Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999). By Johannes Reich*

I. Piercing the Veil of Statehood

Sanctions imposed by the United Nations Security Council have served as an essential instrument to influence and alter the behavior of national leaders in order to maintain international peace and security. Since the first mandatory nonmilitary sanctions regime was established in December 1966 against the white minority government of Southern Rhodesia, the targets of these coercive means have traditionally been states or their representatives. In contrast, the legal framework established pursuant to Resolution 1267 (1999) and subsequent decisions by the Security Council represents a move to pierce the veil of statehood. Under this new regime, individuals not necessarily associated with states or state actors are subject to sanctions. This shift in focus raises pressing issues of constitutional law, not least because the current system lacks basic guarantees of fair trial and effective remedy. Nevertheless, this framework built upon the U.N. Charter is, despite its deficiencies, the only one capable of coping with challenges such as international terrorism which exceed the reach of the nation-state. This Recent Development explores the question: what strategy would both strengthen the rule of law within the U.N. sanctions regime and preserve the international mechanism addressing the most pressing collective challenges to peace?

II. The Emergence of a Barely Checked Supranational Administrative Agency

The "primary responsibility for the maintenance of international peace and security" is vested in the Security Council.[1] That body enjoys wide, if not unlimited, discretion to determine whether a certain event amounts to a "threat to the peace, breach of the peace, or act of aggression."[2] Such a determination allows the Security Council to "make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security."[3] The Security Council is specifically entitled to "decide what measures not involving the use of armed force are to be employed."[4] However, all such decisions made under Chapter VII of the U.N. Charter "shall be carried out by the Members of the U.N. directly and through their action in the appropriate international agencies of which they are members."[5] Consequently, the resolutions of the Security Council, including sanctions, are *not self-executing*. They require a national enforcement mechanism. In the United States, U.N. sanctions are usually enforced through Executive Orders.

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1. U.N. Charter art. 24, para. 1.
2. U.N. Charter art. 39.
3. *Id.*
4. U.N. Charter art. 41.
5. U.N. Charter art. 48, para. 2.

On October 15, 1999, the Security Council adopted Resolution 1267 (1999) acting under Chapter VII.[6] In order "that the Taliban turn over Usama bin Laden" it imposed an air embargo on the Taliban and froze "funds and other financial resources" owned or controlled by the Taliban. The scope of these sanctions was considerably expanded by Resolution 1333 (2000), adopted on December 19, 2000, to include "Usama bin Laden and individuals and entities associated with him . . . including those in the Al-Qaida organization."[7] The Security Council decided that the member states shall freeze financial assets of these individuals (asset freeze), prevent them from entering or traveling through their territory (travel ban), and impose an arms embargo on the designated individuals and entities.[8] The administration of these sanctions was delegated to a special committee of the Security Council comprised of representatives of all Security Council members.[9]

This Committee registers individuals and entities associated with Osama bin Laden or the Qaeda organization in "an updated list, based on information provided by States and regional organizations."[10] This so-called "Consolidated List" catalogues the subjects against whom the sanctions to be enforced by the member-states apply. Each member of the United Nations is entitled to propose individuals or entities to be included on the Consolidated List.[11] The sanctions imposed as a result of the listing constitute a mere "*preventive* measure in combating terrorist activity."[12] They "are *not* reliant upon criminal standards set out under national law."[13] Consequently, neither a criminal charge nor a conviction is a precondition to be proposed or listed.[14] The Committee makes its decisions whether or not to include a person or entity in the Consolidated List *unanimously*. Each member-state of the Committee therefore has a veto; issues on which the Committee fails to reach a consensus are submitted to the Security Council.[15]

The current framework provides for two different procedures for an individual or an entity to seek to be de-listed directly (the so-called "focal point process") and for a state of residence or citizenship to request removal.[16] The "focal point process" allows affected individuals or entities to access the United Nations directly through its "focal point," an agency within the U.N. Secretariat designed to receive de-listing requests.[17] The focal point, however,

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

7. S.C. Res. 1333, ¶ 8(c), U.N. Doc. S/RES/1333 (Dec. 19, 2000).

8. S.C. Res. 1390, ¶ 2, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

9. S.C. Res. 1267, *supra* note 6, ¶ 6; *see* Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, http://www.un.org/sc/committees/1267 (last visited Apr. 26, 2008).

10. S.C. Res. 1390, *supra* note 8, ¶ 2(c) (emphasis added). *See also* S.C. Res. 1333, *supra* note 7, ¶ 8(c).

11. S.C. Res. 1735, ¶ 5, U.N. Doc. S/RES/1735 (Dec. 22, 2006).

12. S.C. Res. 1617, pmbl. & ¶ 2, U.N. Doc. S/RES/1617 (July 29, 2005) (emphasis added).

13. S.C. Res. 1735, *supra* note 11, pmbl. (emphasis added).

14. Sec. Council Comm. Established Pursuant to Resolution 1267, *Guidelines of the Committee for the Conduct of its Work*, ¶ 6(c) (Feb. 12, 2007), http://www.un.org/Docs/sc/committees/1267/1267_guidelines.pdf [hereinafter *Guidelines*].

15. *Id.* ¶ 4(a).

16. *See* S.C. Res. 1730, U.N. Doc. S/RES/1730 (Dec. 19, 2006).

17. *See id.* ¶ 2 & annex.

engages neither in factfinding nor in applying laws.[18] It merely informs the government that initially requested the listing and the government of citizenship and residence of the individual or entity's request for de-listing.[19] At least one of these states is required to endorse such a request in order for it to be placed on the Committee's agenda.[20] The request is deemed to be rejected if, after a limited period of consultation, none of the members of the Committee explicitly ask for the de-listing. Since decisions are made unanimously, the petition is also dismissed if one or more of the fifteen members opposes the request.[21] Moreover, the state of residence or citizenship is entitled to request that a person or entity be removed from the Consolidated List.[22]

This mechanism, which installs the Committee as a supranational agency administering sanctions imposed on individuals, is problematic on several grounds. The procedure outlined above might be apt to cope with measures intended to be "preventive in nature,"[23] but it fails to provide appropriate legal standards for measures which practically amount to criminal sanctions. For example, in the case *Nada v. SECO*, discussed below, the Security Council has frozen assets of and imposed a travel ban on an individual for more than six years. Moreover, none of the resolutions adopted to date provide a clear legal standard as to whether or not an individual or entity is entitled to be removed from the Consolidated List. The current framework only provides factors which the Committee may or may not take into consideration.[24] Consequently, even a mistake in identity or the death of a listed subject would not necessarily result in a de-listing. Moreover, the state that initially requests a listing acts as an *iudex in causa sua* reviewing its own decision. Finally, the consensual decisionmaking process is strongly biased toward preserving the status quo. The mechanism accepts that a person or entity may remain on the Consolidated List for years based on mere hearsay or intelligence that the listed person had no opportunity to challenge.

III. Blacklisted: *Nada v. State Secretariat for Economic Affairs*[25]

A case recently decided by the Swiss Federal Supreme Court highlights the legal problems associated with this sanctions regime. Youssef Mustapha Nada, an Italian national born in Egypt, has been a resident of Campione d'Italia, a small Italian enclave roughly half a square mile in size fully surrounded by Swiss territory. Mr. Nada, a member of the Egyptian Muslim Brotherhood, was a cofounder and co-owner of Al Taqwa Management SA (later renamed "Nada Management Organization"), a financial network with subsidiaries and branches in Europe, the Maghreb, and the Caribbean. In a radio address on November 12, 2001, U.S. President George W. Bush referred

18. S.C. Res. 1730, *supra* note 16, annex.
19. *Id.*
20. *Id.*
21. *Id.*
22. *See Guidelines*, *supra* note 14, ¶ 8(e).
23. *Id.* ¶ 6(c).
24. S.C. Res. 1735, *supra* note 11, ¶ 14 (emphasis added).
25. Bundesgericht [BGer] [Federal Court] Nov. 14, 2007, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 450 (Switz.).

to the institution as one "of two terrorist supporting financial networks."[26] Mr. Nada was thus named a "Specially Designated Global Terrorist" by the U.S. Treasury.[27] Consequently, at the request of the United States, on November 9, 2001, Nada appeared as "QI.E.53.01" on the U.N Security Council's so-called "blacklist," the Consolidated List of the U.N. Security Council.

In order to enforce the Security Council's non-self-executing sanction, the Swiss Federal Council (Switzerland's executive branch) added Mr. Nada's name to the appendix of a decree three weeks later.[28] As a consequence, Mr. Nada was barred from leaving the enclave of Campione d'Italia, and his assets were frozen. An investigation launched by the Office of the Attorney General of Switzerland was closed after more than three years, finding insufficient evidence to bring the case to the Swiss Federal Criminal Court.[29] Thereafter, Mr. Nada filed a petition with the State Secretariat for Economic Affairs (SECO), the administrative agency responsible for the domestic enforcement of the sanctions, asking that the constraints be lifted. SECO, however, dismissed the petition, arguing that Switzerland was bound by the resolutions of the Security Council made pursuant to Chapter VII of the U.N. Charter and that SECO was not allowed to review such decisions. On administrative appeal, the Federal Department of Economic Affairs reached the same conclusion.

The Swiss Federal Supreme Court dismissed Mr. Nada's petition on November 14, 2007, holding that Switzerland was, according to the U.N. Charter, obliged to enforce decisions of the Security Council. The Court further stated that member-states could only annul resolutions made by the Security Council when they would conflict with jus cogens norms. As the guarantees invoked by the petitioner would not qualify as such peremptory norms of international law, the court refused to indirectly review the Security Council's resolutions by annulling the federal decree.

Despite their apparent tension with fundamental human rights (such as the guarantee of a fair trial) these judicial decisions are far from unique. *Nada v. SECO* might dramatically illustrate the legal concerns associated with the current regime as the geographical particularities of the case resulted in a situation that "comes close to house arrest."[30] However, the Court of the First Instance of the European Communities also refused to review indirectly U.N. sanctions on similar grounds.[31] Furthermore, U.S. courts have consistently refrained from annulling economic sanctions imposed or enforced by the

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26. President George W. Bush, Radio Address by the President to the Nation (Nov. 12, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011110.html.

27. OFFICE OF FOREIGN ASSET CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS 204 (Mar. 19, 2008), http://www.treasury.gov/offices/enforcement/ofac/sdn/t11sdn.pdf (updated periodically).

28. *See* Verordnung über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung "Al-Qaïda" oder den Taliban [Taliban Ordinance] Oct. 2, 2000, SR 946.203, *available at* http://www.admin.ch/ch/d/sr/c946_203.html (Switz.).

29. Bundesstrafgericht [Federal Criminal Court], Nov. 30, 2005, BK 2005.14 (Switz.) ¶ A, *available at* http://bstger.weblaw.ch/docs/BK_2005_13.pdf.

30. *Nada*, 133 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II at 467.

31. *See, e.g.*, Case T-315/01, Yassin Abdullah Kadi v. Council and Comm'n, 2005 E.C.R II-3649, *available at* http://curia.europa.eu/ (select "Case Law," then select "Search form," then enter "T-315/01").

federal government.[32] In light of the apparent deficiencies of the legal framework established pursuant to Resolution 1267 (1999), this reluctance of national courts, however, is unlikely to persist. The looming possibility of a clash between national courts and the international regime should encourage the member states to press for an overhaul of the current sanctions regime.

IV. Providing for Fair Trial and Effective Remedy

An effective response to the challenges posed by international terrorism, in particular the attempt to eliminate the financial networks supporting such activities, transcends the reach of individual nation-states. This became apparent when the Security Council adopted Resolution 1373 on September 28, 2001, obliging all member-states to criminalize the funding of terrorist acts.[33] This resolution grants the Security Council wide discretion to define both the elastic notion of a "threat to peace"[34] (which trigger measures according to Chapter VII of the U.N. Charter)[35] and the member-states' obligation to carry out these decisions.[36] According to these unambiguous texts, member-states are neither entitled to invoke conflicting international obligations nor domestic law in a bid to avoid enforcing such resolutions.[37]

The Security Council is, indeed, bound by "the Purposes and Principles of the United Nations."[38] In particular it must heed "human rights."[39] The fact that legal constraints bind the Security Council does not, however, establish jurisdiction of international or national authorities to review whether the Security Council does, in fact, meet its obligations. As opposed to the court-centered legal framework of most contemporary nation-states, the U.N. Charter established a system built around the Security Council as a political body checked through its own decisionmaking mechanism, namely the veto power of its permanent members.[40] Consequently, the International Court of Justice has refrained from reviewing the resolutions made by the Security Council.[41] In order to hold the Security Council at bay, legal scholarship has elaborated two distinctive concepts. Acts of the Security Council taken clearly

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32. Andreas F. Lowenfeld, *The United States*, *in* NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS 618-19 (Vera Gowland-Debbas ed., 2004). *See also* United States v. Dhafir, 461 F.3d 211 (2d Cir. 2006); Nat'l Council of Resistance of Iran v. Dep't of State, 373 F.3d 152 (D.C. Cir. 2004). *But see* Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972) (finding Council sanctions against Rhodesia unenforceable because of a subsequent federal statute).

33. S.C. Res. 1373, ¶ 1(b), U.N. Doc. S/RES/1733 (Sept. 28, 2001).

34. U.N. Charter art. 39.

35. *See, e.g.*, S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (stating that Libya's refusal to extradite the subjects suspected of the bombing of PanAm flight 103 over Lockerbie, Scotland years after the attack amounted to a "threat to peace").

36. *See* U.N. Charter art. 48; *see also id.* art. 1, para. 1.

37. U.N. Charter art. 103; Vienna Convention on the Law of Treaties art. 27, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

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

39. U.N. Charter art. 1, para. 3; U.N. Charter art. 24, para. 2.

40. U.N. Charter art. 27, para. 3. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 94-96 (1993).

41. 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 I.C.J. 16, 45 (June 21).

outside its competence (manifestly *ultra vires*) are not legally binding.[42] Moreover, resolutions violating norms of jus cogens are held to be void.[43] Given the Security Council's wide discretion in determining whether and how it should act under Chapter VII, decisions made clearly beyond its competence almost never occur. Furthermore, the substance of jus cogens norms—that is, a provision "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted"[44]—is narrow and contrasts with the broad powers of the Security Council. In sum, neither of these concepts could effectively check the Security Council.

Whereas the inherent checks imposed on the Security Council through its process of decisionmaking might, in general, have prevented the Council from losing sight of the principles and purposes of the U.N. as far as state and state elites were concerned, these checks are far less effective in cases involving targeted individuals. This lack of effective constraint invites national and regional international courts to provide basic guarantees. The European Court of Human Rights, in particular, stated in a precedent issued in 2005 that it would only defer to national acts enforcing the Security Council's resolution as long as the mechanism controlling the observance of fundamental rights can be considered "at least equivalent" to that provided by the guarantees enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[45] Apart from the fact that such an approach is hardly consistent with the "supremacy clause" of the U.N Charter,[46] such a development risks seriously undermining the U.N.'s already fragile ability "to take *effective* collective measures"[47] in the face of challenges which exceed states' legal and economic resources. Judicial review of Security Council resolutions by national courts would open Pandora's box and result in the fragmentation of U.N. resolutions along the borders of national and supranational jurisdictions.[48] Hence, the U.N. itself must provide for an independent administrative mechanism to review both the listing and de-listing decisions made by the Committee. Only a mechanism at the level of the U.N. can, at the same time, preserve the crucial framework of international implementation of collective measures and also validate the core principles of the rule of law. Such a review mechanism should build upon the principles set forth by the Security Council in Resolution 1617, which imposes sanctions as

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42. *See, e.g.*, Jochen Frowein, *The UN Anti-Terrorism Administration and the Rule of Law*, *in* COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 785, 790 (Pierre-Marie Dupuy et al. eds, 2006).

43. *See, e.g.*, Karl Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, MAX PLANCK Y.B. OF U.N. L. 91, 102-09 (1997).

44. Vienna Convention on the Law of Treaties, *supra* note 37, art. 53.

45. Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VII Eur. Ct. H.R. 109, 158.

46. U.N. Charter art. 103. *See also* Vienna Convention on the Law of Treaties, *supra* note 37, art. 30 para. 1.

47. U.N. Charter art. 1, para. 1 (emphasis added).

48. *See* Bosphorus, *supra* note 45, at 158. *See also* Opinion of Advocate Gen. Poiares Maduro ¶ 56, Case C‑402/05 P, Yassin Abdullah Kadi v. Council and Comm'n (Jan. 16, 2008), *available at* http://curia.europa.eu/ (select "Case Law," then select "Search form," then enter "C‑402/05 P") (recommending that the court reverse the earlier *Kadi* opinion and annul the regulation enforcing U.N. Security Resolutions).

a "preventive measure in combating terrorist activity."[49] Consequently, such measures would have to be imposed for a limited duration only based upon, inter alia, the level of complexity present in a criminal investigation. Such a time limit would justify the listing decision being based upon prima facie evidence not necessarily meeting the standards of criminal proceedings. The time limit could, furthermore, provide incentives to launch formal investigations and criminal proceedings *in absentia* if unavoidable. De-listing requests should be addressed to an independent panel within the U.N. framework consisting of independent experts.

The perseverance of the international system comes at the price of delay, as adapting international law through the channels of international politics is often a painstakingly slow process. In order to adjust the balance between the long-held interest of protecting the international legal order for the sake of individual liberty, member states should, in the meantime, make use of the leeway granted them for humanitarian needs on a case-by-case basis. After all, as Max Weber famously stated, "[p]olitics is a strong and slow boring of hard boards. It takes both passion and perspective."[50]

49. S.C. Res. 1617, *supra* note 12, pmbl.
50. MAX WEBER, POLITICS AS VOCATION 55 (H.H. Gerth & C. Wright Mills trans., 1965).