretion to devise counter-terrorism strategies which are then binding on all states? Or are there certain human rights limitations which restrain the responses the Council may craft? The Security Council's power to employ counter-terrorism policies is limited and the following sections identify the sources of these limitations.

##### *A. Purposes and Principles of the U.N.*

The first limitation can be found in UN Charter Articles 2 and 24(2), respectively, which oblige the UN organization, and the Security Council specifically, to "act in accordance with the Purposes and the Principles of the United Nations."<sup>46</sup> Those purposes and principles include "promoting and

---

40. Alvarez, *supra* note 37, at 119.

41. See Security Council resolutions cited *supra* notes 9 and 16 and accompanying text.

42. *Id.*

43. Peter Guthrie, The Security Council's Anti-Terror Regime: New Powers and Problems 9 (Dec. 2003) (unpublished comment, on file with author).

44. S.C. Res. 1390, *supra* note 16, ¶ 3.

45. S.C. Res. 1455, *supra* note 16, ¶ 2; S.C. Res. 1526, *supra* note 16, ¶ 2; S.C. Res 1617, *supra* note 16, ¶ 21 (The Security Council will "review the measures . . . with a view to their possible further strengthening in 17 months, or sooner if necessary").

46. U.N. Charter, art. 24, para. 2.

encouraging respect for human rights and for fundamental freedoms.”<sup>47</sup> Some commentators have argued that this provision is so vague that it does not serve as a limit to Security Council action.<sup>48</sup> However, notwithstanding its breadth, the requirement clearly does serve as a limitation.<sup>49</sup> The Security Council must fulfil its primary role of maintaining peace and security while adhering to the purposes and principles of the UN. While the Security Council may be able to limit the goals contained in the purposes and principles, it cannot erode their “core content.”<sup>50</sup> In the context of the 1267 regime, this limitation means that the regime cannot erode basic human rights norms.

A closely related reading of the UN Charter suggests that States may refuse to implement aspects of the 1267 regime which contradict the human rights obligations contained in the UN Charter.<sup>51</sup> As stated above, Article 25 obliges states to “carry out the decisions of the Security Council *in accordance with the present Charter*.”<sup>52</sup> While this article can be interpreted in a number of ways, its meaning is clear when read with Article 2(5), which establishes that states “shall give the United Nations every assistance in any action it takes in accordance with the present Charter.”<sup>53</sup> The intent of both of these articles is to only bind states to implement Security Council decisions which are made in accordance with the Charter.<sup>54</sup> Therefore, if the 1267 regime violates core human rights, the Security Council would be acting outside the Charter, and states would not be obliged to abide by it.

This proposition is supported by the International Criminal Tribunal for the former Yugoslavia (ICTY), itself created by the Security Council under Chapter VII. In the Tadic decision, the ICTY concluded that the Security Council is bound by the UN Charter.<sup>55</sup> Moreover, the International Court of Justice has held that even when the Security Council acts under Chapter VII, it must act in

47. U.N. Charter, art 1, para. 3. Articles 55 and 56 of the Charter repeat the obligation of the U.N. to promote human rights and fundamental freedoms.

48. See, e.g., Gabriel Oosthuizen, *Playing Devil's Advocate: The United Nations Security Council is Unbound by the Law*, 12 LEIDEN J. INT'L L. 562 (1999).

49. See also Nicolas Angelet, *International Law Limits to the Security Council*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 71, 74 (Vera Gowlland-Debbas ed., 2001); Iain Cameron, *UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights*, 72 NORDIC J. INT'L L. 159 (2003).

50. Erika De Wet & Andre Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN Y.B. INT'L L. 166, 172 (2002).

51. While it is outside the scope of this paper to consider the consequences that flow from a refusal by states to implement a Security Council resolution on the basis that the resolution is *ultra vires* the Charter, see Alvarez, *supra* note 37, for discussion on this matter.

52. UN Charter art. 25 (emphasis added).

53. UN Charter art. 2, para. 5.

54. See Erika de Wet, *Human Rights Limitations to Economic Enforcement Measures under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime*, 14 LEIDEN J. INT'L L. 277 (2001), for a comprehensive overview.

55. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Oct. 2 1995) (“Neither the text nor the spirit of the Charter conceives of the Security Council as unbound by law.”)

accordance with the purposes of the UN as stated in Articles 1 and 2.<sup>56</sup> It has also held that the breach of certain human rights would violate those purposes and has referred to the Security Council's duty to respect those rights.<sup>57</sup> A recent study commissioned by the UN Office of Legal Affairs also found that the UN Charter obliges the Security Council to respect human rights, specifically due process rights.<sup>58</sup>

### B. Jus Cogens

The strongest argument in favour of limitations on the powers of the Security Council relates to *jus cogens*. *Jus cogens* is defined by the Vienna Convention on the Law of Treaties (Vienna Convention) as:

a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>59</sup>

Although the Security Council may be able to deviate from customary international law or treaty law, it remains bound by peremptory norms of international law or *jus cogens*.<sup>60</sup> The Vienna Convention consolidates customary international law and applies it to "any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization."<sup>61</sup> The Convention further states that any treaty which conflicts with *jus cogens* is void.<sup>62</sup> The Security Council's powers derive from the UN Charter which, as a treaty, does not have the authority to deviate from peremptory norms of international law.<sup>63</sup> The Charter cannot, therefore, be understood to give the Security Council powers unfettered by *jus cogens*. Moreover, states cannot confer more powers to organs of international

---

56. Application of the Convention and Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Yugo.), 1993 I.C.J. 325 (Mar. 1993), ¶ 124.

57. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 57 (June 1971) (with respect to racial discrimination); Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 42 (May 24) (with respect to deprivation of liberty).

58. Bardo Fassbender, United Nations Office of the Legal Counsel, *Targeted Sanctions and Due Process* (2006), [http://www.un.org/law/counsel/Fassbender\\_study.pdf#search=%22%22Targeted%20Sanctions%20and%20Due%20Process%22%22](http://www.un.org/law/counsel/Fassbender_study.pdf#search=%22%22Targeted%20Sanctions%20and%20Due%20Process%22%22).

59. Vienna Convention on the Law of the Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention].

60. See generally Alexander Orakelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59 (2005).

61. Vienna Convention, *supra* note 59, art. 5., 1155 U.N.T.S. at 334.

62. Vienna Convention, *supra* note 59, art. 53, 1155 U.N.T.S. at 344.

63. Matthias Herdegen, *Review of the Security Council by National Courts: A Constitutional Perspective*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES, *supra* note 5, at 79.

organisations than they themselves can exercise.<sup>64</sup> Since states cannot deviate from peremptory norms of international law, they cannot have the power to establish an international organization which is not similarly bound.

The European Court of First Instance has recently held that, “there exists one limit to the principle that resolutions of the Security Council have binding effect: namely that they must observe the fundamental peremptory provision of *jus cogens*. If they fail to do so . . . they would [not] bind . . . Member States.”<sup>65</sup> There is also International Court of Justice authority stating that *jus cogens* prevails over Security Council resolutions.<sup>66</sup> A recent United Kingdom court of appeal decision also accepted that the Security Council could not derogate from human rights norms which have attained the status of *jus cogens*.<sup>67</sup> Any element of the 1267 regime which breaches *jus cogens* is therefore *ultra vires* and void.<sup>68</sup> The Security Council itself has recognized that it should abide by human rights standards, stating that measures to combat terrorism should be consistent with human rights norms.<sup>69</sup> Consequently, it is arguable that the Security Council has implicitly recognised already that it is bound by human rights standards.

#### IV.

##### THE 1267 REGIME: BREACHING THE RIGHT TO A FAIR HEARING

Having outlined the 1267 regime and the limits that human rights law imposes on that regime through the UN Charter and *jus cogens*, I will now argue that the regime breaches those limitations to the extent that it breaches the right to a fair hearing.

##### *A. European Court of First Instance Decision: Yusuf*

The European Court of First Instance has recently handed down the first judgment by an international court analysing the validity of the 1267 regime.<sup>70</sup>

64. De Wet & Nollkaemper, *supra* note 50, at 181.

65. Yusuf, *supra* note 7, ¶ 281.

66. See Application of the Convention and Prevention and Punishment of the Crime of Genocide, *supra* note 56, ¶ 100 (separate opinion of Judge Lauterpacht) (explaining that “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 matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*”).

67. The Queen (On Application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence, ¶ 66-71 [2005] EWHC Civ 327 (Mar. 29, 2006). (U.K.)

68. For further discussion see Orakelashvili, *supra* note 60, at 78.

69. S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (“[A]ny measure taken to combat terrorism [should be] . . . in accordance with international law, in particular international human rights, refugee and humanitarian law”).

70. See Yusuf, *supra* note 7. The case has been appealed to the European Court of Justice. However, the appeal is mainly based on issues of European Community law rather than the aspects of the case discussed in this article. See Case C-415/05 P, Yusuf v. Council (appeal against Judgment of the Court of First Instance of 21 September 2005, appeal lodged Nov. 23, 2005, OJ Feb.

Ahmed Ali Yusuf, a Swedish national, sought to contest his inclusion on the 1267 list by challenging the European regulations implementing the asset freeze against him.<sup>71</sup> The European regulations were passed in response to his inclusion on the 1267 list in November 2001.<sup>72</sup> His original application was joined by other suspects who subsequently withdrew from proceedings when the Swedish government successfully negotiated for their removal from the list.<sup>73</sup> The Swedish government did not lobby to have Yusuf removed, demonstrating the fallibility of the de-listing process, and given his unsuccessful petition, he remained on the list. However, in August 2006, nearly five years after he was listed, he was finally de-listed, demonstrating that he did not have links to terrorism.<sup>74</sup> His eventual de-listing probably only transpired after his high-profile litigation before the European Court of First Instance pressured the Security Council to act.

While the court ultimately held that the regime was valid, the reasoning of its decision is nonetheless groundbreaking. Firstly, it decided that rules of *jus cogens* limit the Security Council. Secondly, it held that the right to a fair hearing, the right to property, and the right to an effective judicial remedy can all constitute *jus cogens*. Thirdly, it held that it can review Security Council decisions to determine whether the Council has observed the rules of *jus cogens*. This final aspect of the decision revives a long-running debate about the extent to which Security Council decisions are judicially reviewable, a debate which started well before the International Court of Justice's *Lockerbie* decision.<sup>75</sup> While it is outside the scope of this paper to fully address the question of review of Security Council decisions, suffice it to say that the court in *Yusuf* answers that question unequivocally in deciding that it "has jurisdiction to review . . . the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*."<sup>76</sup>

However, while the court in *Yusuf* correctly found that the Security Council is limited by *jus cogens*, it nevertheless erred in failing to correctly apply the *jus*

---

10, 2006); cf. C-402/05 P, *Kadi v. Council*, <http://curia.europa.eu/juris/pgibin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C402%2F05+P&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> (appeal against Judgment of the Court of First Instance of 21 September 2005, appeal lodged Nov. 17, 2005, OJ 36/19 Feb. 11, 2006). The *Kadi* case, which was heard at the same time as *Yusuf*, has been appealed on the points of law referred to in this article.

71. For a good summary of the case, see Christian Tomuschat, *Case Note: Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, 43 COMMON MKT L. R. 537 (2006).

72. *Yusuf*, *supra* note 7, ¶ 24.

73. See discussion *infra* Part IV.D.2., for further background facts on the case of Yusuf, Aden and Ali.

74. Press Release, Security Council, Security Council Committee Removes One Individual from Consolidated List, U.N. Doc. SC/8815 (Aug. 24, 2006). See 1267 Comm., *supra* note 20.

75. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v U.S.), 1992 I.C.J. 114 (Apr. 14) (implying that the court had jurisdiction to review Security Council decisions, but declining to do so in the case before it).

76. *Yusuf*, *supra* note 7, ¶ 337.

*cogens* limitation of a right to a fair hearing. I argue that the 1267 regime breaches the *jus cogens* right to a fair hearing and is therefore void to that extent. I wish to use the *Yusuf* decision as a platform for this argument and then posit that the court should have gone further in finding the regime *ultra vires*. I argue that while 1267's sanctioning regime provides for a formal review mechanism, it is not in substance available to listed individuals. Given the brevity of this paper, I will not address the other rights considered by *Yusuf*; however, it is arguable that the 1267 regime also breaches those rights.

*B. Is the Right to a Fair Hearing Part of the Purposes  
and Principles Limitation?*

Does the right to a fair hearing qualify for protection under the purposes and principles of the Charter and therefore limit the Security Council? The answer depends on which human rights fall within this category. Some commentators argue that all rights in the Universal Declaration of Human Rights fall within this category.<sup>77</sup> However, such a broad interpretation is illogical given that some human rights may be derogated from even by states, for example during national emergencies. A more persuasive argument is that only those human rights which are non-derogable fall within this category. Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) provides for the right to a fair hearing by stating that:

in the determination of any criminal charge against [a person], or of [his or her] 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.<sup>78</sup>

Although the ICCPR does not list this right to a fair hearing as a non-derogable provision, the Human Rights Committee has interpreted the “fundamental principles of a fair trial” as being non-derogable.<sup>79</sup>

The International Court of Justice has also stated that the UN was required to establish a judicial body to protect the human rights of its staff when they were involved in a dispute with the UN.<sup>80</sup> It stated that the failure to provide for such a right to a fair hearing was anathema to the purposes and principles of the Charter.<sup>81</sup> The same logic could apply to a third party involved in a dispute with

77. See, e.g., Terry Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 41, 79 (1991).

78. International Covenant on Civil and Political Rights art. 14(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 176, 6 I.L.M. 360, 372 [hereinafter ICCPR].

79. Human Rights Comm., General Comment No. 29: Derogations from provisions of the Covenant during a state of emergency, ¶¶ 11, 16, U.N. GAOR, 56th Sess., Supp. No. 40, at 202, U.N. Doc. A/56/40 (July 24, 2001).

80. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47 (July 13).

81. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 857 (2001).

the UN, such as an individual wishing to dispute his or her listing by the 1267 Committee. Thus, strong authority suggests that the right to a fair hearing is non-derogable and therefore limits the Security Council as an integral part of the purposes and principles of the Charter.<sup>82</sup>

### C. *Is the Right to a Fair Hearing Jus Cogens?*

In reviewing the 1267 regime to see if it complied with the right to a fair hearing, the court in *Yusuf* implicitly recognized that the right can be considered *jus cogens* and thus restricts Security Council action. However, the court avoided explicitly addressing the vociferous debate about which norms qualify for *jus cogens* status.<sup>83</sup> The decision is therefore groundbreaking in *assuming* that the right to a fair hearing constitutes *jus cogens*. Similarly, the Human Rights Committee has stated that the fundamental principles of the right to a fair trial contained in the ICCPR are non-derogable.<sup>84</sup> It also suggests that the right is *jus cogens*.<sup>85</sup>

This raises the vexed issue of the difference between *jus cogens* and non-derogable norms. It is outside the scope of this paper to opine in detail on this problematic distinction.<sup>86</sup> Suffice it to say that the proclamation of a right as being non-derogable is in part recognition of its *jus cogens* nature.<sup>87</sup> However, not all non-derogable norms are necessarily *jus cogens*. Some norms are non-derogable merely because it is never necessary for a state to abrogate them.<sup>88</sup> The classification of norms as *jus cogens* does not depend on whether states parties to a particular treaty have stated that the norms contained in the treaty are non-derogable.<sup>89</sup> Instead, one commentator hypothesizes that a norm is *jus cogens* because it is non-derogable *by nature*, that is, it protects community interests “beyond individual state interests.”<sup>90</sup> The right to a fair hearing could qualify as *jus cogens* based on this definition.

Further evidence for the claim that the right to a fair hearing is *jus cogens* can be found in Common Article 3 of the Geneva Conventions, which guarantees the core elements of the right to a fair trial. The Human Rights Committee has stated that these basic elements of the right to a fair trial cannot

82. See also Fassbender, *supra* note 58.

83. For an extended consideration of this debate, see de Wet, *supra* note 5, at 7; Gutherie, *supra* note 36.

84. General Comment No. 29, *supra* note 79, ¶¶ 11, 16.

85. *Id.* ¶ 11 (“States parties may in no circumstances . . . [violate] peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence”).

86. For further discussion on this matter, see Orakhelashvili, *supra* note 60.

87. General Comment No. 29, *supra* note 79, ¶ 11.

88. *Id.* See also ICCPR, *supra* note 78, art. 11 (“No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation”), art. 18 (“freedom of thought, conscience and religion”).

89. Orakhelashvili, *supra* note 60, at 65.

90. *Id.*

be derogated from even in times of emergency.<sup>91</sup> The ICTY has also held that the right to a fair hearing is essential,<sup>92</sup> implying that the right was a limitation on the Council's powers and that its observance was vital in validating the Council's establishment of the ICTY.<sup>93</sup> The Security Council itself also supported the argument that it is bound by core aspects of the right to a fair hearing by incorporating such standards into the ICTY and ICTR.<sup>94</sup>

It is therefore arguable that the right to a fair hearing has reached the level of *jus cogens*. Moreover, even if the right to a fair hearing has not reached the status of *jus cogens*, it remains one of the core human rights protected by the purposes and principles of the UN Charter, which also limit the Security Council. For the purposes of this paper, I will assume that *Yusuf* is correct in holding that the right to a fair hearing has reached *jus cogens* status, although it is clearly a matter of debate.<sup>95</sup>

#### *D. Does the Sanctioning Regime Breach the Right to a Fair Hearing?*

The right to a fair hearing protected by *jus cogens* or the purposes and principles of the UN Charter will not encompass all aspects as defined by Article 14 of the ICCPR. Only those "fundamental" aspects of the right to a fair hearing are protected.<sup>96</sup> The core procedural guarantees protected by the right to a fair hearing are the provision of a competent hearing before an independent and impartial tribunal and the requirement of "equality of arms" between the parties.<sup>97</sup> The right to a fair hearing does not only extend to formal court proceedings for criminal charges. It applies more broadly to any "procedures [which] determine . . . rights and obligations."<sup>98</sup> However, the right to a fair hearing bestows further protections when criminal charges are in question. These further protections are contained in Article 14(2)-(8) of the ICCPR, which apply only to criminal charges, and include the right to legal representation, to cross-examine witnesses, to be tried without undue delay, etc.

---

91. General Comment No. 29, *supra* note 79, ¶ 16. Article 3 and its basic fair-trial guarantees are common to each of the four Geneva Conventions. See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S.; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

92. Tadic, *supra* note 55, ¶ 38.

93. *Id.*

94. For examples of this incorporation see the Statute and Rules of Procedure for ICTY and ICTR (incorporating core aspects such as the right to a competent hearing before an independent and impartial tribunal and the requirement of "equality of arms" between the parties).

95. See, e.g., Alvarez, *supra* note 37.

96. Human Rights Comm., *supra* note 79, ¶ 11.

97. The fundamental aspects of the right to a fair hearing are contained in art 14(1) of the ICCPR, which applies to any procedure determining rights and obligations. De Wet, *supra* note 5, at 16.

98. Human Rights Comm., General Comment No. 13, ¶ 2, U.N. GAOR, 39th Sess., Supp. No. 40, at 143, U.N. Doc A/39/40 (Apr. 12, 1984).

There is considerable debate as to whether the 1267 sanctioning regime is criminal.<sup>99</sup> The Human Rights Committee has not interpreted the scope of “criminal charges.” However, the European Court of Human Rights has considered what constitutes criminal charges for the purposes of a similar provision.<sup>100</sup> The Court held that the nature and severity of the threatened sanction are critical in determining whether the charge is criminal.<sup>101</sup> In relation to the 1267 regime, the nature and severity of the sanctions should bring the regime within the criminal sphere. The sanctions are imposed on those adjudged to be involved in financing terrorism, a serious criminal activity under both international and national law. Moreover, the severity of the sanctions suggests a punitive element. Sanctions have dire economic consequences because they deny an individual his or her livelihood and remain in place indefinitely.<sup>102</sup> Finally, there is the irreparable stigma of being labelled a terrorist supporter. At the very least, the 1267 regime is “quasi-criminal in nature.”<sup>103</sup> In any event, the fundamental principles of the right to a fair hearing, as embodied in *jus cogens* or the principles and purpose of the UN, will apply to the regime whether it is criminal or not. The only difference in classifying the regime as criminal is that additional aspects of the right to a fair trial will apply.<sup>104</sup>

I now argue, by refuting the *Yusuf* decision, that the 1267 regime breaches the core procedural guarantees protected by the right to a fair hearing as contained in the purposes and principles of the UN Charter and *jus cogens*. In particular, two fundamental aspects of the *Yusuf* decision holding that the sanctioning regime complied with the right to a fair hearing are flawed.

---

99. See U.N. SECURITY COUNCIL, *Third Report of the Analytical Support and Sanctions Monitoring Team*, ¶¶ 37, 41, in LETTER DATED 2 SEPTEMBER 2005 FROM THE CHAIRMAN OF THE SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/2005/572 (Sep. 9, 2005) [hereinafter *Third Report of the Analytical Support and Sanctions Monitoring Team*] (stating alternately that “the sanctions are intended as a deterrent” and “the sanctions do not impose a criminal punishment or procedure”); De Wet & Nollkaemper, *supra* note 50, at 177 (explaining that asset freeze sanctioning regime constitutes a criminal charge); IAIN CAMERON, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, DUE PROCESS AND UNITED NATIONS SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS 2 (2006), [http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/public\\_international\\_law/Texts\\_&\\_Documents/2006/1.%20Cameron%20Report%2006.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_&_Documents/2006/1.%20Cameron%20Report%2006.pdf) (stating that “the effects of blacklisting may be sufficiently serious to be the ‘determination of a criminal charge’, triggering the application of Article 6 [of the European Convention on Human Rights] in its entirety”).

100. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222, 228.

101. *Engel v. Netherlands*, 1 Eur. H.R. Rep. 647 (1976) (Court decision); *Lauko v. Slovakia*, 1998-VI Eur. Ct. H.R. 2497; *Lutz v. Germany*, 123 Eur. Ct. H.R. (ser. A) at 22 (1987).

102. See S.C. Res. 1452, ¶ 1(a), U.N. Doc. S/RES/1452 (Dec. 20, 2002) (changing the regime so that individuals listed are entitled to a minimum income to survive; however, these individuals are still deprived of the ability to work and earn income).

103. Cameron, *supra* note 49.

104. These further protections are those contained in Article 14(2)-(8) of the ICCPR, which apply only to criminal charges such as the right to legal representation, to cross-examine witnesses, to be tried without undue delay etc.

### 1. *Lack of Opportunity to Dispute Listing*

The major reason that *Yusuf* held that the right to a fair hearing had not been breached was that the 1267 regime set up a “mechanism for the re-examination of individual cases.”<sup>105</sup> However, as explained above, the de-listing procedure established by the 1267 Committee is onerous. An individual must convince his government of residence/citizenship to take up his cause with the Committee. This informal petitioning may constitute an insurmountable barrier for the individual. In the current international political climate, states are reluctant to be seen as supporting terrorism. A state may fear that lobbying for the de-listing of a suspected terrorist will be perceived by other states as acting contrary to the “war on terrorism.”

Moreover, if a national government is corrupt or undemocratic or incompetent, the individual’s request may be ignored. The majority of the individuals listed by the 1267 Committee are Afghani.<sup>106</sup> Other nationalities which feature prominently are Yemeni, Egyptian, Algerian, Syrian and Saudi Arabian.<sup>107</sup> None of these countries are renowned for open, accountable government which is responsive to individual requests. Rather, in most of these states, it would be extremely difficult for an individual to successfully petition their government to argue for their de-listing. The example of Yasin Abdullah Kadi is instructive on this point. His application was considered by the European Court of First Instance at the same time as the petitioner in *Yusuf*.<sup>108</sup> Kadi is a national of Saudi Arabia, where he resides. He was listed by the 1267 Committee and sought the assistance of the Saudi Arabian Ministry of Foreign Affairs in petitioning the 1267 Committee for de-listing. However, the Saudi Arabian government never responded to his request.<sup>109</sup> The de-listing process for Kadi was therefore never accessible to him.

Even if an individual manages to convince his government of citizenship or residence to take up his case, that government must also convince the government which proposed the name (most likely to be the United States). Even if that government acquiesces, all of the other committee members must also accede to de-list the individual. In practice, then, the mechanism for review may not be available to the vast majority of the individuals placed on the list.

The European Court perhaps misleadingly cites that Messrs Aden and Ali had their assets unfrozen via the de-listing process.<sup>110</sup> In fact, they were removed from the list before the de-listing process had been instituted in the Committee’s guidelines. Moreover, their state of residence, Sweden, twice

---

105. *Yusuf*, *supra* note 7, ¶ 309.

106. 1267 Comm., *supra* note 20.

107. *Id.*

108. Kadi, *supra* note 70.

109. *Id.* ¶ 151.

110. *Yusuf*, *supra* note 7, ¶ 318. Press Release, Court of First Instance of the European Communities, The Court of First Instance Gives its First Judgments Concerning Acts Adopted in the Fight against Terrorism (Sep. 21 2005).

petitioned the 1267 Committee for removal of the individuals and was rejected both times.<sup>111</sup> The second time, the majority of the members of the Committee favored lifting the sanctions against them, but the United States, Russia and the United Kingdom objected, thereby preventing consensus.<sup>112</sup> The assets freeze against them was eventually lifted after extensive bilateral negotiations between Sweden and the United States, during which Sweden provided the United States with evidence showing that there was no connection between the individuals and Al Qaeda.<sup>113</sup> Even then, the individuals were made to sign pledges dissociating themselves in every way from their employer, the Al Barakaat Foundation.<sup>114</sup>

Since the de-listing process was instituted in the 1267 Committee's guidelines in November 2002, only five individuals have been de-listed.<sup>115</sup> One individual is a citizen of the United Kingdom, one is from Sweden (Yusuf), two others are from Switzerland and the last is a resident of Germany.<sup>116</sup> These individuals were de-listed only after intensive diplomatic lobbying from their home governments. Two of the individuals were de-listed after they provided extensive information about other suspected terrorist supporters.<sup>117</sup> Their de-listing was not predicated on concerns for due process, but rather as a reward for co-operation in counter-terrorism efforts.

These examples demonstrate that the de-listing procedure exists in formal terms, but not in substance. In practice, it does not provide a mechanism for review. Even when innocent people have been listed, the de-listing procedure has failed to provide an effective instrument for review. The sanctions against Aden and Ali were only lifted after extensive diplomatic negotiations on behalf of Sweden. Such effective diplomacy cannot be expected of other governments whose nationals are listed. Nor is diplomacy alone sufficient to guarantee that listings are reviewed. For these reasons, the Court of First Instance erred in finding that the 1267 sanctioning regime did not violate the right to a fair hearing. In addition to matters of principle, there is a very real concern that innocent individuals remain on the list who have been afforded no due process rights and are unable to seek de-listing from their national governments.

---

111. Case T-306/01R, *Aden v. Council*, 2002 E.C.R. II-2387, ¶ 90.

112. *Id.*

113. Dilshika Jayamaha, *US Plans to Request Removal of Six Individuals and Organizations from U.N. Sanctions List*, ASSOCIATED PRESS, Aug. 22, 2002, at 1.

114. *Id.* See *infra* Part IV.D.2 for discussion of the Al Barakaat Foundation.

115. 1267 Comm., *supra* note 20. See, e.g., Press Release, Security Council, Security Council Committee Removes Two Individuals from Consolidated List, Clarifies Corrections Made to List, U.N. Doc. SC/8613 (Jan. 19, 2006).

116. 1267 Comm., *supra* note 115 (Shadi Abdalla de-listed December 23, 2004; Rahmatullah Safi de-listed Oct. 24, 2005; Zeinab Mansour Fattouh, de-listed Jan. 18 2006; Mohamed Mansour, de-listed Jan. 18 2006).

117. *Bin Laden's Ex-Bodyguard Is Taken Off Lists of Terrorists*, L.A. TIMES, Jan. 5, 2005, at A7; *Afghan General Gets His Life Back*, PAK TRIBUNE, Nov. 8, 2005, <http://www.paktribune.com/news/print.php?id=124687> (last visited Nov. 15, 2006).

## 2. Breach of Core Requirements of the Right to a Fair Hearing

The cases of Aden, Ali and Yusuf perfectly illustrate how the 1267 sanctioning regime breaches the core requirements of a fair hearing as protected by *jus cogens* and the purposes and principles of the Charter. Aden, Ali and Yusuf, Swedish citizens of Somali origin, worked for the Al Barakaat International Foundation.<sup>118</sup> Al Barakaat was a non-profit association established to support educational, social and cultural endeavours and to provide assistance to refugees.<sup>119</sup> It also facilitated the transfer of funds so that individuals could send remittances from Sweden to family members in Somalia.<sup>120</sup> The three individuals were “extremely well respected in the immigrant community . . . with no criminal background.”<sup>121</sup> By being put on the list, they were accused of a serious form of criminal wrongdoing, namely involvement in a terrorist organization. Their reputations were destroyed, they lost their jobs and their assets were frozen indefinitely.<sup>122</sup> All of this was done without any evidence presented to the Security Council to demonstrate that they were involved in terrorism. They were neither informed of the reasons for their listing or of the nature of the wrongdoing that they had allegedly committed, nor were they given a hearing by the 1267 Committee, let alone by an independent tribunal. Moreover, they were denied any opportunity to dispute the listing. Finally, in the case of Aden and Ali, when their state sought to have them de-listed, the same body that was responsible for their initial placement on the list, that is, the 1267 Committee, was also responsible for the subsequent review of that decision. In the case of Yusuf, his state refused to seek his de-listing so he had absolutely no access to the de-listing process. Even if a meaningful review process existed, there would be complete inequality of arms given that the 1267 Committee does not provide any information to the individual as to the basis for the freezing.<sup>123</sup> Consequently, the sanctioning regime breaches the most fundamental aspects of a right to fair hearing on any definition.

As described above, the introduction of the 1267 Committee’s guidelines in November 2002 and Resolutions 1452, 1526 and 1617, have ameliorated some aspects of this regime. When an individual is listed, states are now encouraged to present information to the 1267 Committee demonstrating the individual’s alleged connection with terrorism.<sup>124</sup> However, one independent expert has

---

118. Aden, *supra* note 111, ¶ 28.

119. *Id.*

120. One unfortunate consequence of the 1267 regime has been the closure of hundreds of small remittance organisations in the United States alone, which provided invaluable and inexpensive fund transfer facilities for migrant workers. Philip Bowring, *The War on Third-World Remittances*, INT. HER. TRIB., Nov. 28, 2005, at 8.

121. Serge Schmemmann, *Swedes Take up the Cause of 3 on US Terror List*, N.Y. TIMES, Jan. 26, 2002, at A9.

122. Kadi, *supra* note 70, ¶ 149.

123. INTERNATIONAL BAR ASSOCIATION TASK FORCE ON INTERNATIONAL TERRORISM, INTERNATIONAL TERRORISM: LEGAL CHALLENGES AND RESPONSES 126 (2003).

124. S.C. Res. 1526, *supra* note 16, ¶ 17; S.C. Res. 1617, *supra* note 16, ¶ 4.

continued to query the reliability and accuracy of the information relied on by states in compiling the list, given that such information is never made public nor scrutinized.<sup>125</sup> Resolution 1452 changed the regime so that individuals listed are entitled to a minimum income to survive.<sup>126</sup> Nevertheless, individuals are still, in effect, convicted of a crime without due process and without a review mechanism, whether partial or independent. The core aspects of a right to a fair hearing, including a hearing before an independent and impartial body and “equality of arms” between the parties, are still absent from the 1267 regime. The regime therefore breaches the core aspects of a right to a fair hearing as contained in the purposes and principles of the Charter, and in *jus cogens* and is consequently void.

### 3. Permanency of Sanctioning Regime

In finding that the right to a fair hearing had not been breached, the *Yusuf* decision was also predicated on the basis that the sanctioning regime was merely a “temporary, precautionary measure restricting the availability of the applicants’ property.”<sup>127</sup> The court held that because the measures were temporary, there was no requirement to communicate the evidence to the listed individuals.<sup>128</sup> However, as described above, Resolution 1390 and its successor resolutions have ensured that the regime applies permanently. The global “war on terrorism” is unlike a conventional conflict and it is difficult to predict a cessation of terrorist activity in the foreseeable future. Consistent with this actuality, former U.S. Secretary of Defense Donald Rumsfeld labelled the “war on terror” the “Long War” and stated that it was a generational conflict similar to the Cold War, in that it could last for decades.<sup>129</sup> Consequently, it is likely that the sanctioning regime will remain in place for a considerable period of time. In these circumstances, it is not accurate to state that the freezing of assets amounts only to confiscation.<sup>130</sup> A permanent freezing of assets such as this clearly does “affect the very substance of the right of the persons concerned to property in their financial assets.”<sup>131</sup> As such, the Court incorrectly categorized the sanctioning regime as temporary. If the 1267 regime were properly declared permanent, in light of the above analysis, it would be difficult to argue that it does not breach the right to a fair hearing.

---

125. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Promotion and Protection of Human Rights; Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 64, U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005) (prepared by Robert Goldman).

126. S.C. Res. 1452, *supra* note 102, ¶ 1(a).

127. *Yusuf*, *supra* note 7, ¶ 320.

128. *Id.*

129. Josh White & Ann Scott Tyson, *Rumsfeld Offers Strategies for Current War*, WASH. POST, Feb. 3, 2006, at A8.

130. *Yusuf*, *supra* note 7, ¶ 299.

131. *Id.*

## V.

## BAD PRECEDENT: A TREND TOWARDS DENIAL OF RIGHTS?

Although it is difficult to predict future patterns of Security Council legislating, a clear trend towards a denial of rights has been established. The 1267 regime has acted as a precedent and its scope has recently been expanded. Three examples serve to demonstrate this trend. First of all, Resolution 1566 established a Working Group to investigate the extension of the 1267 regime to individuals and entities associated with any terrorist activity, not just those associated with Al Qaeda, the Taliban and Osama bin Laden.<sup>132</sup> In the absence of a definition of “terrorism” that has achieved international consensus,<sup>133</sup> such a substantial expansion of a regime with no legal safeguards is alarming. Secondly, since the establishment of the 1267 regime, the Security Council has created five other sanctioning committees with almost identical powers of listing individuals to those of the 1267 Committee.<sup>134</sup> These Committees either have no de-listing process or feature one as deficient as that established by the 1267 Committee. Adopting the same analysis as above, it is arguable that each of these Committees is also likely to breach the right to a fair hearing. Thirdly, and most alarming, is the recent response to the assassination of former Lebanese Prime Minister Rafik Hariri. Resolution 1636 establishes a similar sanctioning committee to freeze the assets of all individuals suspected of being involved.<sup>135</sup> There is no de-listing procedure and no concept of a fair hearing. However, the most draconian aspect of Resolution 1636 is its demand for the detention of all Syrian individuals considered as suspects.<sup>136</sup> Detention is a clear criminal measure which extends the sanctioning regime far beyond freezing of assets. Without legal safeguards such as the right to a fair hearing, this detention regime is arguably arbitrary and in breach of a clear *jus cogens* norm and the purposes and principles of the Charter.<sup>137</sup>

The 1267 sanctioning regime is therefore not only problematic because it breaches the right to a fair hearing, but also because the Council is expanding its ambit by using it as a model to apply to other situations. Reform of the 1267 regime is therefore needed urgently.

---

132. S.C. Res. 1566, *supra* note 9, ¶ 9.

133. See *id.* ¶ 3 for a broad reference to the aspects of “terrorism.”

134. S.C. Res. 1518, U.N. Doc. S/RES/1518 (Nov. 24, 2003) (associates of Saddam Hussein); S.C. Res. 1521, U.N. Doc. S/RES/1521 (Dec. 22, 2003) (concerning Liberia); S.C. Res. 1533, U.N. Doc. S/RES/1533 (Nov. 24, 2003) (concerning the Democratic Republic of the Congo); S.C. Res. 1572, U.N. Doc. S/RES/1572 (Nov. 15, 2004) (concerning Cote d’Ivoire); and S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (concerning the Sudan).

135. S.C. Res. 1636, ¶ 3, U.N. Doc. S/RES/1636 (Oct. 31, 2005).

136. *Id.* ¶ 11(a).

137. Even the conservative definition of *jus cogens* as contained in the U.S. Restatement includes the prohibition on arbitrary detention as a *jus cogens* norm. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1986).

VI.

HOW THE 1267 REGIME SHOULD BE AMENDED

Elements of the international community have already acknowledged that the 1267 regime is inconsistent with fundamental human rights. The 1267 Monitoring Team established under Resolution 1526 has recognized that the regime lacks due process. It has agreed that listings “run forever” and that the 1267 Committee’s guidelines neither establish a procedure for an individual to petition for de-listing nor provide the Committee with any criteria for de-listing.<sup>138</sup> It has also called for improved de-listing procedures and due process to add fairness.<sup>139</sup> The High-Level Panel on Threats, Challenges and Change found that the “way entities or individuals are added to the terrorist list maintained by the Council and the absence of review or appeal for those listed raise serious accountability issues and possibly violate fundamental human rights norms.”<sup>140</sup> It recommends that a new review process be instituted. Regarding all sanctions regimes, the UN General Assembly called for “fair and clear procedures . . . for placing individuals and entities on sanctions lists and for removing them.”<sup>141</sup> Moreover, Germany, as a member of the Security Council, declared that “clear criteria should be developed that would specify under which objective conditions a given individual or entity should be added to that list,”<sup>142</sup> and stated that, “we should consider introducing some core elements of due process . . . for example . . . that a targeted individual might bring his case to the Committee for consideration.”<sup>143</sup> An independent expert appointed by the UN Commission on Human Rights has also stated that there is a need for “meaningful judicial scrutiny.”<sup>144</sup>

The sanctioning regime needs to be amended not only to ensure its compliance with the right to a fair hearing, but also to address other serious problems that are undermining the regime’s objectives.<sup>145</sup> Of the approximately four thousand individuals detained around the world for links to Al Qaeda, only

---

138. U.N. SECURITY COUNCIL, *Second report of the Analytical Support and Sanctions Monitoring Team appointed pursuant to resolution 1526 (2004) concerning Al-Qaida and the Taliban and associated individuals and entities*, ¶ 53, in LETTER DATED 14 FEBRUARY 2005 FROM THE CHAIRMAN OF THE SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/2005/83 (Feb. 15, 2005) [hereinafter *Second Report of the Analytical Support and Sanctions Monitoring Team*].

139. *Third Report of the Analytical Support and Sanctions Monitoring Team*, *supra* note 99, ¶ 54.

140. A MORE SECURE WORLD: REPORT OF THE SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, ¶ 152, U.N. Doc. A/59/565, U.N. Sales No. E.05.I.5 (2004).

141. G.A. Res. 60/1, ¶ 109, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

142. U.N. SCOR, 58th Sess., 4798th mtg. at 14, U.N. Doc. S/PV.4798 (July 29, 2003) (Mr. Pleuger on behalf of Germany).

143. *Id.*

144. Comm. on Human Rights, *supra* note 125, ¶ 65.

145. See generally Rosand, *supra* note 9.

approximately three hundred have been listed via the sanctioning regime.<sup>146</sup> The 1267 Monitoring Team has concluded that the lack of due process is undermining the credibility and effectiveness of the 1267 sanctions regime and that the lack of a robust de-listing mechanism is discouraging states from submitting names to the list.<sup>147</sup> If the 1267 regime is failing to achieve its objectives, namely preventing or reducing terrorist financing, then the proportionality of the means become particularly questionable.<sup>148</sup> More than fifty member states have expressed concerns about the lack of due process associated with listing and de-listing.<sup>149</sup> It is therefore imperative that the sanctioning regime improve its credibility to encourage states to list more individuals who are actually linked to Al Qaeda. Clearly, there is a growing international consensus that the sanctioning regime should be amended.

It is outside the scope of this paper to provide a thorough overview of different amendment options.<sup>150</sup> It is still worth pointing out that the 1267 Monitoring Team has suggested the following minor reforms:

- allowing individuals to notify the Committee if their state of residence or citizenship failed to forward their application for de-listing;<sup>151</sup>
- requiring states to forward any application for de-listing to the Committee;<sup>152</sup> and

---

146. U.N. SECURITY COUNCIL, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003), on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them*, in LETTER DATED 1 DECEMBER 2003 FROM THE CHAIRMAN OF THE SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/2003/1070 (Dec. 2, 2003).

147. *Second Report of the Analytical Support and Sanctions Monitoring Team*, *supra* note 138, ¶ 54.

148. Cameron, *supra* note 103, at 18.

149. U.N. SECURITY COUNCIL, *Paragraph 13 assessment*, ¶ 37, in LETTER DATED 1 DECEMBER 2005 FROM THE CHAIRMAN OF THE SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN AND ASSOCIATED INDIVIDUALS AND ENTITIES ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL, U.N. Doc. S/2005/761 (Dec. 6, 2005) [hereinafter *Paragraph 13 assessment*].

150. For detailed studies on the different reform options, see IAIN CAMERON, *TARGETED SANCTIONS AND LEGAL SAFEGUARDS* (2003), available at <http://resources.jur.uu.se/repository/5/PDF/staff/sanctions.pdf>; MAKING TARGETED SANCTIONS EFFECTIVE, *GUIDELINES FOR THE IMPLEMENTATION OF UN POLICY OPTIONS* (Peter Wallensteen et al. eds., 2003), available at

[http://www.smartsanctions.se/stockholm\\_process/reports/Final%20report%20complete.pdf](http://www.smartsanctions.se/stockholm_process/reports/Final%20report%20complete.pdf); Alvarez, *supra* note 37; Swiss Non-Paper, *Targeted Sanctions and Due Process: Basic Principle* (2004) (unpublished, on file with author); Watson Inst. for Int'l Stud., *Strengthening UN Targeted Sanctions by Addressing Due Process Concerns: Discussion Draft White Paper for January 24-25, 2006 Informal Expert Roundtable on Targeted Sanctions*, (Jan. 17, 2006) (unpublished, on file with author).

151. *Second Report of the Analytical Support and Sanctions Monitoring Team*, *supra* note 138, ¶ 56.

152. *Third Report of the Analytical Support and Sanctions Monitoring Team*, *supra* note 99, ¶ 55.

- allowing any state to petition the Committee for de-listing.<sup>153</sup>

While these reforms are a start, they are nonetheless inadequate to bring the regime into compliance with the right to a fair hearing. The following minimum requirements are necessary to abide by the right to a fair hearing and to restore credibility to the 1267 regime:

- the adoption by the 1267 Committee of objective criteria according to which individuals and entities will be listed;
- providing a listed individual with notice of, and reasons for, their listing (subject to security sensitivities); and
- the establishment of an independent UN tribunal, for all sanctions committees that adjudicates requests for de-listing and that is directly accessible by listed individuals.

This third aspect of reform is the most controversial. In reality, it is unlikely that the Security Council would approve an independent tribunal with the binding power to de-list individuals. In this situation, a range of alternative solutions are possible, such as an independent Ombudsman or panel of experts or commission of inquiry or inspection panel.<sup>154</sup> Such a body could have the power to directly de-list, or alternatively could have recommendatory powers to de-list which were either binding or non-binding on the Security Council. Even with non-binding recommendatory powers, any of these models would at least bring public pressure on the Security Council to de-list where the independent body so recommends. In deciding which of these models to adopt, the Security Council should consider a range of criteria such as individual accessibility to the body; speed of decision making; and ability to afford the individual a fair hearing.<sup>155</sup>

Clearly these suggestions for reform are no more than a proposed framework that is not without problems and requires more elaboration.<sup>156</sup> However, the need for such measures cannot be disputed. As the 1267 Monitoring Team has noted, affording minimum due process does “not weaken the substance of the United Nations counterterrorism programme. Rather, it strengthens the sanctions by increasing global support for them.”<sup>157</sup>

---

153. *Id.* ¶ 56.

154. See KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 178-91 (2002).

155. *Id.*

156. For example, states will naturally be reluctant to divulge information pertaining to national security to either a UN tribunal or individuals. For a thorough discussion of these problems, see Cameron, *supra* note 152; Watson Inst. for Int'l Stud., *supra* note 152.

157. *Third Report of the Analytical Support and Sanctions Monitoring Team*, *supra* note 99, ¶ 54.

## VII. CONCLUSION

Unlike most national legislators, the Security Council suffers from a lack of accountability.<sup>158</sup> To compound this lack of accountability, the 1267 regime has been described as reflecting hegemonic international law.<sup>159</sup> There is no doubt that the 1267 regime has shifted some responsibility for dealing with individuals who pose a security threat from member states to the Security Council. While there has been a transfer of authority, there has been no commensurate transfer of legal safeguards. This is problematic for a regime which has unprecedented and serious powers, no definition of terrorism, and an exceptionally broad category of individuals it can target.

In this paper, I have argued that the 1267 regime is restrained by the core right to a fair hearing as reflected in *jus cogens* and the purposes and principles of the UN Charter. The sanctioning regime breaches this right in particular by providing no effective mechanism of review for listed individuals. The right to a fair hearing requires, as a bare minimum, the ability for individuals to challenge their listing to a body independent from the 1267 Committee. Such an amendment is necessary to ensure that sanctions are not imposed arbitrarily or unfairly and to minimize the risk of innocent people being targeted.<sup>160</sup> Moreover, reforming the 1267 regime would strengthen it by adding credibility and encouraging better cooperation from states. It is indeed possible to ensure basic due process while effectively sanctioning those who support terrorism. The Security Council is required to do both.

---

158. See Robert Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT'L L. 1121 (2003).

159. Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

160. See U.N. SCOR, 59th Sess., 4892nd mtg. at 9, U. N. Doc. S/PV.4892 (Jan. 12, 2004) (Mr. Trautwein on behalf of Germany).