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**GLOBAL LEGISLATION AND THE
SANCTIONING OF NON-STATE ACTORS:
THE LEGITIMACY OF THE SECURITY
COUNCIL'S RESPONSE TO TERRORISM**

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ABSTRACT

The United Nations Security Council has undertaken a unique course of action in its response to terrorism. The Security Council responded to this global threat from non-State actors by obliging all States to upgrade their capacities to fight terrorism and by imposing a sanctions regime. Given the nature of the threat, the response of the Security Council has necessarily had to be cooperative in nature rather than coercive. To this end, the Security Council has created subsidiary committees which have largely sought to maintain the commitment of States in their efforts against terrorism.

This paper analyses the practice of the Security Council and its subsidiary bodies in order to provide a true understanding of the Security Council's response to this threat to international peace and security. Its response has not gone without criticism. In particular, the Security Council's recent adoption of resolutions of a legislative character has caused major concern. The fundamental tenet of international law, that there exists no international body capable of passing legislation for the international community, has been questioned in light of these developments. Further, the manner in which the Security Council has sanctioned non-State actors raises serious issues of due process.

This paper submits that the ultimate efficacy of such actions depends on their perceived legitimacy. The threat is of such a nature that it requires a unified response from all States. Thus, in order to that the Security Council remains both effective and credible the Security Council must be responsive to the various concerns of Member States.

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I INTRODUCTION

The response of the United Nations Security Council to the threat of terrorism in the years following the September 11 attacks in 2001 has been unprecedented. The Security Council has embarked on an ambitious and unique course in its response to the threat terrorism poses to international peace and security.

Given its mandate of having the primary responsibility for the maintenance of international peace and security,¹ the Security Council has appropriately taken a lead role in the fight against terrorism. It has responded in two ways. Firstly, it has prescribed a range of binding obligations on all Member States, requiring them to progressively increase their capabilities to prevent and suppress terrorism. In doing so, the Security Council has committed itself to a sustained and long-term approach. Secondly, the Security Council has itself taken the fight to the non-State actors who engage in terrorism through a sanctions regime. The current sanctions regime targets Al-Qaida, the Taliban and their associates and seeks to deprive them of the means to commit acts of terrorism.²

In order to assist the Security Council in these tasks, the Security Council has created a number of subsidiary bodies. These bodies have been instrumental in maintaining the commitment of States in their efforts against terrorism. They have become the focus point of the international effort against terrorism. Thus, any analysis of the Security Council's response to terrorism requires an understanding of the practice of these subsidiary bodies.

The goal of this paper is to examine the detailed practice of the Security Council and its subsidiary bodies in order to provide clarity on the particular path that the Security Council has embarked upon. The efficacy and also the legitimacy of the Security Council's actions can then be analysed. The issues

¹ UN Charter, art 24.

² This paper takes the spelling of "Al-Qaida" as is commonly used by the Security Council. This writer is aware that it is often spelt "Al Qaeda".

that this paper raises are similar to some of the traditional inquiries into Security Council action; that is, the extent of the Security Council's Chapter VII powers and the justness of particular Security Council sanctions.

In terms of the extent of the Security Council's powers, much of the recent debate has surrounded the Security Council's assumption of "legislative powers", beginning with the adoption of Resolution 1373 (2001). Some argue that the Security Council does not have the legal mandate or the democratic legitimacy to be a "global legislature". This paper will submit that in certain circumstances it is legitimate for the Security Council to legislate. The nature of threats such as terrorism necessitates this response. However, the circumstances in which the Security Council can legislate are limited and the Security Council must remain responsive to the concerns of States if it wishes to remain effective and credible.

The Al-Qaida and Taliban sanctions regime has also given rise to a lot of debate. In particular, the way in which the particular non-State actors are targeted raises a number of due process issues. There exist very few protections in the management of the list of designated Al-Qaida and Taliban members. This paper will submit that Security Council must implement due process protections in order to ensure the legitimacy of the regime and its effective implementation.

II THE LEGISLATIVE RESOLUTIONS

The September 11 attacks on the World Trade Centre and the Pentagon was not the first time the world had experienced the wrath of terrorism. Nor was it the first time terrorism had invoked a response from the Security Council.³ However, the severity of the attacks and the realisation of vulnerability that followed energised the world community to take a more aggressive approach.

³ For example, the Security Council has dealt with the 1988 Pan Am bombing over Lockerbie (Resolutions 731 (21 January 1992) S/Res/731(1992) and 748 (31 March 1992) S/Res/748(1992)); the 1995 attempted murder of the Egyptian President (Resolution 1054 (26 April 1996) S/Res/1054(1996)); the 1998 US Embassy bombings (Resolution 1189 (13 August 1998) S/Res/1189(1998)); the threat posed by Al-Qaida and the Taliban (UNSC Resolution 1267 (15 October 1999) S/RES/1267(1999)); and terrorism generally (Resolution 1269 (19 October 1999) S/Res/1269(1999)).

The response of the Security Council was the imposition of general, “legislative”, obligations through Resolutions 1373 (2001) and 1540 (2004). This section seeks to detail these Resolutions and the practice of the subsidiary bodies they created in order to provide a base for an analysis of the legitimacy of these actions and ultimately an analysis of their effectiveness.

A *Resolution 1373 and the Counter-Terrorism Committee*

1 *Resolution 1373*

Security Council Resolution 1373 (2001) is the heart of the international effort against terrorism.⁴ Acting under Chapter VII, the Security Council declared international terrorism to be a threat to international peace and security and imposed a host of binding obligations on all Member States to suppress and prevent terrorism.

The financing of terrorism is a major aspect of the Resolution. States were called upon to suppress and prevent the financing of terrorist acts, to criminalise the wilful financing of terrorism, to freeze all economic resources of terrorists, and to prohibit nationals and those within their territories from making any financial or economic resources available, directly or indirectly, to those who commit terrorist acts. States themselves must also refrain from providing any form of support to terrorists.

A general obligation was imposed on States to take steps to prevent terrorist acts. States were obliged to deny safe havens to those who finance, plan, support, or commit terrorist acts and to prevent the movement of terrorists by effective border controls. States were also obliged to ensure that those who finance, plan or perpetrate terrorist acts are brought to justice and to ensure that such terrorist acts are established as serious criminal offences in domestic laws. Furthermore, an obligation was imposed on States to afford each other assistance

⁴ UNSC Resolution 1373 (28 September 2001) S/RES/1373(2001).

in connection with criminal investigations and proceedings relating to the financing or support of terrorist acts. Finally, States were called upon to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism.

Resolution 1373 (2001) is an example of Security Council "legislation". It imposes general obligations that are not limited in time on all 191 Member States.⁵ Many of the obligations draw from the language in the twelve conventions relating to terrorism, which are binding only on States that have become parties to them.⁶ But Resolution 1373 (2001) did more than just impose obligations on States regardless of whether they had signed the relevant conventions. It delivered a "strong operational message: get going on effective measures now."⁷

Importantly, the resolution did not define "terrorism".⁸ In doing so, the Security Council avoided the debate that has stalled the United Nations from concluding a comprehensive convention on terrorism over the past few years.⁹ By avoiding the politically divisive issue, the Security Council sought to gather support from all States in the fight against terrorism. However, the effect has been to give States a vast discretion to decide the extent of their obligations under Resolution 1373 (2001).¹⁰

2 *The Counter-Terrorism Committee*

⁵ Exactly why Resolution 1373 is considered "legislation" is discussed further below.

⁶ In particular, many of the financing obligations are drawn from the International Convention for the Suppression of the Financing of Terrorism (9 December 1999) 39 ILM 270. For a list of the other conventions see UN Acts Against Terrorism <<http://www.un.org/terrorism>> (last accessed 1 October 2005).

⁷ UNSC (18 January 2002) Verbatim Record S/PV.4453, 4.

⁸ The Counter-Terrorism Committee has also decided not to define "terrorism". The Committee decided that they had a fair idea of what is blatant terrorism, and if necessary, they will decide by consensus whether an act is terrorism (UNSC (18 January 2002) Verbatim Record S/PV.4453 5).

⁹ Thalif Deen "UN Member States Struggle to Define" (2005) Global Policy Forum <<http://www.globalpolicy.org>> (last accessed 21 August 2005). An Ad Hoc Committee, created by UNGA Resolution 51/210 (17 December 1996), is charged with elaborating a comprehensive convention on international terrorism. India introduced the current draft in 2000 (UNGA "Draft Comprehensive Convention on International Terrorism: Working Document Submitted by India" (28 August 2000) A/C.6/55/1).

¹⁰ This issue is discussed more in-depth below.

(a) Introduction

Resolution 1373 (2001) established a Committee of the Security Council, the Counter-Terrorism Committee (CTC), consisting of all members of the Security Council. Its task is to “monitor implementation” of the resolution.¹¹ The resolution gave no guidance as to what this role would entail or how the CTC would operate.

It is notable therefore that the CTC is now described as being the “hub of a global, long-term effort to combat terrorism.”¹² The following sections will trace the practice of this committee in order to shed light on the true role the CTC plays.

(b) The goal of the CTC

The CTC is not a sanctions committee. It does not seek to identify any terrorists. Nor does it sit as a tribunal for judging States.¹³ Instead, the goal of the CTC is to maintain the impetus of States to increase their capacities to fight terrorism. As Sir Jeremy Greenstock, British Ambassador to the United Nations and the first Chairman of the CTC stated:¹⁴

Our aim is to raise the average level of Governmental performance against terrorism around the globe. This means upgrading the capacity of each nation's legislation and executive machinery to fight terrorism. Every Government holds a responsibility for ensuring that there is no weak part of the chain... We must do this together, and everyone has a contribution to make.

In order to achieve this goal, the CTC established a dialogue with every Member State to find out what measures Governments had put in place already

¹¹ UNSC Resolution 1373 (28 September 2001) S/RES/1373(2001) para 6.

¹² Eric Rosand “Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism” *Am J Int'l L* 333, 338 [“Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism”].

¹³ UNSC (18 January 2002) Verbatim Record S/PV.4453, 5.

¹⁴ UNSC (18 January 2002) Verbatim Record S/PV.4453, 5.

and what more needed to be done.¹⁵ In this effort, the CTC is guided by the principles of cooperation, transparency and equal treatment.¹⁶

Sir Jeremy Greenstock believed that cooperation had to be an essential hallmark of the CTC's operations.¹⁷ This is because although Resolution 1373 (2001) is mandatory on all Member States, the nature of the obligations requires them to be willingly and purposefully implemented if they are to have any effect.

It is for this reason that to date the CTC has refrained from judging States and condemning those that have been complacent in their efforts. This does not mean that the CTC does not expect every State to work as fast as possible to implement the far-reaching obligations.¹⁸ But it does mean that attention is paid to making sure that States do not feel alienated and threatened. The focus is on assisting States rather than condemning them. Eric Rosand submits that this focus has enabled the CTC to garner support from virtually all 191 Member States.¹⁹

(c) Monitoring implementation

Resolution 1373 (2001) called upon all States to report to the CTC within 90 days and thereafter according to a timetable proposed by the CTC, on the steps they have taken to implement the Resolution. These initial reports and the continued dialogue via follow up questioning and subsequent reporting have been the primary means by which the CTC has monitored implementation of the resolution.²⁰

¹⁵ UNSC (4 October 2002) Verbatim Record S/PV.4618, 5.

¹⁶ Counter-Terrorism Committee "Guidelines of the Committee for the Conduct of its Work" (16 October 2001) S/AC.40/2001/CRP.1, para 1(c).

¹⁷ UNSC (4 October 2002) Verbatim Record S/PV.4618, 5.

¹⁸ UNSC (4 October 2002) Verbatim Record S/PV.4618, 5.

¹⁹ "Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism", above n 12, 335.

²⁰ UNSC (18 January 2005) Verbatim Record S/PV.5113, 3.

In recognition of the broad scope of the Resolution, the CTC broke down the focus of implementation and reporting into three stages.²¹ Stage A required States to focus initially on having adequate legislation in place covering all aspects of the resolution. Stage B aimed at having effective executive machinery in place to combat terrorism. Stage C envisages the CTC continuing dialogue with States who already have in place adequate legislation and executive machinery, addressing the level of interstate cooperation in the fight against terrorism.²²

The CTC divides the task of analysing States' reports between three Sub-Committees, each with responsibility for certain States. Each sub-committee reviews the reports with the support of independent experts in the fields of: legislative drafting; financial, customs, immigration and extradition law and practice; police and law enforcement; illegal arms trafficking; and any other relevant area of expertise.²³ As part of this review process, the relevant Sub-Committees may also invite the State concerned to discuss its report.

The experts then draft responses asking a number of follow-up questions which are to be answered in the State's subsequent report. It is this process of State reporting and response by the CTC that has allowed the Committee to monitor what action is being taken by Member States to increase their capacity to prevent and suppress terrorism. This dialogue has also enabled the Committee to identify those States that are in need of assistance to implement the counterterrorism measures.

(d) Technical assistance

²¹ "Security Council Resolution 1373, The Counter-Terrorism Committee, and the Fight Against Terrorism", above n 12, 335.

²² UNSC Counter-Terrorism Committee "Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)" (26 January 2004) S/2004/70, 11.

²³ See UNSC Chairman of the Counter-Terrorism Committee (23 October 2001) Note Verbale SCA/20/01(4).

The facilitation of technical assistance to States is one of the main components of the CTC's work.²⁴ While the CTC stresses that responsibility for implementing Resolution 1373 (2001), including the preparation of reports to the Committee, rests with States, the Committee also recognises that many States are willing to enhance their capacities to combat terrorism but do not have the technical capabilities.²⁵ The CTC plays a major role in this regard, not by directly providing technical assistance to States, but by acting as a switchboard between the requests and the donors of assistance.²⁶ The CTC works with States to identify their individual needs and those who can provide assistance.

To this end, the CTC maintains a Matrix of Assistance Requests, which offers centralised and updated information on requests received from States for assistance and on any assistance programmes offered by providers, including international, regional and subregional organisations.²⁷ This information allows providers to assess the needs of individual countries and to tailor their programmes accordingly.

The CTC has also developed the Directory of Counter-Terrorism Information and Sources of Assistance.²⁸ The Directory is a source of information on best practices, model laws and available assistance programmes in the area of counter-terrorism. It is contributed to from a wide range of States and organisations wishing to share their expertise in matters relating to Resolution 1373 (2001).

The role the CTC plays in facilitating assistance to States focusses on ensuring adequate legislation is in place and best practices are available for the

²⁴ UNSC Counter-Terrorism Committee "Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)" (26 January 2004) S/2004/70, 8.

²⁵ UNSC Counter Terrorism Committee "Work Programme of the Counter-Terrorism Committee (1 July – 30 September 2005)" (29 June 2005) S/2005/421, para 10.

²⁶ UNSC Counter-Terrorism Committee "Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)" (26 January 2004) S/2004/70, 8.

²⁷ The matrix can be accessed from the Counter-Terrorism Committee's website: <<http://www.un.org/Docs/sc/committees/1373/index.html>> (last accessed 21 August 2005).

²⁸ The database can be accessed from the Counter-Terrorism Committee's website: <<http://www.un.org/Docs/sc/committees/1373/index.html>> (last accessed 21 August 2005).

executive to follow. The CTC does not go further than this and assist States in their active operations against terrorists. The CTC is not a law-enforcement agency.²⁹ It does not facilitate the sharing of intelligence on terrorist activities nor seek to prevent or prosecute specific terrorist acts. Rather, the CTC seeks to ensure that States have the framework in place so that such activities can be readily carried out by States.

(e) Revitalisation

On 14 November 2003, the Chairman of the CTC submitted a report to the Security Council on the problems encountered and the challenges that lay ahead in the implementation of Resolution 1373 (2001).³⁰ The conclusion of this analysis was that the structures and procedures of the CTC needed to be reconsidered. This was necessary given the major roles that the CTC was undertaking.³¹

[T]he CTC has evolved to assume a more proactive role in the dialogue with Member States, in evaluating the implementation of resolution 1373 (2001), in facilitating technical assistance to Member States and in promoting closer cooperation with regional and subregional organisations.

In order to maintain and strengthen these roles, the CTC proposed that it should be "revitalised".³² Change was required in order to make the CTC "more operational, more proactive, and more visible."³³ Thus, through Resolution 1535 (2004), the CTC was restructured.³⁴ It now consists of the Plenary and the Bureau. The Plenary comprises the Security Council's Member States and focuses on strategic and policy decisions.³⁵

²⁹ UNSC (27 June 2002) Verbatim Record S/PV.4561, 3.

³⁰ UNSC Counter-Terrorism Committee "Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)" (26 January 2004) S/2004/70.

³¹ UNSC (4 March 2004) Verbatim Record S/PV.4921, 3-4.

³² UNSC Counter-Terrorism Committee "Proposal for the Revitalisation of the Counter-Terrorism Committee" (19 February 2004) S/2004/124, 2.

³³ UNSC (4 March 2004) Verbatim Record S/PV.4921, 3.

³⁴ UNSC Resolution 1535 (26 March 2004) S/RES/1535(2004). This Resolution endorsed the Counter-Terrorism Committee's report on its own revitalisation and implemented the structure proposed by that report.

³⁵ UNSC (4 March 2004) Verbatim Record S/PV.4921, 4.

The Bureau is composed of the Chair and Vice-Chairs and is assisted by the Counter Terrorism Executive Directorate (CTED) which is headed by the Executive Director and staffed by up to 20 experts and Secretariat personnel. The main task of the CTED is to support and advise the Plenary in all its functions and to carry out the day-to-day work of the CTC.³⁶ A sunset clause was included for 31 December 2007, under which the Executive Directorate will continue to exist only if the Security Council so decides.³⁷

The new structure was designed to enable the Committee to be more agile and efficient in helping Member States comply with Resolution 1373 (2001).³⁸ As States have moved from stage A, which relates to ensuring adequate anti-terrorist legislation is in place, to stage B, which focuses on actual implementation of these measures, more resources were required for the CTC to adequately monitor what was actually happening on the ground.³⁹

One new tool recognised by Resolution 1535 (2004) as necessary for the CTC to fulfil its mandate is on the ground visits to States.⁴⁰ The ability of written reports to give a true understanding of the measures put in place by governments is limited. The CTC has recognised that visits are needed "in order to develop a deeper and more direct dialogue with national Governments, to enhance monitoring of the implementation of resolution 1373 (2001), and to

³⁶ UNSC Counter-Terrorism Committee "Organisational Plan for the Counter-Terrorism Committee Executive Directorate (12 August 2004) S/2004/642, 6. The plan sets out the following priorities for the Executive Directorate: To ensure the collection of information for monitoring purposes; to ensure the comprehensive follow-up of all the Committee's decisions; to strengthen the facilitation of technical assistance; to enhance cooperation among international, regional and subregional organisations; to ensure consistency among all activities of the CTC while maintaining a tailored approach to each State; to provide adequate and complete follow-up of all the Committee's decisions; and to ensure the correct exchange of information at the proper level.

³⁷ UNSC Resolution 1535 (26 March 2004) S/RES/1535(2004), para 2.

³⁸ UN News Centre "Press Conference by the Counter-Terrorism Committee Chairman" (26 March 2004) <<http://www.un.org/news>> (last accessed 21 August 2005).

³⁹ Note: The Counter-Terrorism Committee has identified a need to re-evaluate the stages. While the categorisation of the CTC's work into stages A, B and C proved useful in the early days of the CTC's work, the CTC believes that the categorisation has become progressively artificial and may limit the ability of the CTC to effectively monitor implementation. See UNSC Counter-Terrorism Committee "Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373 (2001)" (26 January 2004) S/2004/70.

⁴⁰ UNSC Resolution 1535 (26 March 2004) S/RES/1535(2004).

ensure a more accurate assessment of the capacities of States and of their needs in terms of technical assistance for the full implementation of the resolution.”⁴¹

(f) Accomplishments

The initial response of Member States to Resolution 1373 (2001) was remarkable. With the horrors of September 11 firmly in people’s minds, the following months saw a flurry of activity among the international community. Virtually all States were eager in their support for the Security Council’s efforts against terrorism.

The efforts of the CTC in its first year of operation in turning this general support into practical action should not be understated. In its first year, 174 Member States had reported to the CTC on action taken and planned. The CTC had responded to almost all of those first reports and had begun to review the 86 follow-up reports States had provided.⁴²

The initial accomplishments of the CTC were emphatically recognised by Secretary-General, Kofi Annan, who made the following statement before the Security Council on 18 January 2002: “The work of the Counter-Terrorism Committee and the cooperation it has received from Member States have been unprecedented and exemplary.”⁴³

Member States also praised the work of the CTC during the Security Council’s open meeting on 4 October 2002.⁴⁴ The CTC was applauded for its success in encouraging and ensuring implementation of Resolution 1373 (2001).

⁴¹ UNSC (18 January 2005) Verbatim Record S/PV.5113, 4.

⁴² UNSC (4 October 2002) Verbatim Record S/PV.4618, 6.

⁴³ UNSC (18 January 2002) Verbatim Record S/PV.4453, 2.

⁴⁴ UNSC (4 October 2002) Verbatim Record S/PV.4618, 6.4618. For example, the representative of Mexico stated: “In the year that has elapsed since its establishment, the Committee has demonstrated its dynamism and its importance to the United Nations.” The representative of Ireland stated: “The work of the Counter-Terrorism Committee, under the leadership of Ambassador Greenstock, has been remarkable.” The representative of Singapore stated: “When the CTC was first set up exactly one year ago, the challenge given to it to spearhead the global campaign against terrorism looked insurmountable. Hence, by all measures, the Committee has done extremely well over the past year, given the resource and time constraints it faces. This remarkable feat could not have been accomplished without the brilliant leadership and passion of Ambassador Greenstock as Chairman.”

The core of Resolution 1373 (2001), the obligation of all States to strengthen their legal and administrative capacities to combat terrorism, was being met with the passing of a vast quantity of antiterrorism legislation around the world. Furthermore, for the first time, a global inventory was being undertaken of measures States were adopting. The CTC had also succeeded in accelerating the pace of ratification of the twelve international terrorism conventions and protocols.⁴⁵

(g) Challenges

The role of the CTC will be long-term. There is no end date on Resolution 1373 (2001). Indeed, the nature of the obligations imposed is such that they are not limited in time. Thus, the CTC has stated that it will not declare any State to be “fully compliant” with Resolution 1373 (2001).⁴⁶ States must not only put in place the requisite legislation but must also ensure its effective implementation.⁴⁷ This requires long-term commitments to ensure that adequate policing structures are put in place and to ensure a sense of vigour is maintained in enforcement and cooperation with other States.

Stimulating this capacity building is a daunting task for the CTC. Many countries simply lack the resources to enforce the legislation. Developing countries often lack the capacity to deal effectively with security, border controls, the movement of criminals, the illegal circulation of firearms, and the financing of terrorist networks.⁴⁸ Compliance for such countries will be a long battle that will require material assistance from other States. The task of the CTC is therefore to facilitate the provision of not merely technical law-drafting assistance, but substantial operational assistance to such countries.

⁴⁵ UNSC (4 October 2002) Verbatim Record S/PV.4618, 6. In July 2001, only Botswana and the United Kingdom had ratified all twelve instruments. By October 2002, 24 States had done so.

⁴⁶ UNSC (4 October 2002) Verbatim Record S/PV.4618, 5.

⁴⁷ The obligation to ensure adequate legislation is in place is also ongoing as the Security Council is continuously adding to the obligations. See for example UNSC Resolution 1624 (14 September 2005) S/RES/1624(2005), the latest piece of Security Council legislation. This resolution requires States to adopt such measures as may be necessary to prohibit by law incitement to commit a terrorist acts or acts. The Counter-Terrorism Committee is directed to include in its dialogue with States their efforts to implement this resolution.

⁴⁸ UNSC (4 March 2004) Verbatim Record S/PV.4921, 12.

There are also some countries that lack the political will to implement these measures. Now that the CTC is engaging in ensuring that the operational side of implementation is adequate, it has become necessary for it to distinguish between States that are not fulfilling their obligations because they lack the necessary capacity, and States that are not complying due to lack of political will. The implementation of legislation is often mere window-dressing that does not evidence any substantive increase in a State's capacity to fight terrorism. It will be a continual challenge for the CTC to ascertain the true state of affairs.

This is particularly so given the recent drop in the level of reporting by States. Although all 191 Member States eventually submitted first round reports, the response has not been universally maintained.⁴⁹ Reporting according to the timetable proposed by the CTC is an obligation required of States by Resolution 1373 (2001).⁵⁰ The concern of the CTC over the failure of States to meet this obligation reached the stage that on 16 December 2004 the Chairman of the CTC presented to the President of the Security Council an official list of 75 Member States that had not met the reporting deadlines for the submission of outstanding second, third and fourth reports.⁵¹

The Committee has recognised that the reasons for not reporting often pertain, to a great extent, to lack of capacity and reporting fatigue.⁵² Given that State reporting is the backbone of the CTC's ability to monitor, it is essential that States continue to report their compliance. Furthermore, the CTC should reduce its reliance on written reports by increasing the number of State visits. These visits are essential to the monitoring of actual operational capacities.

⁴⁹ UNSC (18 January 2005) Verbatim Record S/PV.5113, 3.

⁵⁰ This fact and the importance of timely reporting has been reiterated to States numerous times. See for example UNSC "Work programme of the Counter-Terrorism Committee (1 July - 30 September 2005)" (29 June 2005) S/2005/421, 3. See also UNSC Resolution 1456 (20 January 2003) S/RES/1456(2003), para 4. See also the comments of the representative of Denmark in an open Security Council meeting (UNSC (18 January 2005) Verbatim Record S/PV.5113, 5): "It is of great concern that a growing number of countries are falling behind in their reporting obligations. We recognise that reports alone do not stop the work of terrorists. Nevertheless, those reports remain the backbone of the CTC's ability to monitor the actual steps taken on the ground."

⁵¹ UNSC Counter-Terrorism Committee "List of Late Reports" (20 December 2004) S/2004/982.

⁵² UNSC (20 July 2005) Verbatim Record S/PV.5229, 3.

One major problem is that the CTC has no teeth to deal with countries that lack political will. Although the CTC has identified those that have failed to submit reports to the CTC in a timely manner, it does not go further and name and shame States that do not have the political will to implement Resolution 1373 (2001). This is worrying because there comes a point when more than mere encouragement is necessary for States to implement their obligations.

The Security Council should consider what measures can be utilised to coerce unwilling States. This could involve naming and shaming. It could also involve, as the High Level Panel Report suggested, the development of predetermined sanctions for State non-compliance.⁵³ The challenge will be to do this while maintaining the base support that is so vitally necessary for effective implementation of the counter-terrorism obligations.

B Resolution 1540 and the 1540 Committee

1 Resolution 1540

Resolution 1540 (2004) is similar to Resolution 1373 (2001) in that it is another example of Security Council “legislation”. It also imposes general obligations on all States that require extensive changes to domestic laws. The obligations imposed by Resolution 1540 (2004) are designed to stop the proliferation of weapons of mass destruction to non-State actors.⁵⁴ The Security Council was concerned that the existing non-proliferation regimes did not adequately deal with the risk that non-State actors “may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery”, and so acted under Chapter VII to close this gap in international law.⁵⁵

⁵³ UN Secretary-General’s High Level Panel on Threats, Challenges and Change “A More Secure World: Our Shared Responsibility” (2 December 2004) A/59/565, 47.

⁵⁴ UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004).

⁵⁵ See the preamble of UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004).

Resolution 1540 (2004) seeks to ensure that all Member States refrain from supporting non-State actors' attempts to acquire these weapons and pass laws criminalising such activities by non-State actors.⁵⁶ It also obliges States to establish domestic controls to prevent proliferation of these weapons, such as security measures, physical protection measures, effective border controls, and export and trans-shipment controls.⁵⁷

2 *The 1540 Committee*

A Committee of the Security Council (the 1540 Committee), consisting of all members of the Council, was created to report to the Security Council on the implementation of the Resolution.⁵⁸ States were called upon to present a first report to the Committee within six months of the adoption of the resolution on the steps taken or intended to be taken to implement the resolution.⁵⁹ By 5 December 2004, over a month after the due date of the reports, only 86 States had submitted their national reports.⁶⁰ By 20 July 2005, 118 States had submitted reports.⁶¹

Like the CTC, the 1540 Committee decided to establish three subcommittees to share in the task of reviewing States' reports.⁶² There is currently a group of eight experts supporting this work.⁶³ In considering national reports, the 1540 Committee has already identified both needs and offers of assistance in the implementation of the resolution. No doubt the Committee will become a switchboard for assistance donors and requesters as has the CTC.

The goal of Resolution 1540 (2004) is similar in theme to that of Resolution 1373 (2001). It seeks a global upgrade of legislative and administrative machineries in order to reduce the possibility that terrorists will

⁵⁶ UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004), para 1 and 2.

⁵⁷ UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004), para 3.

⁵⁸ UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004), para 4.

⁵⁹ UNSC Resolution 1540 (28 April 2004) S/RES/1540(2004), para 4.

⁶⁰ UNSC (9 December 2004) Verbatim Record S/PV.5097, 3.

⁶¹ UNSC (20 July 2005) Verbatim Record S/PV.5229, 7.

⁶² UNSC (9 December 2004) Verbatim Record S/PV.5097, 3.

⁶³ UNSC (20 July 2005) Verbatim Record S/PV.5229, 6.

obtain weapons of mass destruction. The promoters of the Resolution stressed that it was not about coercion or enforcement.⁶⁴ Rather, the 1540 Committee would be “the heart of a cooperative approach, allowing countries to compare experience, to establish best practice and to identify areas where technical assistance is needed.”⁶⁵

III LEGITIMACY OF THE LEGISLATIVE RESOLUTIONS

A Introduction

The Security Council Resolutions 1373 (2001) and 1540 (2004) and the practice of the two Security Council subsidiary bodies raise some serious issues concerning the legitimacy of the Security Council’s actions. These issues form part of a wider discourse that has been occurring regarding the legitimacy of contemporary international law. Legitimacy questions are being raised due to developments in international law that are increasingly limiting the realm of national self-governance.⁶⁶

Firstly, international law is expanding into substantive issues that have previously been the domain of national law creation processes. Secondly, the procedure by which international law is being generated increasingly attenuates the link between state consent and the creation of an obligation under international law.⁶⁷ For example, treaties today increasingly delegate law making authority to treaty-based bodies. Although States consent to the creation of such a framework, the specific rights and obligations are created by these bodies without any real consent.⁶⁸

Weiler describes such developments as having led to a new form of international law creation, which he conceptualises as “international

⁶⁴ UNSC (22 April 2004) Verbatim Record S/PV.4950, 12.

⁶⁵ UNSC (22 April 2004) Verbatim Record S/PV.4950, 12.

⁶⁶ See Mattias Kumm “The Legitimacy of International Law: A Constitutionalist Framework of Analysis” (2004) 14 EJIL 907.

⁶⁷ See Kumm, above n 66, 914.

⁶⁸ See Kumm, above n 66, 914.

governance”.⁶⁹ This concept, in recognising the decline of the traditional view of international law being a consent-based order, raises important issues of how contemporary international law making can be legitimised. The immediate impulse is to compare it with domestic governance.⁷⁰ The conclusion one reaches with such a comparison is that international governance is “governance without government”.⁷¹ It lacks the branches of government between which power is separated at the State level, and in particular, it lacks a democratic foundation.

The passing of the two legislative resolutions (as summarised above) by the Security Council exhibits a form of “international governance”. As such, it has become necessary to question the legitimacy of what the Security Council is doing. The goal of such an inquiry is not limited to a narrow legality inquiry, but seeks to elucidate the core issues that will determine how successful the Security Council will be in the coming years in being the bastion of international peace and security.

The legitimacy inquiry is necessary because it is inextricably linked to the willingness of States to cooperate with the Security Council’s collective security efforts. Indeed, some commentators have submitted that there is only a moral duty to obey international law to the extent that it is legitimate.⁷² The question of legality therefore, only takes us so far. Although legality provides a prima facie case for legitimacy,⁷³ a more in depth inquiry is required in order to determine the true capabilities of the Security Council.

B Security Council “Legislation”

⁶⁹ J Weiler “The Geology of International Law – Governance, Democracy and Legitimacy” (2004) 64 *ZaöRV* 527.

⁷⁰ Although there is a need for caution when analysing international law on the basis of criteria derived from municipal law, there is no need to completely refrain from such an analysis. See Ian Brownlie *The Rule of Law in International Affairs* (Kluwer Law International, The Hague, 1998) 213.

⁷¹ Weiler, above n 69, 559.

⁷² See Kumm, above n 66, 908.

⁷³ See Kumm, above n 66, 918.

A number of States have voiced concern over the "increasing tendency of the Council in recent years to assume new and wider powers of legislation on behalf of the international community, with its resolutions binding on all States."⁷⁴ Resolution 1373 (2001) is said to mark the beginning of the Security Council's "legislative phase".⁷⁵ Resolution 1540 (2004) is another example of Security Council "legislation".⁷⁶

What is different about these resolutions that give them the character of "legislation"? In order to answer this question it is necessary to identify the trademark features of "legislation".

Under Chapter VII of the Charter, the Security Council has the power to create binding obligations on all Member States.⁷⁷ In one sense of the word, the Security Council creates "law" whenever it acts under Chapter VII and imposes binding obligations on States. Indeed, calling on Iraq to withdraw from Kuwait, or on the Taliban to hand over Usama Bin Laden, are instances of the Security Council creating legal obligations.

However, they are not examples of lawmaking in the popular sense of the word. The creation of such limited obligations, although having the force of law, cannot be said to be legislative in nature. The trademark of "legislation" is the prescription of general rules that are not limited in time.⁷⁸ It is the presence of these features in the obligations created by Resolutions 1373 (2001) and 1540 (2004) that has caused the Security Council to be coined the term "legislator" when it adopted them.

⁷⁴ This statement was made by the representative of India in the Security Council: UNSC (22 April 2004) Verbatim Record S/PV.4950, 23.

⁷⁵ Paul Szasz "The Security Council Starts Legislating" (2002) 96 Am J Int'l L 901.

⁷⁶ At the time of writing this paper, UNSC Resolution 1624 (14 September 2005) S/RES/1624(2005) was passed. This is the most recent example of Security Council legislation. See footnote 47 for a brief description of Resolution 1624 (2005).

⁷⁷ Article 25 of the UN Charter makes Security Council decisions binding on members.

⁷⁸ See Stefan Talmon "The Security Council as World Legislature" (2005) 99 Am J Int'l L 175, 176 where he states: "The hallmark of any international legislation is the general and abstract character of the obligations imposed."

Past practice of the Security Council has seen the imposition of binding obligations that are limited to a particular conflict or event and, even though not always explicitly limited in time, the obligations would naturally expire after the situation was resolved.⁷⁹ Such actions are not legislative because "legislation" is typically not restricted in application to a particular event in time.

In contrast, Resolutions 1373 (2001) and 1540 (2004) tackle broad and abstract threats (international terrorism, and the proliferation of weapons of mass destruction to non-State actors) and hence the prescribed obligations are necessarily broad and not limited in time. For example, Resolution 1373 (2001) obliges States to criminalise the financing of terrorism and to freeze terrorists funds. Resolution 1540 (2004) obliges States to ensure that weapons of mass destruction do not get into the hands of non-State actors.

The above summary of the practice of the CTC illustrates the legislative nature of the obligations. The CTC requires States to progressively increase their capacities to fight terrorism. The obligations do not relate to a particular terrorist that is to be criminalised or a country to be sanctioned. Rather, norms of general application are prescribed.

The effect of saying that the Security Council has become a global legislator is to raise a number of legitimacy questions. In particular is the argument of some that the Security Council does not have the legal mandate to enact legislation.

C Legality

Since the end of the Cold War, the question of whether there are any legal limits on the power of the Security Council has received much attention. The debate over the legal competence of the Security Council to pass legislative resolutions such as Resolutions 1373 (2001) and 1540 (2004) is the most recent chapter to this long running controversy.

⁷⁹ See Szasz, above n 75, 902.

1 *Articles 39 and 41 of the Charter*

(a) Summary

The mandate of the Security Council is governed by its constituting treaty, the Charter.⁸⁰ Thus, the legal competence of the Security Council to legislate is to be assessed by the scope of the powers assigned to it under the Charter. Through Chapter VII, the Security Council has been given broad powers to achieve its primary purpose of maintaining international peace and security. These powers are indeed broad, but they are not unlimited.⁸¹

Before the Security Council can utilise its powers under Chapter VII it must first determine under Article 39 the existence of a “threat to the peace, breach of the peace, or act of aggression”.⁸² The type of action, not involving the use of force, that can the Security Council can then oblige States to undertake is limited by Article 41.

The Charter does not define the term “threat to the peace”. This was done deliberately by the framers of the Charter to allow the Security Council to remain flexible in being able to respond to new types of threats as they emerge.⁸³ There therefore exists no legal test to be met before a “threat to the peace” can be declared. The decision is rather a political one, involving many different considerations. Thus, the discretion under Article 39 is very broad.⁸⁴

Although Article 39 was initially drafted to refer to threats created by inter-State conflicts, the Security Council has broadened this interpretation to

⁸⁰ See *Prosecutor v Tadic* (Appeal on Jurisdiction) (2 October 1995) IT-94-1-AR72 para 28 (Appeals Chamber, ICTY).

⁸¹ As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in *Prosecutor v Tadic*, above n 80, para 29, “neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)”.

⁸² UN Charter, art 39.

⁸³ Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2 ed, Oxford University Press, New York, 2002) 718-719.

⁸⁴ However, it is not unfettered. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated in *Prosecutor v Tadic*, above n 80, para 29, “the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least within the limits of the Purposes and Principles of the Charter.”

include a vast array of different threats.⁸⁵ The concept of international peace and security has evolved. As the President of the Security Council stated in 1992:⁸⁶

The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.

The Security Council has also remained flexible in the range of measures available to it under Article 41 to address differing threats.⁸⁷ The measures that are listed under article 41 are not exclusive.⁸⁸ As the Appeals Chamber of the International Criminal Tribunal for the ICTY held in *Tadic*, the listed measures “are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve ‘the use of force’. It is a negative definition.”⁸⁹ By not exhaustively listing the measures available under Article 41, the framers of the Charter recognised the need to allow the Council to be flexible in its response to the many different threats that the world may face.

(b) Global policeman

The core role of the Security Council is that it is a global policeman. The Security Council was created to be numerically small in membership and composed of the “Great Powers” in order to ensure fast and effective action in times of crisis.⁹⁰ Although very wide powers are conferred on the Security Council under Chapter VII, the Charter conferred them on the condition that the

⁸⁵ Eric Rosand “The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?” (2005) 28 *Fordham Int'l LJ* 542, 533 [“The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?”].

⁸⁶ UNSC (31 January 1992) Presidential Statement S/23599.

⁸⁷ The Security Council has for example determined the boundary between two states (UNSC Resolution 687 (3 April 1991) S/Res/687(1991)), established a claims commission (UNSC Resolution 692 (20 May 1991) S/Res/692(1991)), two international criminal tribunals (UNSC Resolution 827 (25 May 1993) S/Res/897(1993) and UNSC Resolution 995 (8 November 1995) S/Res/995(1995)), and a committee to maintain a list of terrorists (UNSC Resolution 1267 (15 October 1999) S/Res/1267(1999)).

⁸⁸ The measures available to the Security Council under Article 41 “include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

⁸⁹ See *Prosecutor v Tadic*, above n 80, para 35.

⁹⁰ Simma, above n 83, 437.

Security Council would confine itself to short-term measures while the definitive settlement of a conflict was left to the parties or to the procedures under Chapter VI of the Charter.⁹¹

Thus, despite the lack of express limitations in Articles 39 and 41, some argue that the Security Council's law making powers under Chapter VII do not extend to the creation of general rules. The argument is that the Security Council was designed to be a "global policeman" not a "world legislator".⁹² As such, the Security Council must remain situation-specific.⁹³ It remains bound by the role of responding to particular international crises as they arise. Costa Rica made this argument in an open Security Council meeting on 19 October 2004, prior to the passing of Resolution 1540 (2004):⁹⁴

The Security Council is not a legislative body. Under the Charter, its mandate is confined to specific situations or specific disputes that endanger international peace and security. It can adopt binding measures only insofar as those measures are designed to resolve specific conflicts or deal with specific situations. The adoption of norms with general application is the prerogative of the international community as a whole, and is accomplished by negotiating treaties or through the formation of binding customary law.

As stated above, the Security Council does have some law-making powers through the imposition of binding measures under Chapter VII. Thus, no true separation of powers was intended in the creation of the United Nations system.⁹⁵ The separation of powers doctrine is a domestic concept that requires

⁹¹ Simma, above n 83, 705.

⁹² See Happold and Jose Alvarez "The UN's 'War' on Terrorism" (2003) 31 Int'l J Legal Info 238, 241. See also Happold "Security Council Resolution 1373 and the Constitution of the United Nations" (2003) 16 LJIL 593, 600. See also the comments of various States in UNSC (22 April 2004) Verbatim Record S/PV.4950. For example, the representative of Indonesia stated that "[a]ny far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the Charter."

⁹³ See Georg Nolte "Limits of the Security Council's Powers" in Michael Byers (ed) *The Role of Law in International Politics* (Oxford University Press, New York, 2000) 315, 324. Georg Nolte submits the following: "Security Council action is linked, by definition, to concrete circumstances and the presumption is that it does not purport to influence the existing law beyond the scope of these circumstances."

⁹⁴ UNSC (19 October 2004) Verbatim Record S/PV.5059 (Resumption 1), 20.

⁹⁵ See Simma, above n 83, 707. Bruno Simma comments that the Security Council exercises a number of different functions. To varying degrees it enforces the law, adjudicates, legislates, and administrates.

the executive, legislative and judicial powers of government to be split between two or more independent entities. The separation of powers is necessary for the avoidance of tyrannical government and for the furtherance of the rule of law.

Importing these concepts into the United Nations system is problematic. The founding States did not intend to create a "constitution" as the term is understood for the internal organisation of States.⁹⁶ Indeed a separation of powers was not necessary because States did not confer on the United Nations organs the type of vast powers that a legislature or executive hold at the domestic level. The United Nations cannot be viewed as a State or a "super-State", whatever that expression might mean.⁹⁷

The powers of the Security Council are therefore determined by the Charter, not by any domestic separation of powers concept. The question to be determined is whether the Charter allows the Security Council to use its law-making powers for the creation of general rules not limited in time or whether it limits these powers to the creation of legal obligations in relation to a specific situation. The starting position seems to be that because the Charter primarily endowed the Security Council with a police function, it excludes the Security Council from having legislative powers.⁹⁸

However, in recent practice, the Security Council has exceeded the confines of acting as a policeman. In some cases the Security Council has taken measures amounting to the final settlement of disputes.⁹⁹ For example, after the second Gulf War it established subsidiary organs for the final demarcation of the boundary between Iraq and Kuwait and for the determination of reparation due.¹⁰⁰ It has also created two international criminal tribunals to determine individual responsibility.¹⁰¹

⁹⁶ See Sh Rosenne "General Course on Public International Law" (2001) 291 *Recueil des Cours*, 421.

⁹⁷ See *Reparation for Injuries suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 179.

⁹⁸ Simma, above n 83, 709.

⁹⁹ Simma, above n 83, 706.

¹⁰⁰ Simma, above n 83, 706.

¹⁰¹ UNSC Resolution 827 (25 May 1993) S/Res/897(1993) and UNSC Resolution 995 (8 November 1995) S/Res/995(1995).

These final adjudicatory measures, while not remaining entirely free from criticism, seem to have been accepted by the majority of States.¹⁰² Thus, it seems that the Security Council is not wholly constrained to police functions. However, just because the Security Council has taken measures for the final settlement of disputes does not mean that it has the power to create new legal rules of a general nature. The “legislative” practice of the Security Council prior to Resolution 1373 (2001) has been limited to creating obligations that relate to a specific situation and so end when the threat to the peace disappears.

Despite this, it could be argued that Resolutions 1373 (2001) and 1540 (2004) can be viewed as simply another step forward in the Security Council’s innovative practice.¹⁰³ Indeed, the notion of what is permissible under the Charter has evolved as the Council has been forced to grapple with new threats to international peace and security.

Given the purpose of enabling the Security Council to remain flexible, it is arguable that the Security Council should have the power to impose obligations that are not “situation specific” in order to respond to threats such as terrorism that are global and not limited in time.¹⁰⁴ Although the Security Council has typically responded to specific instances of conflict or instability, the nature of terrorism is such that a more general approach is required. Perhaps it is unrealistic and dangerous to demand that the Security Council can only act on the multitude of specific terrorist threats as they arise rather than terrorism per se.

This author does not take a position on whether Resolutions 1373 (2001) and 1540 (2004) were “ultra vires” or not. It is too early to make a determination of legality. While there is a strong argument against their legality in that they are contrary to the role the Charter assigned to the Security Council, what is

¹⁰² Simma, above n 83, 706.

¹⁰³ “The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?”, above n 85, 570.

¹⁰⁴ The Charter of the United Nations is a treaty and so is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Charter in their context and in the light of its object and purpose: Vienna Convention on the Law of Treaties (26 May 1969) 1155 UNTS 331, art 31(1).

generally considered to be permissible under the Charter has changed over the years. If the Security Council continues to legislate and this receives wide endorsement from States then perhaps Security Council legislation will be considered legal in certain circumstances.

D Legitimacy

1 Legality is not the only issue

It is submitted that trying to define exactly what legal limits exist on the power of the Security Council is not substantially helpful. The nature of the Security Council's powers and the lack of any judicial review procedure mean that the actual vires of Security Council action is not a substantive check on its power. The only real check on Security Council power, apart from its own decision making procedures, is the willingness of States to implement its resolutions. It is for this reason that the fact that some Member States view the newly assumed "legislative" powers as being outside the Security Council's mandate is significant in itself.

The narrow focus of assessing the precise legality of Security Council action and the ability of the International Court of Justice to review its decisions has often led to this arguably more important inquiry being overlooked. As the High Level Report stated, "[t]he effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy".¹⁰⁵

An elaborate analysis of the various legitimacy issues that arise from the Security Council having legislative powers is therefore required in order to ascertain how the Security Council should act in the future if it wishes to remain effective. Firstly, the legitimate jurisdictional bounds of Security Council

¹⁰⁵ UN Secretary-General's High-Level Panel on Threats, Challenges and Change "A More Secure World: Our Shared Responsibility" A/59/565, para 204. See also India's statement in UNSC (22 April 2004) Verbatim Record S/PV.4950, 23: "The issue goes beyond a mere legal consideration of the Council's allocated powers under the Charter. The credibility and even respect that the Security Council can garner depend on its actions being the product of internal cohesion and universal acceptability."

legislation will be assessed. Secondly, the procedural concerns that arise from the Security Council's assumption of legislative powers, particularly the lack of democracy, will be examined.

2 *Jurisdictional Legitimacy*

There are a number of arguments to be made that law-making is not the proper domain of the Security Council. One is the objection that the obligations being created by these legislative resolutions are of the type that should only be created through treaty-making. Another argument against the Security Council legislating is that it does not have the ability to legislate clear rules.

(a) Treaty-making

The obligations created by these legislative resolutions are abstract and are therefore very wide-ranging in their scope. The creation of such obligations has traditionally been the domain of treaty-making. In other words, they are the result of careful planning and lengthy treaty negotiation. By deciding to become a signatory to a treaty, a State is consenting to the norms contained therein and agrees to do what is necessary to conform.

In contrast, there is no "decision to be bound" to Security Council legislation.¹⁰⁶ Rather, a small unrepresentative body imposes new norms of international law with the effect that all States must make sweeping changes to their domestic legal and administrative systems in order to conform to the newly prescribed norms. The lack of consent to, or even participation in, the creation of these norms is a major argument against the legitimacy of such action, and thus bears on the willingness of States to implement. Switzerland's statement in the open Security Council debate preceding Resolution 1540 (2004) illustrates these jurisdictional concerns:¹⁰⁷

¹⁰⁶ Although States have agreed to be bound to Security Council decisions through Article 25 of the Charter, they do not have the opportunity to decide whether to consent to the particular obligations the Security Council imposes.

¹⁰⁷ UNSC (22 April 2004) Verbatim Record S/PV.4950, 28.

In principle, legislative obligations, such as those foreseen in the draft resolution under discussion, should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need.

(b) When treaty-making does not suffice

This author submits that if the Security Council is to continue to use its powers to legislate it should only do so in exceptional circumstances. Its legislative powers are limited by the fact that there must exist a threat to international peace and security of such a nature that requires the Security Council to prescribe general norms. This arguably requires that the threat must be such that the normal means of creating general norms (treaty adoption) are inadequate.¹⁰⁸ In other words, it requires the existence of an emergency. As Talmon submits, "Council legislation is always emergency legislation".¹⁰⁹ If the threat is not urgent, in that there is time for States to negotiate a treaty to deal with the matter, then there is no need for the Security Council to legislate.

Arguably the Security Council has so far limited itself to prescribing general norms in emergency situations. Resolution 1373 (2001) was passed in the context of failings by States to conclude a comprehensive convention on terrorism. The threat of terrorism was evident and urgent steps needed to be taken by States to counter the threat. Although many of the obligations imposed by Resolution 1373 (2001) are found in the International Convention for the Suppression of the Financing of Terrorism, only four States had ratified this convention when Resolution 1373 (2001) was passed.¹¹⁰ Resolution 1373 (2001) and the CTC conveyed the necessary message that action was needed.

Resolution 1540 (2004) was also passed in the context of deficient international law that needed urgent attention. There was a gap in international

¹⁰⁸ See "The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?", above n 85, 556.

¹⁰⁹ Talmon, above n 78, 184.

¹¹⁰ Szasz, above n 75, 903. International Convention for the Suppression of the Financing of Terrorism (9 December 1999) 39 ILM 270.

law in that the current regime on non-proliferation of weapons of mass destruction did not adequately deal with the threat of non-State actors getting their hands on such weapons. This threat was perceived as requiring urgent Security Council led action.¹¹¹ If there exists no such emergency, any attempt by the Security Council to legislate would probably result in States declining to implement the obligations created.

(c) Inadequacies as a Legislator

The notion that the Security Council should only prescribe general norms of international law in rare circumstances is supported by its inadequacies as a legislator. The Security Council was clearly designed as an organ to police situations. It was specifically created to an unrepresentative body that would be able to act swiftly as particular threats arise. These virtues of the Council as a police officer are precisely its vices as a legislator. As well as being unrepresentative, the Security Council lacks the resources and fact-finding capacity to be able to legislate adequately.¹¹²

Resolution 1373 (2001) is a good example of the inadequacy of Security Council legislation. Because it was not preceded by intense negotiation and debate, the obligations imposed lack the clarity possessed by treaty-made obligations such as those contained in the various anti-terrorism conventions.¹¹³ In particular, those conventions define precisely the particular terrorist-related

¹¹¹ Pakistan thought differently (UNSC (22 April 2004) Verbatim Record S/PV.4950, 15): "There is no justification for the adoption of this resolution under Chapter VII of the Charter. The threat of WMD proliferation by non-State actors may be real, but it is not imminent. It is not a threat to peace within the meaning of Article 39 of the United Nations Charter."

¹¹² Permanent Mission of Austria to the United Nations and the Institute for International Law and Justice of the New York University School of Law "The Security Council as World legislator?" (Panel Discussion, New York, 4 November 2004) <<http://www.iilj.org>> (last accessed 1 October 2005).

¹¹³ See for example the definitions contained in the International Convention for the Suppression of Terrorist Bombings (15 December 1997) 37 ILM 249, and the International Convention for the Suppression of the Financing of Terrorism (9 December 1999) 39 ILM 270. There were also a number of concerns over the clarity of the obligations created by Resolution 1540 (2004). For example, the representative of Switzerland stated in a Security Council meeting before the Resolution was adopted that "from the outset, there needs to be maximum clarity with respect to the scope of the obligations imposed on Member States. In this respect, Switzerland is of the opinion that a number of concepts contained in the draft resolution are not sufficiently precise." (UNSC (22 April 2004) Verbatim Record S/PV.4950, 28).

crime they are dealing with. In contrast, Resolution 1373 (2001) imposes obligations to prevent and suppress "terrorism" without defining what "terrorism" is, leaving the true scope of the Resolution unknown.¹¹⁴

It is submitted that this severely waters-down the obligations imposed on States. To legislate against terrorism, a response that is inherently not limited to a defined geographical area, without providing a definition of what acts constitute terrorism, necessarily creates loose obligations. Indeed, as stated above, States have largely been free to interpret the extent of their obligations under Resolution 1373 (2001) themselves, through the particular definition of terrorism they decide upon.¹¹⁵ Although the Security Council and the CTC certainly succeeded (as illustrated above) in conveying an operational message of taking action to build capacities, there comes a point when there needs to be consensus as against whom the "war on terror" is targeting.

(d) Deference to the General Assembly

The main reason why the Security Council avoided the definitional issue was to bypass the debate that has stalled the United Nations from concluding a comprehensive convention on terrorism over the past few years.¹¹⁶ What acts constitute terrorism is an issue that is of great controversy and one that States still remain divided on.

Given this state of affairs, any attempt by the Security Council to legislate a definition of terrorism would be completely inappropriate. This highlights the inadequacy of the Security Council as a legislator. It is a key task of a legislator to define terms in order to provide certainty as to the scope of the prescribed obligations. However, if the Security Council wishes to remain legitimate, it

¹¹⁴ The Counter-Terrorism Committee decided that it would not define "terrorism" (UNSC (18 January 2002) *Verbatim Record S/PV.4453*, 5): "It is not going to define terrorism in a legal sense, although we will have a fair idea of what is blatant terrorism; where necessary, we will decide by consensus whether an act is terrorism."

¹¹⁵ Syria for example has adopted a definition of terrorism "which clearly distinguishes between terrorism and legitimate struggle against foreign occupation" excluding groups fighting the Israeli occupation of Arab territories in Palestine from the application of the resolution (Talmon, above n 78, 189).

¹¹⁶ See footnote 9 for information on the elaboration of a comprehensive convention on terrorism.

must avoid legislating on issues such as a definition of terrorism, which are properly the domain of all States to decide upon.

One definitional issue on which States are divided is whether terrorism can apply to the acts of States in the same way that it applies to non-State actors. The most controversial issue however, is whether there should be a distinction between terrorism and the rights of peoples to combat foreign occupation.

The speeches in Security Council's open meeting held on the 4th and 8th of October 2002 illustrate how divided States are on this issue.¹¹⁷ At this meeting, the Organisation of the Islamic Conference, representing 56 States, condemned "attempts to abolish the distinction between terrorism and the legitimate struggle of peoples against colonial domination or foreign occupation."¹¹⁸ The African Union, representing 53 States, stated that it is "intolerable that populations struggling for their independence against the occupation of their national territories and against the denial of their human rights should be confused with terrorists."¹¹⁹

Arguably in response to the deadlock in the General Assembly over this issue, the Security Council attempted to define terrorism in Resolution 1566 (2004). In paragraph three, the Security Council (acting under Chapter VII) recalled that terrorist acts "are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".¹²⁰ In stating that terrorist acts cannot be justified by any

¹¹⁷ UNSC (4 October 2002) Verbatim Record S/PV.4618; UNSC (4 October 2002) Verbatim Record S/PV.4618 (Resumption 1); UNSC (8 October 2002) Verbatim Record S/PV.4618 (Resumption 2).

¹¹⁸ UNSC (4 October 2002) Verbatim Record S/PV.4618 (Resumption 1), 21. Of particular concern to the Arab Nations has been to exclude groups fighting the Israeli occupation of Arab territories in Palestine from the application of the Resolution.

¹¹⁹ UNSC (8 October 2002) Verbatim Record S/PV.4618 (Resumption 2), 14.

¹²⁰ UNSC Resolution 1566 (8 October 2004) S/RES/1566(2004), para 3. The Security Council definition was limited to "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism."

cause, the Security Council attempted to override the debate over whether there can be a distinction between terrorism and the right to fight a foreign occupier.

Numerous States made comments at an open Security Council meeting following Resolution 1566 (2004) criticising the Security Council's attempt to define terrorism.¹²¹ Most comments evidenced a general concern about the Security Council abrogating the functions of the General Assembly. For example, the Algerian representative, after reiterating the need to distinguish terrorism from the legitimate struggle for liberation, stated:¹²²

My delegation therefore believes that the criminal acts set out in paragraph 3 of resolution 1566 (2004) should not be interpreted as a definition of terrorism. It is not up to the Security Council to legislate in that regard. That prerogative falls under the competence of the General Assembly.

The representative of Switzerland noted that the definition does not "comply with the principle of legality in criminal law, which requires the clear and precise formulation of laws."¹²³ Because of such problems, the representative stated that "Switzerland hopes that in future the Council will fully respect the prerogatives of the Assembly with regard to developing and codifying international law."¹²⁴

The general view of States seems to be that paragraph three is not a legal definition of terrorism. Instead, it is a statement of policy that the targeting of innocents is never justifiable no matter what the cause.¹²⁵ While one may not be

¹²¹ UNSC (19 October 2004) Verbatim Record S/PV.5059.

¹²² UNSC (19 October 2004) Verbatim Record S/PV.5059, 17. The representative of Brazil also made the following statement (UNSC (19 October 2004) Verbatim Record S/PV.5059, 11): "Defining terrorism falls under the functions and powers of the Assembly, as foreseen in the Charter." The representative of Costa Rica stated (UNSC (19 October 2004) Verbatim Record S/PV.5059, 20: "[W]e would like to highlight that the Security Council can not carry out a task of codifying international criminal law, because that task is incumbent on the international community as a whole."

¹²³ UNSC (19 October 2004) Verbatim Record S/PV.5059, 25. The representative of Costa Rica also stated (UNSC (19 October 2004) Verbatim Record S/PV.5059, 20): "[P]aragraph 3 does not meet the requirements, from a technical legal point of view, for functional definition of a crime."

¹²⁴ UNSC (19 October 2004) Verbatim Record S/PV.5059, 25.

¹²⁵ The US Representative to the United Nations stated after the adoption of Resolution 1566 that "essentially paragraph 3 is not a law; it's a statement of policy" (United States Mission to the UN "Remarks by Ambassador John C. Danforth, U.S. Representative to the United Nations, after the

able to argue with this on moral grounds, it is submitted that the Security Council overstepped its boundaries in terms of what States perceive to be its jurisdictional limits. States have been trying to agree on a definition of terrorism for years. The sad truth remains that "one man's terrorist is another man's freedom fighter". To the extent that paragraph three attempts to legislate on this, it falls on deaf ears and will be of no effect.

(e) Conclusion

It can be concluded that the Security Council is clearly not an omnipotent legislator. Not only must there exist an emergency such that it is not appropriate to wait for the creation of a multilateral treaty, but the Security Council must also show deference to issues that the General Assembly is dealing with, such as the definition of terrorism.

The Security Council must therefore only legislate to the extent that the obligations created receive wide support. The Security Council does not have the means or the consensus to decide upon controversial or complex issues. If the Security Council purports to do so, it will be abrogating from the function of the General Assembly as the forum to decide upon such issues. Furthermore, because the Security Council must avoid such issues, its legislation will usually only be provisional pending the final determination by all member States of the controversial issues.¹²⁶

3 *Procedural legitimacy*

Passage of Resolution 1566, at the Security Council Stakeout" (8 October 2004) Press Release). See also the following statement of the representative Brazil made in the Security Council meeting that followed Resolution 1566 (UNSC (19 October 2004) Verbatim Record S/PV.5059, 11): "In our view, resolution 1566 (2004) reflects compromise language that contains a clear important political message, but it is not an attempt to define the concept of terrorism." The representative of Costa Rica stated (UNSC (19 October 2004) Verbatim Record S/PV.5059, 20): "We understand that these two paragraphs are political statements, and not legal enactments".

¹²⁶ Resolution 1540 (2004) was seen by many as an interim measure pending a more comprehensive convention on the matter. It was legitimate for the Security Council to legislate as immediate steps needed to be taken. However, as the representative of New Zealand stated (UNSC (22 April 2004) Verbatim Record S/PV.4950, 21): "In New Zealand's view, this draft resolution represents a critical stopgap measure rather than an optimal solution. These are complex issues, and they must be addressed comprehensively and effectively."

Some would argue that the legitimacy of obligations imposed by the Security Council cannot be questioned given that States consented to be bound by Security Council decisions. Through Article 25 of the Charter, States agreed that they would become bound by obligations imposed by the Security Council when it acted under Chapter VII, and furthermore, it was agreed that such obligations would take precedence over existing treaty obligations.¹²⁷

However, it is submitted that little legitimating value can put on this consent as the Security Council increasingly engages in an expansive interpretation of its powers.¹²⁸ It was never envisaged that States were consenting away their fundamental ability to choose their obligations under international law.

More is required to legitimise the Security Council's legislative powers than a mere Article 25 argument. In particular, the concerns arising from a lack of democracy need to be addressed. There is a clear democratic deficit in the Security Council. It is both unrepresentative and unaccountable. If an international organisation were to have legislative power, one would think that the United Nations General Assembly would most suit that role.

This writer is well aware of the need to be careful to not blindly apply domestic concepts and processes to international contexts. Democracy is a form of domestic government that legitimises the power of governance. Just because an international institution such as the Security Council has a power of governance, it does not mean that domestic forms of democracy are the only instrument for legitimising that power.¹²⁹

¹²⁷ UN Charter, Art 103.

¹²⁸ See Kumm, above n 66, 914.

¹²⁹ See Weiler, above n 69, 561. Weiler submits that it is misguided to simply ask whether international law making should be democratic given the radically varied ways and means of international norm setting and law making. A contextual analysis is required. Furthermore, "given that the vocabulary of democracy is rooted in notions of demos, nation and state, there is no conceptual template from the traditional array of democratic theories one can employ to meet the challenge... What is required is both a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither State nor Nation and to search for alternative legitimating devices which would make up for the non applicability of some of the classical institutions of democracy where that is not possible."

Indeed it would be ludicrous to try to legitimise international law making through a simplistic application of a majority rules principle.¹³⁰ Furthermore, electoral accountability is not the right test to apply.¹³¹ However, this does not mean that some of the core democratic principles cannot be applied to analyse the procedural legitimacy of the Security Council's legislative activities. In particular, the notions of participation, transparency, and some form of accountability are certainly applicable.¹³²

In terms of participation, views that the Security Council is unrepresentative have been compounded in light of the Security Council's assumption of legislative powers. The case for reform of the membership of the Security Council is more urgent in light of recent legislative activity.

Furthermore, as Security Council legislation affects the interests of all States, the legitimacy of such legislation would increase if the Security Council allowed the views of the wider UN membership to be heard and debated.¹³³ As the New Zealand representative declared to the Security Council prior to Resolution 1540 being passed:¹³⁴

[T]he draft resolution will not succeed in its aim without the support and acceptance of Member States. Such acceptance requires the Council to dispel any impression of negotiations behind closed doors or that a small group of States is drafting laws for the broader membership without the opportunity for all Member States to express their views.

This statement was made during an open debate held by the Security Council that involved 51 States. It is the view of this author that this practice of open participation should continue whenever the Security Council contemplates

¹³⁰ Weiler, above n 69, 561.

¹³¹ Kumm, above n 66, 926.

¹³² See Kumm, above n 66, 926.

¹³³ Article 31 of the United Nations Charter provides that "[a]ny member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected."

¹³⁴ UNSC (22 April 2004) Verbatim Record S/PV.4950, 21.

passing legislation. As the Philippines representative stated, “[t]hose who are bound should be heard.”¹³⁵

Not only should States be allowed to participate, but the Security Council should be responsive to their concerns. Although the members of the Security Council cannot be held accountable in the way members of a legislature are in a democracy, it is submitted that the willingness of States to comply is the accountability mechanism here. Cooperation not coercion is required for Security Council legislation to be effective. This is essential given the nature of the obligations being created. Thus, if the Security Council wishes to ensure effective implementation of its legislation, it must be responsive to the concerns of States.

E Actual Efficacy of the Security Council's Action

While it is important to focus debate on what procedural mechanisms are in place to ensure the legitimacy of Security Council action, this should not overshadow the essential inquiry of how effective the particular Security Council actions are in maintaining international peace and security. Given that the primary goal of the Security Council is the maintenance of international peace and security, the Security Council must be judged, to a very large extent, by the actual effectiveness of its actions. It is too soon to judge how successful Resolution 1540 (2004) has been in achieving its goal. This is not the case with Resolution 1373 (2001).

Simply put, Resolution 1373 (2001) has been very successful in raising the general ability of States to prevent and suppress terrorism. The Resolution did more than merely urge States to increase their efforts against terrorism. It obliged States to take numerous concrete steps to increase their legislative and

¹³⁵ UNSC (22 April 2004) Verbatim Record S/PV.4950, 2. See also the following statement of the representative of Liechtenstein (UNSC (22 April 2004) Verbatim Record S/PV.4950 (Resumption 1), 21): “Open debates of the Security Council are an important means of enabling the Council to hear the view of other Member States and thus to truly act on their behalf, as foreseen in the Charter of the United Nations. We believe that that practice is of particular importance when the Council tackles, on an exceptional basis, issues in the area of standard-setting and lawmaking, as is the case with the subject matter before us today.”

enforcement capabilities. As a result, practical changes can be seen to have occurred. Despite the problem outlined above that States have a vast discretion in the implementation of the Resolution, the vast majority of States have taken the obligations very seriously with the result that global capabilities have certainly increased.

Much of this success can be attributed to the work of the CTC. The CTC cannot be judged by the number of terrorists arrested or the number of attacks avoided. As illustrated in the above synopsis of the CTC's work, the CTC is not a law enforcement agency. Nor does it coordinate States' enforcement activities against specific threats. So it does not have any operational achievements in that sense to report.¹³⁶ Rather the CTC plays the unique role of seeking to raise average State performance against terrorism across the globe.

Thus, although the CTC is certainly an innovation in the practice of the Security Council, it has not replaced States as the primary actors in the maintenance of international peace and security. It is still very much a State-centred system. Resolution 1373 (2001) imposed the obligations to prevent and suppress terrorism on States. The CTC seeks to further State performance of these obligations.

Although the CTC faces numerous challenges, as highlighted above in the synopsis of its work, this does not detract away from the fact that it has largely been successful in stimulating counter-terrorism activity on the part of States. The dialogue the CTC has engaged in has focussed States' efforts on what practical measures need be taken to ensure their compliance with Resolution 1373.

These successes suggest that the creation of general legal rules by the Security Council can be an effective tool to use to counter threats that are global and not situation-specific. Thus, it is submitted that where appropriate, the Security Council should not shy away from passing legislation. The failure of all

¹³⁶ UNSC (27 June 2002) Verbatim Record S/PV.4561, 3.

States to agree on a particular course of action in a timely manner should not prevent immediate action from being taken when the threat so demands. However, it would be wise for the Security Council to take account of the issues discussed above in order to ensure that when it does legislation, it does so in a legitimate fashion.

IV SANCTIONING NON-STATE ACTORS

The Security Council has not only sought to increase States' capacities to prevent and suppress terrorism, it has also taken a more direct approach against the threat of terrorism through the use of sanctions. Although a traditional tool in its armoury, the sanctions regime the Security Council has applied against the Taliban and Al-Qaida is unlike any other. The following section seeks to outline the sanctions regime, its implementation and the various problems with the regime in order to provide a base for an analysis of due process issues and to analyse the efficacy of the sanctions.

A *The Taliban and Al-Qaida Sanctions Regime and the 1267 Committee*

The current Taliban and Al-Qaida sanctions regime originated in Resolution 1267 (1999).¹³⁷ Through this Resolution, the Security Council sought to provide an international response to the threat posed by Usama bin Laden and his Al-Qaida organisation.¹³⁸ The Resolution followed the indictment by the United States of Usama bin Laden and his associates for the 1998 bombings of United States embassies in Nairobi, Kenya and Tanzania, and the failure of the Taliban to deny Al-Qaida a safe haven in Afghanistan.¹³⁹ The Security Council, accustomed to dealing with States, decided to confront the Al-Qaida threat by targeting the Taliban.¹⁴⁰ The resolution required, inter alia, all Member States to

¹³⁷ UNSC Resolution 1267 (15 October 1999) S/RES/1267(1999).

¹³⁸ This paper takes the spelling of "Usama bin Laden" as is commonly used in the Security Council. This writer is aware that it is often spelt "Osama bin Laden".

¹³⁹ See the preamble of UNSC Resolution 1267 (15 October 1999) S/RES/1267(1999).

¹⁴⁰ UNSC 1267 Committee "First 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" (25 August 2004) S/2004/679, 5 ["First Report of the Monitoring Team"]

freeze the financial resources of the Taliban. A Committee of the Security Council (1267 Committee), consisting of all the members of the Council was created to monitor State implementation of the resolution and to report violations of the sanctions regime.¹⁴¹

Following the failure of the Taliban to hand over Usama bin Laden and the impunity with which Al-Qaida continued to train and plan operations in Afghanistan, the Security Council decided to strengthen the sanctions regime.¹⁴² Resolution 1333 (2000) imposed an arms embargo and a travel ban on the Taliban. The more significant step was to extend the asset freeze to Usama bin Laden, Al-Qaida and their associates.¹⁴³ The 1267 Committee was charged with maintaining an updated list of those individuals and entities based on information provided by States and regional organisations.¹⁴⁴ The resolution placed a twelve month time limit on the sanctions.¹⁴⁵

Following September 11 and the United States' attacks on Afghanistan, resolution 1390 (2002) was passed, which now forms the basis for today's sanction regime.¹⁴⁶ The sanctions consist of an asset freeze, a travel ban, and an arms embargo. Those targeted are Usama bin Laden, members of Al-Qaida and the Taliban, and other individuals, groups, undertakings and entities associated with them as referred to in the list maintained by the 1267 Committee.¹⁴⁷ These persons and entities are targeted wherever they are situated, not just within the Afghanistan territory. The sanctions regime is reviewed periodically for the purposes of improvement but it is otherwise permanent.¹⁴⁸

¹⁴¹ UNSC Resolution 1267 (15 October 1999) S/RES/1267(1999), para 6.

¹⁴² This was done by UNSC Resolution 1333 (19 December 2000) S/RES/1333(2000). See the comments of the representative of the United States in UNSC (19 December 2000) Verbatim Record S/PV. 4251, 7: "The Taliban cannot continue to flout the will of the international community and support and shelter terrorists without repercussions. As long as the Taliban leadership continues to harbour terrorists, in particular Usama bin Laden, and to promote terrorism, it remains a threat to international peace and security".

¹⁴³ UNSC Resolution 1333 (19 December 2000) S/RES/1333(2000), para 8(c).

¹⁴⁴ UNSC Resolution 1333 (19 December 2000) S/RES/1333(2000), para 8(c).

¹⁴⁵ UNSC Resolution 1333 (19 December 2000) S/RES/1333(2000), para 23.

¹⁴⁶ UNSC Resolution 1390 (28 January 2002) S/RES/1390(2002).

¹⁴⁷ UNSC Resolution 1390 (28 January 2002) S/RES/1390(2002), para 2.

¹⁴⁸ Paragraph 3 of resolution 1390 provides for the sanctions to be reviewed in twelve months at which time the Council "will either allow these measures to continue or decide to improve them". The effect is that the sanctions will continue indefinitely until the Security Council decides to withdraw them.

It should be noted that the sanctions regime does not apply to terrorists that are not associated with Al-Qaida or the Taliban. Many countries maintain their own list of terrorists that include groups that may not be on the 1267 Committee's list, such as the Palestinian group Hamas.¹⁴⁹ Indeed, Resolution 1373 (2001) extends the obligation to freeze terrorists' assets beyond merely those on the 1267 Committee's list.¹⁵⁰

Following the Beslan terrorist attacks in 2004, Russia tabled a draft resolution before the Security Council that would have established a new list of terror subjects, targeting those not on the 1267 Committee's list. Russia was motivated largely by its desire to extend sanctions to Chechan rebels. The resolution was not passed in its submitted form, but Resolution 1566 (2004) did establish a working group to make recommendations to the Security Council on what practical measures should be imposed upon terrorists other than Al-Qaida and the Taliban.

B The List of Al-Qaida and Taliban Members and Their Associates

The foundation of the sanctions regime is the list maintained by the 1267 Committee. This list represents the front line of the United Nations efforts against international terrorism. The goal is to ensure the listed individuals and entities do not have the means to organise and carry out terrorist attacks. Every Member State is under an obligation to "freeze without delay the funds and other financial assets or economic resources" of the people and entities on that list.¹⁵¹ Further, Member States must prevent those on the list from travelling through their territory and from acquiring arms.

¹⁴⁹ For example, the European Union maintains a list that is annexed to Common Position (EEC) 2001/931/CFSC [2001] OJ L 344. The list is drawn up on the basis of investigations carried out by the competent judicial and police authorities in the European Union Member States. The list includes ETA (Basque Fatherland and Liberty), the IRA (Irish Republican Army), the terrorist wing of Hamas, and other revolutionary activist groups, as well as the names of individuals belonging to such groups. These groups are generally not associated with Al-Qaida or the Taliban and so do not appear on the 1267 Committee's list.

¹⁵⁰ UNSC Resolution 1373 (28 September 2001) S/RES/1373(2001), para 1(c).

¹⁵¹ UNSC Resolution 1390 (28 January 2002) S/RES/1390(2002), para 2(a).

It is States that implement the sanctions against those targeted, and it is also States who are responsible for identifying those who are to be targeted. Although the 1267 Committee controls who goes on the list, it relies on the submission of names by States of known Al-Qaida and Taliban members and their associates.

Any State may propose a name for addition to the list. Proposed additions must "include identifying information and background information, to the greatest extent possible, that demonstrates the individual(s)' and/or entity(ies)' association with Usama bin Laden or with members of the Al-Qaida organisation and/or the Taliban".¹⁵² The Chairman of the Committee will circulate to all members of the Committee the proposed addition upon which the members have two working days to object before the addition will be deemed adopted.¹⁵³ Because the Committee works by consensus, one fervent objector can stop the addition of a name to the list.¹⁵⁴

There is no evidentiary standard required for the addition of a name to the list. Particularly during the Committee's initial period of work, the addition of names to the list was largely based on political trust, often made without explanations of the link between the named individual or entity and Al-Qaida and the Taliban.¹⁵⁵

C Monitoring Compliance

¹⁵² UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 17. Prior to resolution 1526, there was no such requirement and additions were made, especially in the early post-September 11 days, without disclosing the intelligence that demonstrated the link with Al-Qaida or the Taliban, and often with little accompanying identifying information.

¹⁵³ This is known as the "no objection procedure". See UNSC 1267 Committee "Guidelines of the Committee for the Conduct of its Work" (7 November 2002, amended on 10 April 2003), para 9(b) <<http://www.un.org/Docs/sc/committees/1267Template.htm>> (last accessed 22 August 2005).

¹⁵⁴ See UNSC 1267 Committee "Guidelines of the Committee for the Conduct of its Work" (7 November 2002, amended on 10 April 2003), para 9(a) <<http://www.un.org/Docs/sc/committees/1267Template.htm>> (last accessed 22 August 2005).

¹⁵⁵ Eric Rosand "The Security Council's Efforts to Monitor the Implementation of Al Qaeda / Taliban Sanctions" 98 Am J Int'l L 745, 748 ["The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions"].

In order to assist the 1267 Committee in its monitoring function, the Security Council decided to establish, through resolution 1363 (2001), a Monitoring Group of experts.¹⁵⁶ This group produced reports to the Committee based on its review of the reports of Member States and information gathered from visits to selected countries. These reports contain invaluable findings on the level to which the sanctions have been implemented and the substantive effect they are having on the Al-Qaida and Taliban networks.¹⁵⁷ The Monitoring Group was eventually replaced by the Analytical Support and Sanctions Monitoring Team (the "Monitoring Team") with the passing of resolution 1526 (2004).¹⁵⁸

The means by which the 1267 Committee has monitored State compliance with the sanctions regime is through reports submitted by Member States.¹⁵⁹ The Security Council has, through various resolutions, requested reports to be made to the 1267 Committee.¹⁶⁰ In particular, Resolution 1455 (2003) required a comprehensive review to be undertaken, requiring all States to submit a report on the steps taken to implement the sanctions, on all related investigations and enforcement actions, and including a comprehensive summary of frozen assets of listed individuals and entities within their territories.¹⁶¹

¹⁵⁶ UNSC Resolution 1363 (30 July 2001) S/RES/1363(2001).

¹⁵⁷ Not all were happy with the workings of the Monitoring Group. Some States were concerned with the way the Monitoring Group operated and its lack of sensitivity. See for example the comments of the representatives of Liechtenstein and Ireland in UNSC (12 January 2004) Verbatim Record S/PV.4892. The Liechtenstein representative stated: "The Liechtenstein authorities have cooperated in a proactive and constructive manner with the Group in order to facilitate its task, and have provided it with important information. However, we believe that such cooperation should be reciprocated by the Monitoring Group. The Group's case-based investigative work has not always been conducted with a view to ensuring enhanced implementation of the measures imposed by the Council. Furthermore, we noted once again that the report prepared by the Group was leaked to the press before it was received by the States concerned. We expect that that situation will not reoccur in the future." See also "The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions", above n 155, 754-755.

¹⁵⁸ UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 6.

¹⁵⁹ The Committee has conducted some visits to States in order to gain a further understanding of the level of implementation but the main source of information continues to be State reports.

¹⁶⁰ See UNSC Resolution 1333 (19 December 2000) S/RES/1333(2000), para 20; UNSC Resolution 1390 (28 January 2002) S/RES/1390(2002), para 6; UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 21; UNSC Resolution 1455 (17 January 2003) S/RES/1455, para 6; UNSC Resolution 1617 (29 July 2005) S/RES/1617(2005), para 10.

¹⁶¹ UNSC Resolution 1455 (17 January 2003) S/RES/1455(2003), para 6.

The level of reporting by Member States to the 1267 Committee has generally been poor. As at 30 October 2003, six and a half months after the required submission date for Resolution 1455 reports, only 83 States had submitted a report (108 not submitted).¹⁶² A year later, 60 States had still not submitted a report.¹⁶³

The failure of so many States to report has been of serious concern. The Chairman of the 1267 Committee stated that the inadequate reporting has "seriously hampered the Committee in accomplishing its task" of monitoring States' implementation of the sanctions regime.¹⁶⁴ Given that many States have not reported, it is hard to say whether those States are implementing the regime. However, the Monitoring Team has made it clear that the lack of a report from a State doesn't necessarily denote any lack of will to produce one or any lack of commitment to the international effort against Al-Qaida and the Taliban.¹⁶⁵

An important reason for not reporting appears to be lack of capacity to produce the required reports.¹⁶⁶ There also seems to be an impression that some States do not need to report to the 1267 Committee because they have reported their counterterrorism efforts to the CTC or because the Al-Qaida and Taliban threat is of no national concern to them.¹⁶⁷ The Security Council has stressed the importance of reporting to each committee.¹⁶⁸

D Problems with the Sanctions

Over the years, the 1267 Committee and its monitoring experts have undertaken the very important task of identifying how the sanctions regime can

¹⁶² UNSC 1267 Committee "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" (2 December 2003) S/2003/1070, 36 ["Second Report of the Monitoring Group"].

¹⁶³ "Second Report of the Monitoring Group", above n 162, 14.

¹⁶⁴ UNSC (12 January 2004) Verbatim Record S/PV.4892, 6.

¹⁶⁵ "First Report of the Monitoring Team", above n 140, 18.

¹⁶⁶ "First Report of the Monitoring Team", above n 140, 18.

¹⁶⁷ "First Report of the Monitoring Team", above n 140, 18.

¹⁶⁸ UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), paras 22 and 23 requested all States that had not submitted 1455 reports to explain in writing their reasons for non-reporting and requested the 1267 Committee to circulate a list of those States that had not reported.

be continually improved. Member States have contributed to this process by identifying in their reports the problems they have had in implementing the regime. While the 1267 Committee and the Security Council have generally been flexible in their response, a number of concerns remain, particularly relating to listing and delisting procedures.

1 The 1267 Committee's list

(a) Quality of the list

Perhaps the most consistently voiced concern has been to do with the quality of the list of designated individuals and entities. Many States have reported that the names listed contain insufficient identifiers to allow proper enforcement of the sanctions.¹⁶⁹ For example, many entries on the list lack basic identifiers such as date of birth, nationality, known location and passport information. Without such identifying information, enforcement of the sanctions by financial institutions and border authorities is next to impossible.¹⁷⁰ Furthermore, problems have occurred with the misspelling of names and inaccuracies in translation.¹⁷¹

In response to these concerns, the Monitoring Team has made a concerted effort to obtain additional information from States on the names they have submitted.¹⁷² In addition, Resolution 1526 (2004) has called upon all States to

¹⁶⁹ See UNSC 1267 Committee "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" S/2005/83, 12 ["Second Report of the Monitoring Team"]; See also UNSC (12 January 2004) Verbatim Record S/PV.4892, 4; See also "Second Report of the Monitoring Group", above n 162, 67.

¹⁷⁰ "First Report of the Monitoring Team", above n 140, 11. The difficulty in positively identifying listed individuals was evident from many States 1455 reports. In Liechtenstein's 1455 report, it reported that it is often not able to freeze the accounts of a given individual without having a date of birth. It further reported that some of the aliases listed give rise to confusion. Portugal's 1455 report gave a telling example: "In one case one name on the list corresponded to around 50 identical names in the database of a banking institution." See "Second Report of the Monitoring Group", above n 162, 67.

¹⁷¹ "First Report of the Monitoring Team", above n 140, 11.

¹⁷² "Second Report of the Monitoring Team", above n 169, 12.

include identifying information when submitting names to the 1267 Committee.¹⁷³

(b) Size of the list

Another problem with the list is its small size. As of 1 October 2005, there are 448 names on the list.¹⁷⁴ To put this in perspective, the Monitoring Group reported in December 2003 that some 4000 individuals have been arrested or detained around the world on the basis of their links with Al-Qaida.¹⁷⁵ It seems as though many States have not been submitting names to the Committee.

The 1267 Committee does not believe that the list needs to be an exhaustive compendium of all known Al-Qaida members and associates.¹⁷⁶ However, it is clear that further work needs to be done to make the list more representative of the threat the world faces from Al-Qaida. In this respect, the Committee and its Monitoring Team have strongly encouraged more States to submit names to the list.¹⁷⁷ The Security Council has also stressed the importance of submitting names "unless to do so would compromise investigations or enforcement actions."¹⁷⁸

Several reasons have been put forward for the reluctance of States to submit names. Some States may be reluctant to submit names because of their concerns that the regime breaches individuals' fundamental rights of due process.¹⁷⁹ States have also expressed concern over the harshness of the asset freeze for those on the list and their families. The Security Council responded to this latter issue by adopting Resolution 1452 (2002) which allows funds to be

¹⁷³ UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 17.

¹⁷⁴ UNSC 1267 Committee "New Consolidated List"

<<http://www.un.org/Docs/sc/committees/1267Template.htm>> (last accessed 1 October 2005).

¹⁷⁵ "Second Report of the Monitoring Group", above n 162, 9.

¹⁷⁶ "Second Report of the Monitoring Team", above n 169, 12.

¹⁷⁷ As of 25 August 2004, only twenty one States had submitted names for inclusion on the List.

See "First Report of the Monitoring Team", above n 140, 10.

¹⁷⁸ See UNSC Resolution 1455 (17 January 2003) S/RES/1455(2003), para 4. See also UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 16.

¹⁷⁹ "First Report of the Monitoring Team", above n 140, 11.

accessed that are “necessary for basic expenses”.¹⁸⁰ Problems over who exactly is “associated with” Al-Qaida, Usama bin Laden and the Taliban has been suggested as another reason for States not submitting names.¹⁸¹ The Security Council sought to rectify this situation by passing Resolution 1617 (2005) which defines more clearly what connection is required for the “associated with” test to be met.¹⁸²

2 *The asset freeze*

According to the Monitoring Team’s report in February 2005, “[t]he asset freeze is perhaps the most implemented of the sanctions on a global scale, and it may constitute the most effective mechanism to prevent large-scale terrorist operations.”¹⁸³ A considerable effort has been made by the international community to deny terrorists access to funds. It now seems as though all but three Member States have a legal framework in place for freezing the assets of Al-Qaida, the Taliban and their associates.¹⁸⁴

However, one shortcoming is that in many countries there is apparently still a need to present sufficient evidence to judicial authorities as a prerequisite of the freezing of assets.¹⁸⁵ These requirements have caused concern to the 1267 Committee because they entail delays and are not as effective as executive-authorised freezes. The Chairman of the Committee has thus made it clear that “such systems are not in conformity with Member States’ obligations”.¹⁸⁶

¹⁸⁰ UNSC Resolution 1452 (20 December 2002) S/RES/1452(2002), para 1. This allowance only applies after the relevant State(s) has notified the 1267 Committee of its intention to authorise access to such funds and in the absence of a negative decision by the Committee within 48 hours of such notification. Access to funds are also allowed for “extraordinary expenses, provided that such determination has been notified by the relevant State(s) to the Committee and has been approved by the Committee.”

¹⁸¹ “First Report of the Monitoring Team”, above n 140, 10.

¹⁸² UNSC Resolution 1617 (29 July 2005) S/RES/1617(2005). See below for the definition of “associated” and an analysis of the scope of the sanctions.

¹⁸³ “Second Report of the Monitoring Team”, above n 169, 5.

¹⁸⁴ “First Report of the Monitoring Team”, above n 140, 12.

¹⁸⁵ UNSC 1267 Committee “Third 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” (9 September 2005) S/2005/572, 17 [“Third Report of the Monitoring Team”]

¹⁸⁶ UNSC (20 July 2005) Verbatim Record S/PV.5229, 6.

As a result of the sanctions, Al-Qaida's funding has decreased significantly.¹⁸⁷ Generally, the formal banking sector has responded well with the introduction of stricter "know your customer" rules, extensive circulation of the 1267 Committee's list, and tightening up of procedures.¹⁸⁸ However, much still needs to be done to extend these measures to banks and other financial institutions in States that lack the resources to implement effective controls.¹⁸⁹

The 1267 Committee has always been conscious of the problems of imposing financial measures against a threat that is characterised by clandestine operations. Indeed the Committee currently believes that Al-Qaida, the Taliban and their associates readily use alternative means of holding and moving assets outside of the formal financial sector.¹⁹⁰ The Committee has therefore stressed the need for Member States to regulate the use of alternative remittance systems and the cross-border movement of hard cash.¹⁹¹

3 *The travel ban*

The travel ban has had little if any effect on the activities of the Taliban and Al-Qaida.¹⁹² Not one country has reported that it has prevented a person on the list from travelling.¹⁹³ There are numerous reasons for this poor result. The lack of detail in many entries on the list makes it difficult for border officials to identify that any particular traveller is subject to the ban.¹⁹⁴ The lack of effective border controls and failure to incorporate the list into them also undermines the effectiveness of the ban. Further, the ability of terrorists to use stolen and altered travel documents is a major problem.¹⁹⁵

¹⁸⁷ "First Report of the Monitoring Team", above n 140, 12.

¹⁸⁸ "Second Report of the Monitoring Team", above n 169, 20. The Monitoring Team has noted that although registered banks have generally been given up-to-date versions of the Consolidated List, the List is having limited distribution to financial institutions other than banks. See "First Report of the Monitoring Team", above n 140, 13.

¹⁸⁹ See "Second Report of the Monitoring Group", above n 162, 24.

¹⁹⁰ "Second Report of the Monitoring Team", above n 169, 20.

¹⁹¹ "First Report of the Monitoring Team", above n 140, 14; "Second Report of the Monitoring Team", above n 169, 21-26.

¹⁹² "First Report of the Monitoring Team", above n 140, 16.

¹⁹³ "Second Report of the Monitoring Team", above n 169, 39.

¹⁹⁴ "First Report of the Monitoring Team", above n 140, 16.

¹⁹⁵ "Second Report of the Monitoring Team", above n 169, 40.

4 *The arms embargo*

The arms embargo has reportedly been the hardest of the sanctions to implement.¹⁹⁶ This is because preventing Al-Qaida, the Taliban and their associates from acquiring arms basically requires States to curb the flow of arms to non-State actors across the globe.¹⁹⁷ Furthermore, the difficulties in preventing these terrorists from obtaining arms is compounded by the fact that one of the hallmarks of Al-Qaida is the simplicity of its methodology.¹⁹⁸ For example, the Madrid bombers used mining explosives and cell phones as detonators rather than military products.¹⁹⁹

V *LEGITIMACY OF THE 1267 SANCTIONS*

While it is generally considered appropriate for the Security Council to target non-State actors with sanctions, there are a number of issues with the Al-Qaida and Taliban sanctions regime that impinge on its perceived legitimacy. Firstly, there are some concerns over the scope of the sanctions. The definition of "associated with" is very wide and has the potential to catch those who unknowingly support Al-Qaida or the Taliban. Secondly, there are major issues relating to the lack of due process protections in the maintenance of the list.

A *Scope of the Sanctions Regime*

The Al-Qaida and Taliban sanctions regime represents a major innovation in the practice of the Security Council. It is not the first time that non-State actors have posed a threat to international peace and security. Nor is it the first time the Security Council has imposed sanctions against non-State actors.²⁰⁰ However, when it has done so, the sanctions have been limited to a particular rebel group confined to a particular geographical area.

¹⁹⁶ UNSC (12 January 2004) Verbatim Record S/PV.4892, 5.

¹⁹⁷ "Second Report of the Monitoring Group", above n 162, 28.

¹⁹⁸ "First Report of the Monitoring Team", above n 140, 15.

¹⁹⁹ "First Report of the Monitoring Team", above n 140, 15.

²⁰⁰ In the case of the UNITA held areas of Angola, the Security Council imposed "smart" sanctions against the leadership of UNITA, including an asset freeze wherever their assets were situated (Resolution 1173). In the case of Cambodia, the Security Council imposed limited sanctions against the PDK (also known as the Khmer Rouge) by Resolution 792.

The Al-Qaida and Taliban sanctions regime is much more ambitious than this. The sanctions regime does not just target the well-known leadership of these groups, nor is it designed to target a particular geographical area. The sanctions apply broadly to anyone who is “associated with” these groups, wherever in the world they are situated.

As stated above, the Security Council defined in Resolution 1617 (2005) what connection is required for the “associated with” test to be met.²⁰¹ The acts or activities which indicate the required connection include:²⁰²

- participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
- supplying, selling or transferring arms and related materials to;
- recruiting for; or
- otherwise supporting acts or activities of;

Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

This definition is clearly quite broad. It follows from the Monitoring Team’s recommendation for States to interpret “associated with” broadly in order to ensure that terrorist suspects do not fall between the cracks.²⁰³ The reference to “any cell, affiliate, splinter group or derivative thereof” recognises the changed nature of the Al-Qaida threat. Today’s threat is more readily characterised by a global network rather than an organisation with a structure and hierarchy that was once Al-Qaida prior to the expulsion of the Taliban from power in Afghanistan.²⁰⁴ The threat includes “franchise” or “start-up” groups

²⁰¹ UNSC Resolution 1617 (29 July 2005) S/RES/1617(2005).

²⁰² UNSC Resolution 1617 (29 July 2005) S/RES/1617(2005) para 2.

²⁰³ “Second Report of the Monitoring Team”, above n 169, 11. The Monitoring Team recommended that if in doubt, States should submit the name, leaving it up to the Committee to ensure that each case falls within the scope of the sanctions programme.

²⁰⁴ “First Report of the Monitoring Team”, above n 140, 6.

that have little or no direct contact with the central leadership but who share the same political objectives and religious beliefs.²⁰⁵

Thus, groups that adopt the Al-Qaida philosophy may find themselves sanctioned even though they may never have had any contact with the old Al-Qaida organisation that trained in Afghanistan. While this is justifiable, some States have been concerned that the definition doesn't include any knowledge and intent elements.²⁰⁶ Therefore, those who unknowingly and inadvertently support terrorists may find themselves blacklisted and sanctioned.

B Due Process Concerns

Perhaps the most innovative and controversial aspect of the sanctions is that those to be targeted are decided upon by a committee of the Security Council. Because the Security Council targeted such an ambiguous threat, it was necessary to create a process whereby the particular individuals and entities to be targeted could be identified. That process is the maintenance of the list by the 1267 Committee.

²⁰⁵ See "First Report of the Monitoring Team", above n 140, 7. See also the comments of the Chairman of the 1267 Committee in UNSC (20 July 2005) Verbatim Record S/PV.5229, 4-5: "There can be no doubt that the threat posed by Al-Qaida is radically different from the threat it posed when this sanctions regime was first imposed. It is believed that Al-Qaida terrorism now comprises three separate but interlinked groups: first is the old leadership, whose names are known to everyone; second are the fighters who were trained in camps in Afghanistan and graduated as expert terrorists; and third is a new and growing generation of followers who, although they may never have left their countries of residence, have embraced the core elements of the Al-Qaida message. Given that the Committee is devoting increasing attention to the third group, I wish to encourage the Council to make clear to Member States that the word 'associated' must also cover such groups so that the sanctions regime can be adapted to the new threats."

²⁰⁶ See the following statement of the representative of Liechtenstein in UNSC (20 July 2005) Verbatim Record S/PV.5229 (Resumption 1), 8: "Current discussions on an improved sanctions regime also deal with the question of which individuals, groups, undertakings and entities can be considered as being "associated with" Al-Qaida for the purpose of listings. This is a welcome exercise that takes into account the structure of Al-Qaida and the nature of the threat it poses. The draft currently under discussion, however, entails the danger that such a definition could become too sweeping and include third parties that have some relationship to those targeted and that might factually contribute, in an inadvertent manner, to terrorist activities. In accordance with our legal understanding, knowledge and intent are indispensable mental elements of criminal liability and must thus be included in such a definition. This would also be in line with international legal standards such as those established by the Convention for the Suppression of the Financing of Terrorism, to which we are a party."

Many States have complained that the way in which the list is managed violates fundamental norms of due process. The open Security Council meeting on 30 July 2005 evidences a general concern among States about the lack of clear criteria for the addition of names to the list and the lack of adequate safeguards for those who are on the list.²⁰⁷

1 The need for due process protections

Those who are placed on the 1267 Committee's list face very serious curtailment of their liberties. Indeed, the "effects of a freezing order, if it is effectively implemented, are devastating for the target".²⁰⁸ Such ramifications are entirely appropriate for those who are truly terrorists. However, as it was noted at the International Conference of Jurists in November 2004, the human rights restrictions that result from blacklisting make it "essential that there are strong safeguards in place to check, in all senses of the word, the way in which national and international authorities use the power to blacklist organisations and individuals".²⁰⁹

In light of all this, and the huge effect that the sanctions have on those designated, one would be forgiven for thinking it abhorrent that the power to make designation decisions rests in a political body as the 1267 Committee. However, this is a necessary evil in order to achieve the purpose of the sanctions. If designation decisions were subject to due process protections of a nature required for criminal proceedings, the assets of terrorists would dissipate before any freezing order could be obtained.

Due process protections of this nature are not required due to the fact that these sanctions are generally not considered to be criminal penalties.²¹⁰ However,

²⁰⁷ UNSC (20 July 2005) Verbatim Record S/PC.5229.

²⁰⁸ Iain Cameron "European Union Anti-Terrorist Blacklisting" (2003) 3 Human Rights Law Review 225, 227.

²⁰⁹ Bill Bowring and Douwe Korff "Terrorist Designation with Regard to European and International Law: The Case of the PMOI" (International Conference of Jurists, Paris, 10 November 2004), 30.

²¹⁰ Peter Guthrie "Security Council Sanctions and the Protection of Individual Rights" (2004) 60 NYU Ann Surv Am L 491, 502-508.

they certainly contain a punitive element given the severity of their effects on individuals and entities listed.²¹¹ As such, some form of due process protections are required.

2 *Protections at the international level*

(a) The process

The Committee adds names to the List largely on the basis of trust in the intelligence of the designating State. Although States are required, when submitting names, to give information to the greatest extent possible that demonstrates the individual's or entity's association with Al-Qaida or the Taliban, this is a cursory requirement.²¹² Once an individual is listed, all States are under a binding obligation to impose the required sanctions.

Very few limits were placed on the 1267 Committee's discretion to decide which particular individuals and entities should be sanctioned. Thus, the power of the 1267 Committee to make decisions on the individual responsibility of non-State actors is broad and unparalleled. The only substantive limitation is that the targets must be "associated" with the Taliban or Al-Qaida. This limitation is minor given the broad definition of the word "associated".²¹³

No judicial finding of wrongdoing is needed and there is no standard against which "guilt" is assessed. There is no legal test that requires any knowledge or intention elements. There is no evidentiary burden to be met. Within this context, determinations that an "association" exists are by definition arbitrary.

²¹¹ See the following statement of the representative of Switzerland (UNSC (20 July 2005) Verbatim Record S/PC.5229 (Resumption 1), 9). "Furthermore, while targeted sanctions are intended to be preventive in nature, they are punitive in their effects, and the rights of individuals under domestic and international law are severely affected."

²¹² UNSC Resolution 1526 (30 January 2004) S/RES/1526(2004), para 17.

²¹³ See above for the definition.

The only procedural limitation is that consensus of the Committee members is required.²¹⁴ There are currently very few safeguards for those who have made it onto the list. Specifically, individuals are not notified of their presence on the list. Once designated and put on the list, there is no time limit for when that designation runs out. This means that the sanctions apply for life unless the Security Council decides otherwise. There exists no formal mechanism for an independent review or appeal of the listings and a listed individual or entity cannot directly petition the Committee for delisting, or even obtain an explanation for the designation.

(b) The Swedish case

The first time substantial concerns were raised about the lack of adequate due process protections occurred in the case of three Swedish individuals claiming to have been wrongly listed.²¹⁵ Based on United States' intelligence, the 1267 Committee added the three Somali-born Swedish citizens to the list on 9 November 2001.²¹⁶ These individuals were allegedly associated with the non profit Al Barakaat International Foundation, which was accused of terrorist financing.²¹⁷

Swedish financial institutions implemented the sanctions, as was required by European Union regulations, by freezing the bank accounts of these three individuals.²¹⁸ The individuals protested their innocence claiming that they had no knowledge that Al Barakaat had any link to terrorism.²¹⁹ With no avenue for judicial review of the listing decision, lawyers for the individuals brought proceedings for interim relief before the European Court of Justice seeking an annulment of the European Council regulation that implemented the sanctions.²²⁰

²¹⁴ This limitation is not substantial as members of the Committee pay a large amount of deference to the decision of a State to submit a name for inclusion on the list.

²¹⁵ Guthrie, above n 210, 511.

²¹⁶ Guthrie, above n 210, 511.

²¹⁷ Case T-306/01 R *Aden v Council and Commission* [2002] ECR II-2387, para 27.

²¹⁸ "The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions", above n 155, 749-750.

²¹⁹ "The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions", above n 155, 750.

²²⁰ Case T-306/01 R *Aden v Council and Commission* [2002] ECR II-2387.

It was argued that the sanctions impeded their fundamental rights, in particular the right to a fair hearing.²²¹ Interim relief was denied due to the urgency condition not being satisfied.

The individuals also petitioned the Swedish government, which then approached the United States government to obtain the information that led to the addition of their names onto the 1267 Committee's List.²²² A representative of the Swedish Police, after reviewing the information, concluded that it contained nothing that proved the allegations.²²³ The Swedish government subsequently filed a request with the 1267 Committee to have the names of the three individuals removed from the list. However, despite support from the majority of the Committee, objections from the United States, the United Kingdom and Russia prevented the Committee from reaching the necessary consensus.²²⁴

Sweden then entered into bilateral negotiations with the United States and it was only after the United States was provided with detailed personal histories of the individuals concerned that the United States requested that two of the three individuals be removed from the List.²²⁵

(c) Current delisting guidelines

Following this incident the Committee adopted guidelines on delisting procedures.²²⁶ The delisting procedure follows closely what occurred in the Swedish case. A listed individual must petition its government of residence or citizenship (the petitioned government) to review the case and approach bilaterally the government that originally proposed the listing (designating

²²¹ Case T-306/01 *R Aden v Council and Commission* [2002] ECR II-2387, para 62.

²²² Guthrie, above n 210, 512.

²²³ Guthrie, above n 210, 512.

²²⁴ "The Security Council's Efforts to Monitor the Implementation of Al-Qaida/Taliban Sanctions", above n 155, 750.

²²⁵ Guthrie, above n 210, 512. The third remains listed.

²²⁶ UNSC 1267 Committee "Guidelines of the Committee for the Conduct of its Work"

(7 November 2002, amended on 10 April 2003)

<<http://www.un.org/Docs/sc/committees/1267Template.htm>> (last accessed 22 August 2005).

government) to persuade that government to seek or allow delisting.²²⁷ Consensus, as usual, is required.

Many States argue that these guidelines do not provide adequate due process protections.²²⁸ Indeed the High-level Panel Report notes that “[t]he 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 and conventions.”²²⁹ The current review mechanism relies purely on the willingness of the petitioned government to argue the petitioner’s case, and also the willingness of the designating State and ultimately all members of the 1267 Committee to agree on delisting.

3 *Protections at the domestic level*

(a) The need for domestic protections

The obligation placed on States to sanction those on the 1267 Committee’s list can potentially place States in conflict with their human rights obligations. This potential conflict is evident from the Monitoring Team’s report in February 2005, which stated that at least thirteen lawsuits have been filed around the world directly related to the sanctions.²³⁰ Most lawsuits have not directly challenged the 1267 Committee’s decision to list, but have instead challenged the legality of the laws that implemented the sanctions.²³¹ The argument is that the “State or regional body implementing the sanctions failed to

²²⁷ UNSC 1267 Committee “Guidelines of the Committee for the Conduct of its Work” (7 November 2002, amended on 10 April 2003), para 7(d)

<http://www.un.org/Docs/sc/committees/1267Template.htm> (last accessed 22 August 2005).

²²⁸ See the various comments of States in UNSC (20 July 2005) Verbatim Record S/PV.5229. For example, the representative comments that “several countries have voiced concern that the listing and delisting procedures do not live up to the principles of due process. Some countries have even stated that they will not be able to propose names for inclusion on the Committee’s list until those concerns have been addressed.”

²²⁹ UN Secretary-General’s High Level Panel on Threats, Challenges and Change “A More Secure World: Our Shared Responsibility” (2 December 2004) A/59/565, 47.

²³⁰ “Second Report of the Monitoring Team”, above n 169, 16.

²³¹ Gutherie, above n 210, 519.

abide by, among other principles, fundamental norms of due process, right to property and freedom of association.”²³²

Given the lack of adequate procedural protections at the international level, and the constitutional or international obligations of States to guarantee some protections of due process, some States have included in their laws that implement the sanctions regime, their own mechanisms that seek ensure procedural fairness. New Zealand is an example of such a State.

(b) New Zealand’s protections

New Zealand’s legal framework allowing for the implementation of asset freezes against those on the 1267 Committee’s list exists by virtue of the Terrorism Suppression Act 2002. The asset freeze regime is premised on an individual, group or body first being designated as a “terrorist entity” by the Prime Minister.²³³ The Prime Minister may make such designations if certain statutory criteria are met, which essentially require some evidence of involvement in a “terrorist act” (as defined).²³⁴ The fact that an entity is on the 1267 Committee’s list is “sufficient evidence” of involvement.²³⁵

When the Act came into force, all names appearing on the 1267 Committee’s list were treated as if the Prime Minister had made a final designation in respect of them.²³⁶ Since then, the Prime Minister has made designations in relation to each individual or entity as and when they are added to the 1267 Committee’s list.²³⁷ The effect of the designation is to freeze the assets

²³² “Second Report of the Monitoring Team”, above n 169, 16.

²³³ UNSC 1267 Committee “Report of New Zealand as Required under United Nations Security Council Resolution 1455” (17 April 2003) S/AC.37/2003/(1455)/21, 3.

²³⁴ The Prime Minister may make an interim designation under section 20 of the Terrorism Suppression Act 2002 if the Prime Minister has “good cause to suspect” the required involvement in a terrorist act. This designation lapses after 30 days unless a final designation is made. A final designation may be made if the Prime Minister “believes on reasonable ground” the required involvement exists.

²³⁵ Terrorism Suppression Act 2002, s 31.

²³⁶ Terrorism Suppression Act 2002, s 75.

²³⁷ UNSC 1267 Committee “Report of New Zealand as Required under United Nations Security Council Resolution 1455” (17 April 2003) S/AC.37/2003/(1455)/21, 3. However, there will be a certain space in time between the addition of a name to the 1267 Committee’s list and a designation by the Prime Minister. Indeed, in the Parliamentary debate over the Terrorism

of the entity because it is an offence to knowingly deal with property owned or controlled by designated entities or to make property or financial related services available to such an entity.²³⁸

The Terrorism Suppression Act 2002 provides the following safeguards for designated entities: The entity is notified of the Prime Minister's designation;²³⁹ judicial review of the designation is available;²⁴⁰ the Prime Minister may revoke a designation;²⁴¹ and there is a time limit on the designation.²⁴²

4 *Conflicting obligations*

Arguably the binding obligation on States to impose sanctions on those on the 1267 Committee's list leaves no room for States to put in place their own safeguards. Although States may be bound by international human rights instruments to provide such safeguards, Article 103 of the Charter makes it clear that obligations Member States owe under the Charter prevail over obligations under any international treaty.²⁴³ Thus, if New Zealand for example did not implement the sanctions against a listed individual because the domestic judicial review proceedings found the designation to be unwarranted, or the statutory time limit applied, then New Zealand would be in breach of the Charter.²⁴⁴

Alternatively, if a State simply implemented the sanctions without providing procedural safeguards, the State may breach international human rights

Suppression Amendment Bill (No 2), Dr the Hon Lockwood Smith noted that the 1267 Committee's list contained 13 more designations than New Zealand's list of designated terrorists ((14 June 2005) 626 NZPD 21646).

²³⁸ UNSC 1267 Committee "Report of New Zealand as Required under United Nations Security Council Resolution 1455" (17 April 2003) S/AC.37/2003/(1455)/21, 5.

²³⁹ Terrorism Suppression Act 2002, ss 21 and 23.

²⁴⁰ Terrorism Suppression Act 2002, s 33.

²⁴¹ Terrorism Suppression Act 2002, s 34.

²⁴² Terrorism Suppression Act 2002, s 35. It should be noted that the Terrorism Suppression Amendment (No 2) Act 2005 extended the time limit another two years in order to avoid the untenable scenario of the Attorney General having to make hundreds of applications to the High Court to extend the designations that were due to expire. It will be interesting to see what happens in a couple of years when this period runs out.

²⁴³ UN Charter, art 103.

²⁴⁴ See Guthrie, above n 210, 517.

instruments or its law may breach the States own constitutional requirements.²⁴⁵ This current state of affairs is undesirable. States should not be put in such a difficult position.²⁴⁶ It is submitted that the issue of conflicting international duties could be avoided if effective safeguards are put in place at the international level.

In an open meeting of the Security Council on 20 July 2005, many States called on the Security Council to improve the Committee's listing and delisting procedures.²⁴⁷ Numerous suggestions were made.²⁴⁸ Switzerland's representative called for "transparent factual and evidentiary requirements with respect to the listing of individuals and groups".²⁴⁹ Most believed that targeted individuals and entities should be informed of their listing. Furthermore, there were calls for the duration of the sanctions to be limited. With respect to delisting, many called for individuals to be able to directly petition the Committee or an independent review body. Under such a process, the Committee would still retain the final decision making power.²⁵⁰

These concerns of States need to be addressed in order to increase the perceived legitimacy of the sanctions regime. The current regime interferes with States' constitutional structures and international obligations by obliging them to apply the sanctions regardless of whether they breach fundamental due process norms. The Security Council could make an explicit allowance for States to implement due process protections at the domestic level. However, this would result in inconsistent protections and thus inconsistent implementation of the regime. It is submitted that the Security Council should take responsibility for protecting the due process rights of non-State actors by implementing protections at the international level. This is necessary not just in terms of human rights

²⁴⁵ Guthrie, above n 210, 517.

²⁴⁶ Liechtenstein made this comment in an open Security Council meeting (UNSC (12 January 2004) Verbatim Record S/PV.4892), 25: "States must not be put in a difficult position with regard to their judicial and constitutional standards because of their commitment to implement measures imposed by the Council."

²⁴⁷ UNSC (20 July 2005) Verbatim Record S/PV.5229.

²⁴⁸ Denmark, Greece, Liechtenstein, Switzerland all made suggestions on how the procedures could be improved.

²⁴⁹ UNSC (20 July 2005) Verbatim Record S/PV.5229 (Resumption 1), 9.

²⁵⁰ UNSC (20 July 2005) Verbatim Record S/PV.5229, 16.

protections, but in order to increase the willingness of States to implement the sanctions and submit names to the list.

C Actual Results

As stated above, the Security Council must be judged to a large extent by the actual results it produces. Thus it is necessary to inquire into how effective the Al-Qaida and Taliban sanctions regime has been in ensuring that these groups are denied the means to commit terrorist acts. In terms of the asset freeze, 32 States have reported to have taken action to freeze assets of those listed, amounting to a total of US\$91 million worth of assets frozen as at 30 June 2005.²⁵¹

This figure certainly indicates some success, but it does not tell the true story of how much affect the sanctions regime is having on Al-Qaida and the Taliban. The reality is that the sanctions regime "has had a limited impact."²⁵² In addition to the problems with the regime outlined above, the sanctions are not achieving results that have been hope for because of the changed nature of the threat. Indeed, the Monitoring Team observed: "As a result of national and international action, Al-Qaida's funding has decreased significantly. But so has its need for money."²⁵³

For example, the Bali bombings in 2002 are estimated to have cost less than \$50,000, the 2004 attacks in Madrid about \$10,000.²⁵⁴ Further, the main threat posed by Al-Qaida is characterised by start-up groups that have never had any contact with the Al-Qaida leadership and many of whom have never left their country of residence.²⁵⁵ Security Council sanctions are largely unable to curb this threat.

²⁵¹ "Third Report of the Monitoring Team", above n 185, 21.

²⁵² "First Report of the Monitoring Team", above n 140, 9.

²⁵³ "First Report of the Monitoring Team", above n 140, 12.

²⁵⁴ "First Report of the Monitoring Team", above n 140, 12.

²⁵⁵ "Third Report of the Monitoring Team", above n 185, 8: "The final group is made up of new recruits who have become or are being radicalized by world events or by extremists in their communities who have already been seduced by the Al-Qaida message, or even by terrorist websites and in chat rooms on the Internet. Members of this group form cells locally without any direction from or contact with a central leadership. These cells are emerging as the main threat

Although this is so, the sanctions are very important in stopping elaborately planned and highly funded acts of terrorism.²⁵⁶ Thus, despite the many problems in sanctioning non-State actors, they are a legitimate tool to be used. They have a real effect on the maintenance of international peace and security. Simply because the sanctions are difficult to apply does not mean that they are worthless. Every effort must be made to deny terrorists the means to commit terrorism.

It will be interesting to see whether the Security Council will extend the sanctions regime to terrorist groups not associated with Al-Qaida and the Taliban. It is submitted that before this can happen, States must agree on a clear definition of terrorism so that the scope of such a sanctions regime can be accurately determined. Furthermore, whenever the Security Council applies a sanctions regime to non-State actors it should ensure that adequate due process protections are in place.

VI CONCLUSION

The United Nations Charter was drafted, and the Security Council was created, at a time when States were the principle threat to international peace and security. Indeed the United Nations was largely created "to save succeeding generations from the scourge of war".²⁵⁷ Today the United Nations is no longer solely concerned with avoiding inter-State conflict. Terrorism, once considered to be the domain of domestic legal processes, has become one of the most serious threats to international peace and security.²⁵⁸

posed by Al-Qaida terrorism today. They are bound to the Al-Qaida leadership by an overall unity of purpose but remain independent, anonymous and largely invisible until they strike. They can be found in most areas of the world, in Muslim and non-Muslim countries alike, and comprise people from a wide range of social and educational background, age and ethnicity."

²⁵⁶ "First Report of the Monitoring Team", above n 140, 12.

²⁵⁷ Preamble to the UN Charter.

²⁵⁸ At the recent 2005 World Summit, world leaders strongly condemned "terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security." UNGA "2005 World Summit Outcome" (20 September 2005) A/60.L.1, para 81.

The Security Council has certainly proved its flexibility by responding to this threat. Through its legislative resolutions and the work of the CTC, the Security Council has successfully directed the multilateral effort against terrorism with a sense of urgency while fostering the required cooperation needed to ensure willing implementation of the norms. Furthermore, the Security Council has imposed a sanctions regime on individuals whose full identity and geographical whereabouts are uncertain, succeeding to a certain extent in denying Al-Qaida and the Taliban the means to carry out large scale attacks.

Although the Security Council has indeed been responsive, its actions have raised some serious issues that impact on its credibility and ultimately on the effectiveness of its response.

In terms of the Security Council's assumption of legislative powers, it is submitted that despite its inadequacies as a legislator, it may be necessary for the Security Council assume this role in certain circumstances. The success of Resolution 1373 (2001) shows that the prescription of general rules can a very effective tool for the Security Council to use against a threat such as terrorism that is global and not limited in time. Although the Security Council is not an ideal legislator, its legislation does have the advantage of conveying the necessary operational message.

However, the availability of legislative powers as an effective tool for the Security Council depends ultimately on the perceived legitimacy of such actions. If States perceive particular Security Council legislation to be illegitimate or illegal, the obligations would not receive the support required for meaningful implementation.

It is submitted that Security Council legislation will only be legitimate in emergency situations where the traditional means of law making are inadequate. The Security Council is in essence a body that has the power to act swiftly in times of emergencies. It is not an omnipotent legislator. Furthermore, Security Council legislation will generally only be effective if there is broad consensus

behind the norms being created. Thus, the Security Council should allow participation in the drafting of the obligations in order to ensure that the obligations are widely supported.

(b) In regard to the Security Council sanctioning role, States should not be put in the difficult position of having their constitutional or international law human rights obligations conflict with the obligation they owe to sanction those designated by the 1267 Committee. It is submitted that the Security Council should implement adequate due process protections in order to ensure the protection of individual's rights and the effective implementation of the sanctions. In particular, the delisting procedures of the 1267 Committee are grossly inadequate. Designated individuals and entities should be able to directly petition the 1267 Committee or some independent review board for delisting. Any future sanctions regime targeting non-State actors should implement these recommendations.

These issues that this paper has raised form part of a common theme that the effectiveness of Security Council action against a global threat such as terrorism depends on the willingness of States to take action. Terrorism represents perhaps the most potent example of a threat that recognises no boundary and thus one that requires concerted action within the framework of multilateral cooperation. The traditional coercion role of the Security Council has limited application. If the Security Council wishes to remain effective in its response to this global threat it needs to be responsive to States' concerns.

The Security Council has certainly exercised its flexibility by...
this threat. Through its legislative resolutions and the...
Security Council has successfully directed the...
terrorism with a sense of urgency while...
needed to...
Security Council has...
human rights...
designated...
attacks...
protection of individual's rights and the effective implementation of the...
in particular...
independent...
Any future...
recommendations...
the...
Security Council...
the effectiveness...
terrorism...
boundary...
maintain...
has limited...
response...
Security Council...
If States...
illegal...
implementation.

It is admitted that Security Council legislation will only be legitimate in emergency situations where the traditional means of law making are inadequate. The Security Council is in essence a body that has the power to act swiftly in times of emergency. It is not an omnipotent legislator. Furthermore, Security Council legislation will generally only be effective if there is loyal consensus

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